The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Lyndy Michelle Greenway Sellers

Office Address: (including county) Rainey, Kizer, Reviere & Bell, P.L.C.; 105 S. Highland Avenue; Jackson, TN 38301; Madison County

Office Phone: 731-426-8145 Facsimile: 731-426-8111

Email Address: [redacted]

Home Address: (including county) [redacted] Jackson, TN 38305; Madison County

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Rainey, Kizer, Reviere & Bell, P.L.C.; 105 S. Highland Avenue; Jackson, TN 38301

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed to practice law in Tennessee in 2000. My BPR number is 020769.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am licensed to practice law in Tennessee. My BPR number is 020769.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No, I have never been denied admission to, suspended or placed on inactive status by the Bar of any state.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

I am a Partner with Rainey, Kizer, Reviere & Bell, P.L.C., and have been associated with the firm since August of 2000. My office is located at 105 S. Highland Avenue, Jackson, Tennessee 38301.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I have been employed continuously since completion of my legal education.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The general nature of my practice is a civil trial practice. I represent physicians, nurses, other health care providers, hospitals, and clinics in health care liability litigation and potential litigation. I represent health care providers in investigations by various Boards, contract negotiations, and regulatory matters. Eighty (80) percent of my practice involves representation of health care providers in health care liability litigation and potential litigation. Ten (10) percent of my practice involves representation of health care providers in investigations by various Boards. Five (5) percent of my practice involves representation of health care providers in contract negotiations. Five (5) percent of my practice involves representation of health care providers in regulatory matters.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Since 2000, I have practiced in the following courts: General Sessions Court, Juvenile Court, Chancery Court, Circuit Court, the Court of Appeals for the Western Section, the Tennessee Supreme Court, and the United States District Court for the Western District of Tennessee. I have also filed pleadings in the Sixth Circuit Court of Appeals.

Although the majority of my practice has been focused on health care liability litigation and potential litigation, I have represented individuals in adoptions, name changes, conservatorships, workers' compensation cases, settlement approvals, regulatory matters, real estate transactions, automobile accident litigation, contract negotiations, professional malpractice, board complaints, cases involving the Tennessee Governmental Tort Liability Act, landlord tenant disputes, employment disputes, and premises liability actions. In conjunction with that representation, I have prepared all necessary pleadings, settlement documents, discovery responses, contract changes, and required orders. I have prepared clients for depositions, trials, and investigations. I have advised clients as to regulatory matters and during contract negotiations. I have performed investigations pre-suit and during lawsuits. I have handled contract disputes and automobile accident trials in General Sessions Court. I have appeared in Juvenile Court as a guardian ad litem; and I have worked on class action case as well. I have represented parties in numerous mediations involving health care liability actions. I have also represented parties in mediations

involving employment disputes and automobile accidents. As a Rule 31 listed Civil mediator, I have mediated landlord tenant disputes in General Sessions Court.

I have significant litigation experience. My practice involves multi-million dollar health care liability actions. I have a heavy motion practice. I have argued numerous dispositive motions, including motions to dismiss and motions for summary judgment. I have also argued numerous motions on discovery matters. I have handled comprehensive party, lay, and expert witness depositions. Additionally, I have participated in health care liability trials. In June of 2013, I was second chair for a Defendant in a medical malpractice trial in the Obion County Circuit Court (and first chair while my partner was out during a family emergency). I assisted with voir dire, performed cross examinations and direct examinations of witnesses, argued evidentiary objections, and assisted with a motion for directed verdict. After two weeks of trial, my client was granted a directed verdict. In January of 2012, I was second chair for a Defendant in a medical malpractice trial in the Madison County Circuit Court for Division II. I assisted with voir dire, performed cross examinations and direct examinations of witnesses, argued evidentiary objections, and assisted in all aspects of the trial. The jury returned a verdict in favor of the Defendant. In September of 2007, I was associate counsel for Defendants in a medical malpractice action in the Madison County Circuit Court. I assisted in various aspects of the trial. The jury returned a verdict in favor of the Defendants. In additional to jury trials, I have concluded numerous cases with motions for summary judgment and motions to dismiss. I have represented numerous parties where cases have been resolved during mediation and immediately before trial. I have successfully investigated matters prior to cases being filed and been able to conclude the matters prior to filing or convinced opposing counsel not to file the matter.

In addition to handling matters at the trial court level, I have also been involved with appellate court matters including matters that have been before the Tennessee Supreme Court. I have written briefs in at least five appellate matters. I have also been second chair for oral argument at the appellate court level. Having also been involved in a class action lawsuit, I have assisted with briefs in the Sixth Circuit.

I have not handled any criminal matters.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I was one of the defense attorneys involved in *Myers v. AMISUB*, 982 S.W.3d 310 (Tenn. 2012). In *Myers*, the Tennessee Supreme Court found that even when a lawsuit is nonsuited and refiled, the Plaintiff must comply with the statutory requirements of filing a medical malpractice claim, including providing 60 day presuit notice and filing a certificate of good faith with the complaint. The Court dismissed the Plaintiff's case with prejudice for failure to comply with the statutory requirements.

In 2013, I was one of the defense attorneys involved in *Speck v. Woman's Clinic*, 2013 WL 5296886. In *Speck*, the Court of Appeals held that the trial court did not err in granting summary judgment in favor of the Defendants based on the applicable statute of limitations involving inquiry notice of pregnancy and affirmed the trial court's denial of the Speck's motion to alter or amend the order granting summary judgment.

I was one of the defense attorneys involved in *Lockard v. Bratton* in the Circuit Court of Henderson County. I drafted Defendant Christopher H. Bratton, M.D.'s Motion for Summary Judgment as to Plaintiff's Claims for Medical Battery and Lack of Informed Consent; Defendant Christopher H. Bratton, M.D.'s Motion for Summary Judgment as to Plaintiff's Claim for Medical Malpractice; Defendant Christopher H. Bratton, M.D.'s Motion to Exclude Causation Opinions of Daniel M. Strickland, M.D.; and all supporting pleadings. The trial court granted all motions and the Court of Appeals later affirmed the decisions of the trial court. (2009 WL 275783 (Ct. of App. Feb. 4, 2009) *perm. to appeal denied* by Supreme Court (Aug. 17, 2009)). The Court of Appeals held that the Circuit Court did not err in excluding Plaintiff's expert's standard of care or causation opinions. The Court of Appeals affirmed the Circuit Court's decision granting Defendants' Motions for Summary Judgment as to Plaintiff's medical malpractice claim and Plaintiff's lack of informed consent claim.

Other reported cases include: *Elliott v. Cobb*, 320 S.W.3d 360 (Tenn. 2010) and *Butler v. Madison County Jail*, 109 S.W. 3d 360 (Tenn. Ct. App. 2002.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I am a Rule 31 Listed Civil Mediator. As a mediator, I have provided pro bono mediations to parties in General Sessions Court in Madison County to assist individuals in resolving disputes despite their inability to pay. I provided my services through the Mediator for a Day program.

I have not served as an arbitrator or judicial officer.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

In addition to the legal experience stated above, I have served as the Administrator of two different estates.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission

or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I have not previously submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

I attended Southwest Missouri State (now Missouri State) from 1993 to 1995. In 1995, I attended summer classes at the University of Mississippi and decided to stay in Oxford, Mississippi to complete my undergraduate degree. I attended the University of Mississippi from 1995 to 1996. I graduated from the University of Mississippi with a Bachelor of Arts Degree Magna Cum Laude on December 20, 1996. I attended the University of Tennessee College of Law in Knoxville, Tennessee from 1997 to 2000. I graduated with a Doctor of Jurisprudence Cum Laude from the University of Tennessee College of Law on May 12, 2000. In law school, I was Vice-President of the Student Bar Association. I was also a member of the University of Tennessee College of Law Legal Clinic. In 2000, I received the Distinguished Student Attorney Service Award from the University of Tennessee College of Law Legal Clinic Faculty.

PERSONAL INFORMATION

15. State your age and date of birth.

I am currently 44 years old. My birthdate is [redacted] 1974.

16. How long have you lived continuously in the State of Tennessee?

I have lived continuously in the State of Tennessee for 22 years.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Madison County for 18 years.

18. State the county in which you are registered to vote.

I am registered to vote in Madison County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have not served in the military.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

I have not ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No, to my knowledge, I am not under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

No formal complaints have been filed against me with any supervisory authority.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No, a tax lien or other collection procedure has not been instituted against me by federal, state, or local authorities or creditors within the last five (5) years.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC,

corporation, or other business organization)?

No, I have not filed bankruptcy.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes, I have been a party in the following legal proceedings. On September 20, 2010, Storm Shelters of Tennessee, Inc. filed a civil summons in the Madison County General Sessions Court in Jackson, Madison County, Tennessee against Andrew and Michelle Sellers. The docket number was 10cv-4305. The action was for a storm shelter that was installed at a house by Storm Shelters of Tennessee, Inc. prior to the purchase of the house by Andrew and Michelle Sellers. A trial of the matter was held on December 17, 2010, in which a judgment was entered in favor of the Defendants, Andrew Sellers and Michelle Sellers. Storm Shelters of Tennessee, Inc. filed a Notice of Appeal to the Circuit Court of Madison County, Tennessee at Jackson signed by John David Favara. The docket number was C-10-377. Defendants filed a Motion to Dismiss. On April 20, 2011, the Court granted Defendants' Motion to Dismiss finding that Storm Shelters of Tennessee, Inc. failed to properly perfect their appeal from General Sessions Court and the Court was without jurisdiction to hear the appeal.

On January 20, 2010, Andrew Sellers and Michelle Sellers filed a Verified Complaint for Temporary Restraining Order, Injunctive Relief and Damages against Duncan Howell Homes, LLC, Jeffrey G. Duncan, and Larry Howell in the Chancery Court for Madison County, Tennessee at Jackson. The docket number is 66711. The action arose out of a contract of sale that was entered into by the parties and warranty deed that was executed by Defendants regarding property located at 111 Nottingham Drive, Jackson, Madison County, Tennessee, 38305. The case was partially resolved and the remainder of the case was dismissed.

On or about September 28, 2011, I sustained an injury to my right elbow. I had a right tennis elbow release and continued pain. I filed a workers' compensation claim with the workers' compensation carrier. The claim has been resolved.

In 2003 I was involved in an automobile accident. Mr. Allison T. Medlin ran into my vehicle causing pain and injuries. Around July of 2004, Michelle Sellers and Andrew Sellers filed a lawsuit against Allison T. Medlin in the Madison County General Sessions Court. The docket No. was 04-2046. The claim was settled.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and

fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

American Red Cross Mid-West Tennessee Chapter Board of Directors (2016 to present)

University School of Jackson Parents' Club (2007 to present)

I attend Fellowship Bible Church in Jackson.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

While at Southwest Missouri State University (now Missouri State University), I was a member of the Delta Upsilon Chapter of Sigma Kappa Sorority. As a sorority, Sigma Kappa strived to provide women lifelong opportunities and support for social, intellectual and spiritual development by bringing women together to positively impact their communities. Sigma Kappa limited membership to females. When I left Southwest Missouri State University in 1995, I became an alumna member of Sigma Kappa.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Foundation
Fellow (2011 to present)
IOLTA Grant Review Committee (2007-2009)

Tennessee Bar Association
Vice-President (2018 to present)
President-Elect (6/2019 to 6/2020)
President (6/2020 to 6/2021)
Board of Governors (2007-2009; 2012 to present)
Executive Committee (2018 to present)
Chair, Long Range Planning Committee (2019 to present)
Programs Committee (2014-2016)

Membership Committee (2012-2014)
Finance Committee (2007-2009; 2018 to present)
Public Education Committee (2005-2006)
Member (2000 to present)

Tennessee Bar Association Young Lawyers Division
President (2008-2009);
President-Elect (2007-2008);
Vice-President (2006-2007);
Immediate Past President (2009-2010);
Fellow (2011 to present);
Fellows Liaison (2011-2012);
West Tennessee Governor (2003-2006);
Executive Committee (2003-2012);
Statewide Public Service Chair (2010-2011);
District 13 Representative (2001-2003);
Statewide Public Service Chair (2010-2011);
Long Range Planning Committee, Chair (2007-2008), Reporter (2002-2003);
Member (2000-2012)

Jackson-Madison County Bar Association
President (2004-2006);
Vice-President (July 2004 to August 2004);
Treasurer (2003-2004)
Immediate Past President (2006-2007)
Board of Directors (2001-2007)
Member (2000 to present)

American Bar Association
Young Lawyers Division Tennessee Delegate (2006-2009)
National Outstanding Young Lawyer Award Board (2007-2008)

Howell Edmunds Jackson American Inns of Court
Barrister (2010-2013; 2016 to present)
Fellow (2013-2016)

Tennessee Bar Association Leadership Law
Graduate (2005)
Alumni Executive Council (2006-2007)
Alumni (2006 to present)

Tennessee Defense Lawyers Association
Member (2012 to present)

29. List honors, prizes, awards or other forms of recognition which you have received since

your graduation from law school that are directly related to professional accomplishments.

In 2011, I was named a Fellow of the Tennessee Bar Foundation. In 2008, I received the President's Special Recognition Award for Exceptional Service as President-Elect of the Tennessee Bar Association Young Lawyers' Division. I was selected as a member of the Tennessee Bar Association Leadership Law Class of 2005. In 2002, I received the Pro Bono Project Award from West Tennessee Legal Services. In 2000, I received the UT Legal Clinic Faculty Distinguished Student Attorney Service Award.

30. List the citations of any legal articles or books you have published.

Not Applicable.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not applicable.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No, I have not ever been a registered lobbyist.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached to the following to this application:

Speck v. Woman's Clinic (1) Defendants/Appellees' Brief; and (2) Defendants Woman's Clinic, P.A. and Dr. Ryan Roy's Answer in Opposition to Rule 11 Application for Permission to Appeal. Ninety-five (95%) percent of each example reflects my own personal effort.

Blackburn v. McLean (1) Defendants' Joint Answer in Opposition to the Plaintiff's Application for Extraordinary Appeal. Ninety-five (95%) percent of the example reflects my own personal

effort.

Myers v. AMISUB (1) Defendant Tennessee EM-I Medical Services, P.C.'s Application for Permission to Appeal Pursuant to Tennessee Rule of Appellate Procedure 9; (2) Brief of Defendants/Appellants. The Application reflects ninety-five (95%) percent of my own personal effort. The Brief reflects eighty (80%) percent of my own personal effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I am seeking this position because I want to serve the State of Tennessee and the legal profession. The court has a long history of remarkable work and I want to continue that tradition. Throughout my career I have been dedicated to the law and devoted to the profession and my community. I strive to approach all situations with an open mind and listening ears. I believe that I would enjoy analyzing the law and applying it to different situations instead of advocating for one side or the other.

In the last 18 years, I have discovered that one of my favorite parts of the practice of law is being able to serve the public and the profession as shown through my activities and achievements. In seeking this position I feel that I can have a positive impact on the court; and the position will also provide me with an opportunity to further broaden my service to the public and the profession.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

As part of my commitment to equal justice under the law, while President of the Tennessee Bar Association Young Lawyers Division, I instituted the Wills for Heroes Program in Tennessee. The Wills for Heroes program provides free wills, powers of attorney, and advance directives for Tennessee's firefighters, law enforcement officers, and first responders. Since its inception in Tennessee, the program has served over 3500 heroes and their families. The program is still ongoing and making an impact across Tennessee. Also during my time as President of the Tennessee Bar Association Young Lawyers' Division, I spearheaded the Division's efforts in carrying out the Tennessee Bar Association's Justice 4All Campaign serving individuals across the State of Tennessee.

As a Rule 31 Listed Civil Mediator, I have provided pro bono mediations to parties in General Sessions Court in Madison County, Tennessee.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking the open judicial position in the Court of Appeals for the Western Section. The Court of Appeals for the Western Section hears civil cases. There are four judges in the Western Section. Currently, two of the judges are from Memphis and one is from Dyersburg. My selection would impact the court by placing a judge on the court from Jackson, Madison County. This would provide additional geographic diversity to the court. Currently, all three judges in the Western Section are men. My selection would provide gender diversity to the court. Two of the current judges were chancellors prior to being selected and one was the Clerk and Master. I believe that my work as a defense attorney with a focus on litigation will provide additional diversity to the court. Ultimately, I believe that my selection would have a positive impact on the court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I am currently a member of the American Red Cross Mid-West Tennessee Board of Directors. The American Red Cross Mid-West Tennessee Chapter serves Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Madison, McNairy and Weakley counties in Tennessee. If I am appointed Judge, I plan to continue serving with the American Red Cross Mid-West Tennessee Chapter and helping individuals in those counties.

Currently, I am Vice-President of the Tennessee Bar Association. I plan to continue serving Tennessee attorneys, members of the judiciary, and the public through the Tennessee Bar Association if I am appointed. I will become President-Elect of the Tennessee Bar Association in June of 2019 and then President of the Tennessee Bar Association in June of 2020.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I believe my experiences as an attorney, a mediator, a mother, and a servant to the profession and my community will assist me in holding judicial office. I understand and appreciate the great responsibility that comes with judicial office. I believe that my experiences in numerous leadership roles from Law School to the present have provided me with the skills necessary to work with a number of different individuals to evaluate situations from many different aspects, accomplish common goals, and solve problems.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will uphold the law even if I disagree with the substance of the law. It is the job of the Judiciary to uphold the law and I will take the job seriously. One example from my experience

as a licensed attorney that supports my response to this question involves the statute of limitations applicable to a case. Regardless of any alleged or proven injuries asserted by a party, the party must still comply with Tennessee law in filing and maintaining a claim for damages. Even if I believe that a party was injured and potentially deserves some amount of damages, if he/she failed to file the claim within the applicable statute of limitations, then the claim must be dismissed.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Marty R. Phillips; Partner at Rainey, Kizer, Reviere & Bell, P.L.C.; 105 S. Highland Avenue, Jackson, TN 38301; (731) 423-2414

B. Les Jones; Partner at Burch, Porter, & Johnson, PLLC; 130 North Court Avenue; Memphis, TN 38103; ([redacted]

C. V. Latosha Dexter; Deputy University Counsel at the University of Memphis; 8812 Stony Glen Drive; Bartlett, TN 38133; [redacted]

D. David Hicks; Executive Director of the American Red Cross Mid-West Tennessee Chapter; 19 Stonecreek Circle; Jackson, TN 38305; ([redacted]

E. Jon Ewing; Chief Operating Officer of the Woman's Clinic; 244 Coatsland Drive; Jackson, TN 38301; [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] of Appeals Western Grand Division_ of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 13, 2019.

Michelle Sellers

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Lyndy Michelle Greenway Sellers
Type or Print Name

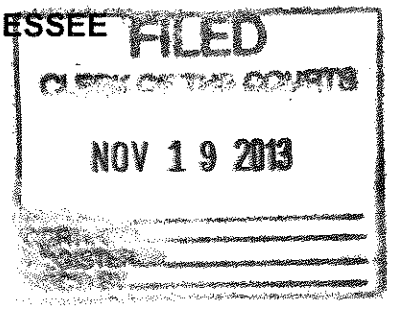
Michelle Sellers
Signature

2/13/19
Date

_020769
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE



JULIE SPECK and KEVIN SPECK

Plaintiffs/Applicants,

vs.

NO: W2012-02111-SC-R11-CV
On Appeal from the Circuit Court of Madison County, Tennessee No. C-11-87

WOMAN'S CLINIC, P.A. and DR. RYAN ROY,

Defendants/Respondents.

DEFENDANTS WOMAN'S CLINIC, P.A. AND DR. RYAN ROY'S ANSWER IN OPPOSITION TO RULE 11 APPLICATION FOR PERMISSION TO APPEAL

MARTY R. PHILLIPS (#14990)
MICHELLE GREENWAY SELLERS (#20769)
Rainey, Kizer, Reviere & Bell, P.L.C.
105 S. Highland Avenue
Jackson, TN 38301
(731) 423-2414

Attorneys for Defendants/Respondents

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STATEMENT OF THE CASE

This is a medical malpractice case in which the Plaintiffs contend that Mrs. Speck wrongfully became pregnant following a sterilization procedure which Dr. Roy performed at the Woman's Clinic, P.A.[1] Plaintiffs filed a Complaint on March 30, 2011, alleging that Ryan Roy, M.D. and Woman's Clinic, P.A. (hereinafter "Dr. Roy" or "Defendants") committed medical malpractice and proximately caused injuries to Plaintiffs. (R. Vol. 1 at 1-9.) Defendants filed an Answer denying all allegations of medical negligence. Defendants also asserted the following defenses:

> SECOND DEFENSE
>
> Plaintiffs' cause of action is barred by the applicable statute of limitations codified at Tennessee Code Annotated § 29-26-116(a)(1).
>
> NINTH DEFENSE
>
> Plaintiffs have failed to state a claim for relief under *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). To the extent the complaint seeks damages beyond those permitted by *Smith v. Gore*, the claim for those damages should be dismissed.

(R. Vol. 1 at 14-15.)

On September 21, 2011, the depositions of Plaintiff Julie Speck, Plaintiff Kevin Speck, and Defendant Dr. Roy were taken. (R. Vols. 5, 6, 7.) On February 2, 2012, Defendants filed a Motion for Summary Judgment based on Plaintiffs' failure to timely file their Complaint within one year and one hundred twenty days of discovery of the injury (pregnancy) as required by Tennessee Code Annotated § 29-26-116 and § 29-26-121. (R. Vol. 1 at 47-48). Defendants' Motion for Summary Judgment was accompanied by a Memorandum in Support

[1] References to the record on appeal shall be designated "R. Vol. __ at __."

of Defendants' Motion for Summary Judgment (R. Vol. 1 at 53-77) and Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment (R. Vol. 9).

On April 5, 2012, in response to Defendants' Motion for Summary Judgment, Plaintiffs filed the Affidavit of Julie Speck. (R. Vol. 1 at 89-92.) Plaintiffs further responded to Defendants' Motion for Summary Judgment on April 9, 2012. (R. Vol. 1 at 82-84.) In the Response to the Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, Plaintiffs admitted that Julie Speck underwent an Essure sterilization procedure performed by Dr. Roy on August 25, 2008 and that Plaintiffs filed a Complaint on March 30, 2011 alleging that Dr. Roy provided negligent medical treatment to Plaintiff. (R. Vol. 1 at 85-88.) Plaintiffs did not specifically dispute the remaining statements and provide specific citations to the record. Instead, Plaintiffs referred the Court to the Affidavit of Julie Speck. (R. Vol. 1 at 85-88.) The Affidavit of Julie Speck does not demonstrate that the remaining facts are disputed.

On April 11, 2012, Defendants filed a Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment. (R. Vol. 1 at 101-129.) Defendants also filed the Affidavit of Ryan Roy, M.D. in response to Plaintiffs' reply. (R. Vol. 1 at 96-100.) The Affidavit of Ryan Roy, M.D. provides uncontroverted expert proof that ultrasound is not used to confirm whether or not a patient is pregnant. (R. Vol. 1 at 96.) Defendants' Motion for Summary Judgment was heard on April 12, 2012, at which time the trial court granted

Defendants' Motion for Summary Judgment finding that Plaintiffs' alleged injury is pregnancy and the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant. (R. Vol. 1 at 135-142.) By Order entered on April 27, 2012, the trial court dismissed the action against Defendants because Plaintiffs had failed to file their Complaint within the applicable statute of limitations. The trial court found that based upon Mrs. Speck's deposition testimony, she knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy. (R. Vol. 1 at 135-142.) The Court found that the Plaintiffs' Complaint was barred by the statute of limitations because the claim was not filed within the statute of limitations or the period in which the statute of limitations was extended by operation of Tennessee Code Annotated § 29-26-121.

On April 16, 2012, Plaintiffs filed a Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 93-95.) On April 24, 2012, Plaintiffs served a Supplemental Affidavit of Plaintiff Julie Speck. (R. Vol. 1 at 132.) On May 2, 2012, Plaintiffs refiled Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 156-158.) On July 6, 2012, Defendants filed a response in opposition to the Motion. (R. Vol. 2 at 165-231.) On July 13, 2012, the trial court heard argument on Plaintiffs' Motion to

Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment and entered an Order denying the Motion on August 9, 2012 finding that the motion didn't meet the standard set for in Tenn. Rule Civ. Pro. 59.04. (R. Vol. 2 at 234-239; R. Vol. 4.))(copy attached in Appendix.)

The Defendants also filed a Motion for Partial Summary Judgment (R. Vol. 1 at 49-50), Memorandum in Support of Defendants' Motion for Partial Summary Judgment (R. Vol. 1 at 29-46), and Rule 56.03 Statement of Undisputed Material Facts (R. Vol. 1 at 51-52) on February 1, 2012 contending that Tennessee law does not allow Plaintiffs to recover for costs of raising, educating, nurturing, etc. of the child born subsequent to the procedure conducted by Dr. Roy. Plaintiffs failed to file a response to Defendants' Motion for Partial Summary Judgment or Defendants' Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Partial Summary Judgment. Defendants' Motion for Partial Summary Judgment was heard on April 12, 2012, at which time the trial court granted Defendants' Motion for Partial Summary Judgment to the extent the Plaintiffs' claims exceed those damages permitted by this Court's decision in *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987).

On September 4, 2012, Plaintiffs filed a Notice of Appeal from the Order Denying Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment, Order Granting Defendants' Motion for Summary Judgment, and Order Granting Defendants' Motion for Partial Summary Judgment. (R. Vol. 2 at 240-241).

The Court of Appeals, finding no error, affirmed the trial court's order granting Defendants summary judgment based on the applicable statute of limitations and affirmed the trial court's denial of Plaintiffs' motion to alter or amend the order granting the Defendants' Motion for Summary Judgment. *Speck v. Woman's Clinic, et al.*, No. W2012-02111-COA-R3-CV, 2013 WL 5296886 at *1 (Tenn. Ct. App. Sept. 18, 2013.)

STATEMENT OF FACTS

On August 4, 2008, Julie Speck signed an Essure Hysteroscopic Tubal Occlusion Consent form. (R. Vol. 6 at 125.) Mrs. Speck read the Essure Hysteroscopic Tubal Occlusion Consent form before she signed it. (R. Vol. 6 at 45.) She signed the Essure Hysteroscopic Tubal Occlusion Consent form after talking to Dr. Roy about the Essure procedure on August 4, 2008. (R. Vol. 6 at 45.) Mrs. Speck knew that there was still a chance she could get pregnant after having the Essure procedure. (R. Vol. 6 at 45.) The Essure Hysteroscopic Tubal Occlusion Consent form states: "Failure. Like all methods of birth control, the Essure procedure should not be considered one hundred percent effective." (R. Vol. 6 at 45.)

On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Julie Speck at the Woman's Clinic. (R. Vol. 1 at 2; R. Vol. 6 at 28, 46.) Prior to the procedure, Mrs. Speck had a urine pregnancy test at the Woman's Clinic to determine whether or not she was pregnant.[2] (R. Vol. 1 at 2-3.) The pregnancy test taken prior to the procedure was negative. (R. Vol. 1 at

[2] The Woman's Clinic, P.A. uses the same type of pregnancy test that is purchased over the counter. (Vol. 1 at 96.)

2-3.) Mrs. Speck does not claim that she had any other type of testing to determine whether or not she was pregnant prior to the procedure. The purpose of the Essure sterilization procedure was to prevent Mrs. Speck from becoming pregnant even though—as Mrs. Speck acknowledged—no sterilization procedure is 100% effective (R. Vol. 6 at 50.) Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case. (R. Vol. 1 at 2.) She had a history of regular and timely menstrual periods. (R. Vol. 6 at 54, 67; R. Vol. 1 at 126.) According to her medical records, Mrs. Speck's menstrual cycles were regular, occurring approximately every 28 days. (R. Vol. 1 at 126; R. Vol. 6 at 67.)

On November 27, 2009, Mrs. Speck believed she was pregnant because her menstrual period was several days late and that was unusual for her. (R. Vol. 6 at 67.) Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant. (R. Vol. 6 at 67.) The fact that Mrs. Speck's period was several days late led her to tell her husband that something was wrong because she was so late. (R. Vol. 6 at 68.) By November 27, 2009, Mrs. Speck had informed her husband that her menstrual period was late and the only thing she could think of was that she was pregnant. (R. Vol. 6 at 68.) When Mrs. Speck told Mr. Speck that she had missed a period and thought she was pregnant, he told her that she needed to go get a pregnancy test. (R. Vol. 7 at 33.) To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, she

bought two home pregnancy tests, because she wanted to be "double sure" of the results. (R. Vol. 6 at 67-68.)

The pregnancy tests that Mrs. Speck purchased indicated that they were over 99% accurate for determining whether a woman was pregnant. (R. Vol. 1 at 97.) Mrs. Speck took at least one pregnancy test on November 27, 2009 which confirmed that she was pregnant. (R. Vol. 6 at 66-69.) The first pregnancy test taken on November 27, 2009 was positive. (R. Vol. 6 at 68.) The results of the first pregnancy test were not equivocal in any way. There was no question about the result. It was clear. (R. Vol. 6 at 68.) On either November 27, 2009 or November 28, 2009, Mrs. Speck took a second pregnancy test. (R. Vol. 6 at 69.) The second pregnancy test was positive immediately. (R. Vol. 6 at 69.) Mrs. Speck called her husband and told him that she was pregnant, the test was positive, and she was upset. (R. Vol. 6 at 35; R. Vol. 7 at 35.) Mr. and Mrs. Speck both testified that they knew she was pregnant before she took the pregnancy tests. (R. Vol. 6 at 69; R. Vol. 7 at 36.) The pregnancy tests confirmed that she was pregnant. (R. Vol. 6 at 69.) The pregnancy test used at the Woman's Clinic is not any more accurate that the pregnancy test Mrs. Speck used at home. (R. Vol. 1 at 96.) Before she took the pregnancy test, Mr. Speck felt like Mrs. Speck was pregnant. (R. Vol. 7 at 35.) Mr. Speck thought Mrs. Speck was pregnant before she took the test based on their past history and his gut just told him she was pregnant. (R. Vol. 7 at 36.) There was never any question in his mind that she was pregnant. (R. Vol. 7 at 37.)

On November 30, 2012, Mrs. Speck presented to Dr. Soll at the Woman's Clinic. (R. Vol. 2 at 228 -231.) According to her medical records from November 30, 2012, she had taken two positive pregnancy tests over the weekend. (R. Vol. 2 at 228.) On November 30, 2009, Mrs. Speck's last period had occurred approximately 5.5 weeks prior. Prior to her period 5.5 weeks before, her cycles were regular, occurring approximately every 28 days. (R. Vol. 2 at 228.) On November 30, 2009, Mrs. Speck had a urine pregnancy test at the Woman's Clinic like the two that she had already taken at home. (R. Vol. 2 at 231; R. Vol. 1 at 97.) Mrs. Speck recalled taking another pregnancy test at the Woman's Clinic and them telling her that it was also positive. (R. Vol. 6 at 70.) On November 30, 2009, Dr. Soll informed Mrs. Speck that she would need to stop Paxil if she was confirmed to have an "iup," (or intra uterine pregnancy). (R. Vol. 2 at 228.) Mrs. Speck's medical records from November 30, 2009, do not state that she should stop taking Paxil "if" she was positive for pregnancy. (R. Vol. 2 at 228-231.) Mrs. Speck's pregnancy had already been confirmed by the prior pregnancy tests she took over the weekend. Ultrasound is not used to determine if a patient is pregnant. (R. Vol. 1 at 96.)

On July 21, 2010, Mrs. Speck gave birth to a baby boy. (R. Vol. 6 at 7.) He is a perfectly healthy little boy. (R. Vol. 6 at 87.) He has brought joy and happiness to her life. (R. Vol. 6 at 87.) His birth was a happy day. (R. Vol. 7 at 40.) He has been a blessing in Mr. Speck's life. (R. Vol. 7 at 47.) He had no difficulty as a result of Mrs. Speck having had the Essure procedure. (R. Vol. 6 at 81.)

By letter dated November 29, 2010, more than one year after she confirmed her pregnancy by two positive pregnancy tests, Plaintiffs provided Notice of a Potential Claim to Defendants. (R. Vol. 1 at 2, 7, 8.) On March 30, 2011, over two years and seven months after the alleged malpractice, Plaintiffs filed a Complaint in the Circuit Court of Madison County, Tennessee, alleging that Dr. Roy provided negligent treatment to Mrs. Speck. (R. Vol. 1 at 1-9.) The Complaint was also filed over one year, four months, and four days after Mrs. Speck took her first positive pregnancy test and confirmed her pregnancy. (R. Vol. 1 at 1-9; *See also*, R. Vol. 6.) In filing this action, Plaintiffs failed to comply with Tennessee Code Annotated § 29-26-116.

Section 29-26-116 provides: "[t]he statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104." Tenn. Code Ann. § 29-26-116(a)(1)(2011). The statute further provides that if "the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn. Code Ann. § 29-26-116(a)(2)(2011). Plaintiffs discovered Mrs. Speck's pregnancy by November 27, 2009. As a result, the statute of limitations expired on March 29, 2011. Tenn. Code Ann. § 29-26-116(a)(2). Plaintiffs failed to file their Complaint by March 29, 2011.

Defendants filed a Motion for Summary Judgment supported by the deposition testimony of Plaintiffs confirming that Plaintiffs were at least on inquiry notice of Mrs. Speck's pregnancy by November 27, 2009. Plaintiffs made an unsuccessful attempt to demonstrate that she was not on inquiry notice that she

was pregnant by November 27, 2009. The Defendants' argument asks the Court to consider and rely upon the Plaintiffs' undisputed testimony while the Plaintiffs' argument asks the Court to reject the Plaintiffs' undisputed testimony.

On April 12, 2012, the trial court heard argument on Defendants' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment. (R. Vol. 3; R. Vol. 1 at 135-142, 143-145.) On April 27, 2012, the trial court entered an Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 1 at 135-142.)(copy attached in Appendix.) Contrary to Plaintiffs' assertions, the trial court did not assess this matter with the benefit of hindsight. The trial court assessed this matter based on the evidence presented including Plaintiffs' admitted knowledge of her pregnancy. The trial court found that the Plaintiffs' claim is barred by the applicable statute of limitations because Plaintiffs failed to file their Complaint within one year and one hundred twenty days of discovery. (R. Vol. 1 at 135-142.) The Order also provides that because the alleged injury in this case is pregnancy, the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant. Additionally, the Order sets forth the following ten undisputed material facts:

1. On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant;

2. Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case;

3. Mrs. Speck had a history of regular and timely menstrual periods;

4. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009;

5. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant;

6. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results;

7. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time;

8. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate;

9. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs. Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant; and

10. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive.

(R. Vol. 1 at 136-138.) The Order further provides as follows:

> Based upon Mrs. Speck's deposition testimony, she knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy.

> Therefore, the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009.

(R. Vol. 1 at 138.)

On April 16, 2012, Plaintiffs filed a Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 93-95.) On April 24, 2012, Plaintiffs served a Supplemental Affidavit of Plaintiff Julie Speck. (R. Vol. 1 at 132.) On May 2, 2012, Plaintiffs refiled Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 156-158.) On July 6, 2012, Defendants filed Defendants' Reply in Opposition to Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 2 at 165-231.)

On July 13, 2012, the trial court heard argument on Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 2 at 234-239; Vol. 4.) After considering the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment, the Defendants' Reply in Opposition to Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the arguments of counsel, the deposition of Julie Speck, the deposition of Kevin Speck, the deposition of Ryan Roy, M.D., and the entire record in this case, the trial court determined that the Plaintiffs' Motion should be denied. (R. Vol. 2 at 234-239.)

On August 9, 2012, the Court entered an Order Denying Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 2 at 234-239)(copy attached in Appendix.) The trial court considered the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure and found "that no errors as to law or facts have arisen as a result of the Court overlooking or failing to consider matters." (R. Vol. 2 at 235.) The trial court further found that "a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003)." (R. Vol. 2 at 235.) Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment failed to meet the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 2 at 235.) The trial court found that the Supplemental Affidavit of Julie Speck should not be considered. (R. Vol. 2 at 235.) The trial court found that "the Supplemental Affidavit of Julie Speck is not a clarification of Mrs. Speck's prior testimony" and after comparing the Supplemental Affidavit of Julie Speck to the Affidavit of Julie Speck, the court found "that the Supplemental Affidavit presents additional evidence that was clearly available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment." (R. Vol. 2 at 235.) The trial court found that the Supplemental Affidavit of Julie Speck is inconsistent with her prior testimony. (R. Vol. 2 at 236.) Additionally, the trial court found that

> [t]he information contained in the Supplemental Affidavit of Julie Speck was not mentioned in Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs, the depositions of Mr. Speck, Mrs. Speck, or Ryan Roy, M.D., or the Affidavit of Julie Speck. Plaintiffs offer no plausible reason for failing to present the evidence contained in the Supplemental Affidavit of Julie Speck prior to the hearing on Defendants' Motion for Summary Judgment.

(R. Vol. 2 at 236.) Furthermore, the trial court found that

> [n]otwithstanding the Court's findings that the Plaintiffs have failed to satisfy the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure, failed to meet the grounds of Rule 59.04 of the Tennessee Rules of Civil Procedure, and that the Supplemental Affidavit of Julie Speck should not be considered, the Court finds that even if the Supplemental Affidavit of Julie Speck was considered, Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment would be denied.

(R. Vol. 2 at 236.) The trial court found that the Supplemental Affidavit of Julie Speck did not change the undisputed material facts in this matter. (R. Vol. 2 at 237-238.)

On February 1, 2012, Defendants also filed a Motion for Partial Summary Judgment (R. Vol. 1 at 49-50), Memorandum of Law in Support of Motion for Partial Summary Judgment (R. Vol. 1 at 29-46), and Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Partial Summary Judgment (R. Vol. 1 at 51-52) contending that Tennessee law does not allow Plaintiffs to recover for costs of raising, educating, nurturing, etc. of the child born subsequent to the procedure conducted by Dr. Roy. Plaintiffs did not file a response to Defendants' Motion for Partial Summary Judgment or Defendants' Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Partial Summary Judgment. On April 12, 2012, the trial court heard

argument on Defendants' Motion for Partial Summary Judgment. (R. Vol. 3; R. Vol. 1 at 143-145.) Plaintiffs offered no argument in opposition to Defendants' Motion for Partial Summary Judgment. (R. Vol. 3 at 23-24.) The trial court granted Defendants' Motion for Partial Summary Judgment to the extent the Plaintiffs' claims exceed those damages permitted by *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987)(R. Vol. 1 at 143-145.) On April 27, 2012, the trial court entered an Order Granting Defendants' Motion for Partial Summary Judgment. (R. Vol. 1 at 143-145.)(Copy attached in Appendix).

On July 16, 2013, the Court of Appeals heard argument on Plaintiffs' appeal. On September 18, 2013, the Court of Appeals, discerning no error, affirmed the Trial Court's Order Granting Defendants' Motion for Summary Judgment and Order Denying Plaintiffs' Motion to Alter and/or Amend. *Speck v. Woman's Clinic, et al.*, No. W2012-02111-COA-R3-CV, 2013 WL 5296886 at *1 (Tenn. Ct. App. Sept. 18, 2013.)(Copy attached in Appendix). The Court of Appeals noted:

> In this case, the claimed injury is a healthy pregnancy that occurred after the Defendants performed a pregnancy-avoidance medical procedure in an allegedly negligent manner. In this circumstance, the limitations period began to run when the Specks had knowledge of facts sufficient to put a reasonable person on notice that Mrs. Speck was "injured," *i.e.,* pregnant. *See Redwing,* 363 S.W.3d at 459 (quoting *Carvell v. Bottoms,* 900 S.W.2d 23, 29 (Tenn.1995) (quoting *Roe,* 875 S.W.2d at 657)). The Supreme Court has explained that, "once a plaintiff gains information sufficient to alert a reasonable person of the need to investigate 'the injury,' the limitation period begins to run." *Sherrill,* 325 S.W.3d at 593 n. 7 (quoting *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008)). "The discovery rule is not intended to permit a plaintiff to delay filing suit until the discovery of all the facts that affect the merits of his or her claim." *Redwing,* 363 S.W.3d at 459. "Neither actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury

> by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." *Sherrill,* 325 S.W.3d at 595.

Speck v. Woman's Clinic, P.A., et al., No. W2012-02111-COA-R3-CV, 2013 WL 5296886 at *8 (Tenn. Ct. App. Sept. 18, 2013). The Court of Appeals applied the prior discovery rule decisions and found:

> Applying these principles to the undisputed facts in this case, we must agree with the trial court that the Specks were at least on inquiry notice of Mrs. Speck's pregnancy no later than November 27, 2009. All of the evidence submitted—the Specks' depositions and Mrs. Speck's affidavits—indicate that Mrs. Speck suspected she was pregnant on that date and received at least some confirmation of her suspicion in the form of a positive result on one of the home pregnancy tests she purchased. Under these circumstances, the Specks were on inquiry notice on November 27, 2009, regardless of the accuracy of the home pregnancy test, regardless of whether the Specks subjectively believed that the test results were inaccurate, and regardless of whether the purpose of an ultrasound test is to confirm the results of other types of pregnancy tests. As we have indicated, one need not know "of all the facts that affect the merits of ... her claim," *Redwing*, 363 S.W.3d at 459, and "diagnosis of the injury by another medical professional" is not a prerequisite for inquiry notice, *see Sherrill,* 325 S.W.3d at 595. Accordingly, we must conclude that the trial court did not err in granting summary judgment in favor of the Defendants based on the applicable statute of limitations.

Id. at *9.(Footnotes excluded)

The Court of Appeals also found that the Trial Court did not abuse its discretion in denying the Speck's Motion to Alter or Amend. The Court of Appeals noted the reasoning of the trial court in denying the Speck's motion to alter or amend as follows:

> The Court finds that a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003). The Court finds that Plaintiffs'

> Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment fails to meet any of the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment.
>
> The trial court then held that it would be inappropriate to consider the Supplemental Affidavit of Mrs. Speck in ruling on the motion to alter or amend because the affidavit "attempts to create an issue of material fact after an adverse ruling of this Court" and was inconsistent with Mrs. Speck's prior testimony. Furthermore, the trial court reasoned, the Specks offered "no plausible reason for failing to present the evidence contained in the Supplemental Affidavit of Julie Speck prior to the hearing on Defendants' Motion for Summary Judgment." In the alternative, even if the Supplemental Affidavit were considered, the trial court held, it would nevertheless deny the Specks' motion to alter or amend. The trial court observed that the facts stated in the Supplemental Affidavit did not affect the ten undisputed facts set out in the trial court's summary judgment order. The Specks both admitted to early suspicions that Mrs. Speck was pregnant based on her late period and on the positive test results from home pregnancy tests that "were 99% accurate." For all of these reasons, the trial court denied the Specks' motion to alter or amend.

Id. at *9. The Court of Appeals then held as follows:

> We agree with the trial court that, even if Mrs. Speck's Supplemental Affidavit were considered, it does not create a genuine issue of material fact on the issue of notice. The Supplemental Affidavit states that Dr. Roy assured Mrs. Speck that "there was no way that [she] could be pregnant, it was not possible, [she] cannot be pregnant were his words." It also states that Dr. Roy told Mrs. Speck that "that there have been some false positives on pregnancy test[s] and that apparently there was a batch of faulty or defective pregnancy tests in the Jackson area." However, **none of the alleged statements by Dr. Roy change the undisputed fact that by November 27, 2009, Mrs. Speck's menstrual period was late and she had tested positive for pregnancy on at least one home pregnancy test.** Dr. Roy's alleged statements may have given Mrs. Speck some reason to hope that her suspicions were incorrect, but **she was still placed on inquiry notice before Dr. Roy's alleged statements and remained on inquiry notice after his statements.** This conclusion is bolstered by the further undisputed fact that Mrs. Speck continued to investigate whether she was pregnant after speaking to Dr Roy. Thus, even giving the Specks the benefit of every reasonable inference, they still had

> knowledge of facts that placed them on inquiry notice about Mrs. Speck's pregnancy. *See Roe,* 875 S.W.2d at 656-57(statute of limitations in medical malpractice action "is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred"). This holding makes it unnecessary for us to address whether the trial court erred in declining to consider Mrs. Speck's Supplemental Affidavit.
>
> Under these circumstances, we must conclude that the trial court did not abuse its discretion in denying the Specks' motion to alter or amend the order granting the Defendants' motion for summary judgment based on the statute of limitations.

Id. at 10.(emphasis added). The Court of Appeals further held as follows:

> We affirm the trial court's grant of summary judgment in favor of the Defendants based on the applicable statute of limitations, and we also affirm the trial court's denial of the Specks' motion to alter or amend the order granting summary judgment. This holding results in affirmance of the trial court's dismissal of the Specks' lawsuit in its entirety, and makes it unnecessary for us to address the Specks' argument that the trial court erred in granting the Defendants' motion for partial summary judgment based on *Smith v. Gore.* All other arguments raised but not specifically addressed herein are either rejected or are pretermitted by our decision.

Id.

On or about November 5, 2013, the Specks filed a Rule 11 Application for Permission to appeal this matter. Plaintiffs inaccurately characterize this case as one of first impression in Tennessee.

REASONS WHY THE APPLICATION SHOULD BE DENIED

This case is not one that meets the character of reasons for review by the Tennessee Supreme Court. Uniformity of decision is already secure, and the questions of law and public interest concerning Section 29-26-116, the statute of limitations, and discovery rule are not only well-settled, but grounded upon and consistent with well-established precedent. In the present action, well-settled law was applied to the undisputed facts established by the Plaintiffs' own sworn testimony. Furthermore, the *Smith v. Gore* decision is a well-reasoned and well-established precedent. This Court stated that if any change is to be made regarding the issues set forth in *Smith*, then the Legislature is the proper forum to consider changing the law. In the last twenty-five years, the Legislature has not amended or modified this Court's decision in *Smith*. If Plaintiffs wish for any portion of the law to be amended, then they should seek assistance from the Legislature.

Therefore, because the questions presented are well-settled and settled correctly, there is no need for the exercise of supervisory authority by this Court.

I. Uniformity of Decision is Secure.

In their Application, Plaintiffs do not even attempt to argue that a divide exists among reviewing courts in Tennessee regarding application of the discovery rule. Instead, Plaintiffs incorrectly assert that this is a unique case and the Court should permit the appeal because the discovery rule has not been addressed in a wrongful pregnancy case before. Contrary to Plaintiffs' assertions, this is not an issue of first impression.

In fact, this Court adopted the discovery rule in a wrongful pregnancy case almost forty years ago. *See Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn. 1974.) *Teeters* was a medical malpractice action brought by a patient who became pregnant after a bilateral tubal ligation. *Id.* at 512-13. This Court held that the "cause of action accrued when plaintiff discovered that she was pregnant, or in the exercise of reasonable care and diligence, she should have so discovered." *Id.* at 517. Since that time, the discovery rule has been applied to numerous cases dealing with many different types of alleged injuries. As such, the application of the statute of limitations and the discovery rule in a medical malpractice case such as this one is well-settled and does not present the Court with an issue of first impression. *See, i.e. Sherrill v. Souder*, 325 S.W.3d 584 (Tenn. 2010); *Hoffman v. Hosp. Affiliates*, 652 S.W.2d 341 (Tenn. 1983); *Roe v. Jefferson*, 875 S.W.2d 653 (Tenn. 1984); *Stanbury v. Bacardi*, 953 S.W.2d 671 (Tenn. 1997); *Holliman v. McGrew*, 343 S.W.3d 68 (Tenn. Ct. App. 2009) *perm. appl. denied* Aug. 17, 2009; *DiGregorio v. Jackson*, No. M2006-01547-COA-R3-CV, 2007 WL 2751803 (Tenn. Ct. App. Sept. 21, 2007).

Furthermore, Plaintiffs do not argue that the Court of Appeals or Trial Court failed to follow well-established law or that any divide exists among reviewing courts in Tennessee regarding the potential damages allowed in a wrongful pregnancy case. Instead, Plaintiffs ask this Court to significantly change the well-established law set forth over twenty-five years ago in *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987) regarding the available damages in a

wrongful pregnancy case. This Court should decline the invitation to overturn many years of sound and uniform precedent.

II. Important Questions of Law and Public Interest Concerning Section 29-26-116, the Statute of Limitations, and Discovery Rule are Not Only Well-Settled, But Grounded Upon and Consistent With Well-Established Precedent.

The central question is whether Plaintiffs filed their case within the applicable statute of limitations. This question has been answered, and answered correctly by the Trial Court and Court of Appeals, based on well-established precedent and well-established principles of law. Further review is unnecessary.

A. Applying settled law on the statute of limitations and discovery rule in a medical malpractice action, the Court of Appeals appropriately affirmed the Trial Court's Order Granting Defendants' Motion for Summary Judgment as Plaintiffs' claims are barred by the statute of limitations.

1. The statutory period of limitations in medical malpractice actions is one year after the cause of action accrues.

Pursuant to Tennessee Code Annotated § 29-26-116(a)(1), "[t]he statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104." Tenn. Code Ann. § 29-26-116(a)(1)(2011). The statute specifically provides that if "the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn. Code Ann. § 29-26-116(a)(2)(2013).

2. The statute of limitations in this case began to run when the Plaintiffs became aware of facts sufficient to put a reasonable person on notice that Mrs. Speck was pregnant.

The Court of Appeals applied the correct standard in determining when Plaintiffs' cause of action began to accrue - when the Plaintiffs were aware of facts sufficient to put a reasonable person on notice that Mrs. Speck was pregnant as previously established by this Court. *See Roe,* 875 S.W.2d 653, 656-57; *Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn. 1995); *Sherrill,* 325 S.W.3d 584, 595; and *Hoffman v. Hosp. Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn. 1983). In *Roe*, this Court recognized that the statute of limitations in medical malpractice actions "is tolled only during the period when the plaintiff has *no knowledge at all that a wrong has occurred*, and, *as a reasonable person is not put on inquiry.*" *Roe* 875 S.W.2d at 656-57(emphasis added)(*quoting Hoffman v. Hosp. Affiliates*, 652 S.W.2d 341, 344 (Tenn. 1983)). Further, *"[i]t is not required* that the plaintiff actually know that the inquiry constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action'; the plaintiff is *deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.*" *Id.* at 657 (emphasis added).

Importantly, the statute of limitations in a medical malpractice action is not tolled until an individual obtains actual knowledge of a breach of the standard of care nor until an individual obtains diagnosis by a medical professional. *See Sherrill,* 325 S.W.3d 584, 595. In 2010, this Court made clear that "[n]either actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." *Sherrill, 325 S.W.3d* at 595.

In the present action, Plaintiffs' injury is pregnancy. (R. Vol. 1 at 1-9; R. Vol. 1 at 135-142.) Plaintiffs' cause of action began accruing when Plaintiffs were aware of facts sufficient to put a reasonable person on notice that they had suffered an injury of pregnancy. (R. Vol. 1 at 135-142.) The statute of limitations is not tolled until Plaintiffs unequivocally knew "for sure" that Mrs. Speck was pregnant; nor is it tolled until her pregnancy was confirmed by a healthcare provider. *See Roe* 875 S.W.2d at 656-57; *See also Sherrill* 325 S.W.3d at 595. The actions and sworn testimony of Plaintiffs show that they were put on at the least inquiry notice that Mrs. Speck was pregnant by the time she took the first positive pregnancy test on November 27, 2009. Therefore, the Court of Appeals correctly found that Plaintiffs were aware of facts sufficient to put a reasonable person on inquiry notice that they had suffered an injury of pregnancy prior to November 29, 2009. The actions of the Plaintiffs show that they were on inquiry notice prior to November 29, 2009. Whether or not the pregnancy was confirmed by a healthcare provider or the Plaintiffs were 100% sure about the pregnancy is irrelevant in this case.

3. It is well-settled that medical malpractice cases involving the discovery rule are appropriate for summary judgment.

The Court of Appeals and Trial Court correctly followed well-established precedent and appropriately found that whether Plaintiffs exercised reasonable care and diligence in discovering the injury was not an issue that the Trial Court was required to submit to the jury. In fact, this Court and the Tennessee Court of Appeals have previously upheld trial court orders granting motions for summary

judgment in numerous cases where the medical malpractice discovery rule was at issue and the court was required to determine whether the plaintiffs filed a medical malpractice action within one year of discovery of the alleged injury. *See*, *Roe,* 875 S.W.2d 653; *Roberts v. Bicknell*, 73 S.W.3d 106 (Tenn. Ct. App. 2001) *perm. to appeal denied* March 4, 2002; *Holland v. Dinwiddie*, No. W2006-00523-COA-R3-CV, 2006 WL 3783534, (Tenn. Ct. App. Dec. 27, 2006) *perm. to appeal denied* May 21, 2007; *Murphy v. Lakeside Medical Center, Inc.*, No. E2006-01721-COA-R3-CV, 2007 WL 906760 (Tenn. Ct. App. Mar. 26, 2007); *Brandt v. McCord*, 281 S.W.3d 394 (Tenn. Ct. App. 2008) *perm. to appeal denied* Oct. 27, 2008; *Holliman,* 343 S.W.3d 68; *McCulley v. Garber*, No. E2005-01606-COA-R3-CV, 2006 WL 1044142 (Tenn. Ct. App. Apr. 20, 2006); *Lewis v. Campbell*, No. M2000-03092-COA-R3-CV, 2002 WL 1800905 (Tenn. Ct. App. Aug. 7, 2002); *Farrow v. Barnett*, No. 03A01-9603-CV-00084, 1996 WL 560534 (Tenn. Ct. App. Oct. 3, 1996); *Parris v. Land*, No. 53505-6 T.D., 1996 WL 455864 (Tenn. Ct. App. Aug. 14, 1996); *Clifton v. Bass*, 908 S.W.2d 205 (Tenn. Ct. App. 1995) *perm to appeal denied* Sept. 18, 1995; *Cantrell v. Buchanan*, No. 88-334-II, 1989 WL 25598 (Tenn. Ct. App. Mar. 22, 1989), *perm. to appeal denied* June 5, 1989; and *Bennett v. Hardison*, 746 S.W.2d 713 (Tenn. Ct. App. 1987) *perm. to appeal denied* March 14, 1988. Furthermore, in 2000 the Tennessee Court of Appeals reversed a trial court decision denying Defendants summary judgment where the Plaintiff failed to file the Complaint within one year of discovery of her injury. *See Huttchson v. Cole*, No. M1999-00204-COA-R10-CV, 2000 WL 354405 (Tenn. Ct. App. Apr. 7, 2000). In 1996, the Court of Appeals held that a

Complaint was not filed within the applicable statute of limitations and the trial court erred in failing to direct a verdict for the defendant on the basis that the statute of limitations bars the action. *Stanbury v. Bacardi*, No. 01-A-01-9509-CV00420, 1996 WL 200338 (Tenn. Ct. App. Apr. 26, 1996). This Court upheld the decision and held that Plaintiffs failed to file an action within one year of discovery. *See Stanbury,* 953 S.W.2d 671. Therefore, the trial court clearly had authority to determine whether Plaintiffs' Complaint was filed within one year of when they knew or should have known about the injury and the court appropriately determined that Plaintiffs failed to file a Complaint within the applicable statute of limitations. Contrary to Plaintiffs' assertions, the Court of Appeals decision is well-supported by the facts and sworn testimony in this matter, the Court did not fail to acknowledge any controlling authority, and the decision of the trial court was appropriately affirmed.

4. The Court of Appeals appropriately applied well-settled law to the undisputed facts established by Plaintiffs' own sworn testimony.

Applying well-settled law and principles to the undisputed facts in this case, the Court of Appeals appropriately found that the Plaintiffs were at least on inquiry notice of Mrs. Speck's pregnancy by no later than November 27, 2009. The Court of Appeals found that "[a]ll of the evidence submitted – the Specks' depositions and Mrs. Speck's affidavits – indicate that Mrs. Speck suspected she was pregnant on that date and received at least some confirmation of her suspicion in the form of a positive result on one of the home pregnancy tests she purchased." *Speck v. Woman's Clinic, P.A., et al.*, No. W2012-02111-COA-R3-

CV, 2013 WL 5296886 at * 9 (Tenn. Ct. App. Sept. 18, 2013). Accordingly, Plaintiffs were on inquiry notice of the alleged malpractice prior to November 29, 2009.

The injury here is pregnancy and the issue whether Plaintiffs were on inquiry notice that Mrs. Speck was pregnant was decided based on well-settled law and established legal principles. First, Mrs. Speck had regular periods after the Essure procedure. During her deposition she testified as follows:

Q: Did you have regular periods after the Essure procedure?

A: Yes, sir.

(R. Vol. 6 at 54.) Second, Mrs. Speck suspected she was pregnant before Friday, November 27, 2009 because her period was several days late which was unusual. Mrs. Speck testified as follows:

Q: When did you suspect that you were pregnant? And, of course, I'm talking about with Colton.

A: Gotcha. It was the day after Thanksgiving in 2009.

(R. Vol. 6 at 66-67.) She further testified as follows regarding her suspicion that she was pregnant the day after Thanksgiving in 2009:

Q: Why were you suspicious? Or why did you think you were pregnant?

A: My period was several days late.

Q: And that was unusual – –

A: Yes, sir.

Q: – – because you'd always had regular periods.

A: They were always a couple days late, but not that many.

(R. Vol. 6 at 67.) Third, Mrs. Speck had been pregnant four times prior to November 27, 2009. (R. Vol. 1 at 2.) She was aware that a late period likely meant she was pregnant. She testified as follows:

Q: And having been pregnant before, you knew what that likely – –

A: Yes, sir.

Q: – – signified, didn't you?

A: (The witness nodded.)

(R. Vol. 6 at 67.) Fourth, Mrs. Speck took two positive pregnancy tests to confirm her suspicion that she was pregnant by no later than Saturday, November 28, 2009. She testified as follows regarding the pregnancy tests:

Q: And what did you do to confirm your suspicion that you were pregnant?

A: I went and bought a home pregnancy test, two pregnancy tests.

Q: Do you remember the kind of test you bought?

A: The Dollar General brand. That's – – it's the DG brand, but I don't know what the brand was.

Q: Two of the same kind?

A: Yes, sir.

Q: Or did you get two different brands? Why did you get two?

A: To make double sure.

Q: And was this on the day after Thanksgiving 2009?

A: Yes, sir.

Q: Before you bought those pregnancy tests, did you tell Mr. Speck that you thought you were pregnant?

A: I told him something was wrong because I was so late.

Q: And the only thing you had in mind was you were pregnant?

A: It's the only thing I could think of.

Q: So what did the first pregnant test show?

A: Positive.

Q: And was it equivocal in any way? Any question about the result, or – –

A: No, sir.

Q: – – did it clearly show positive?

A: It was clear.

Q: How is a positive result recorded on that particular test?

A: How was it recorded?

Q: Yeah. How was it displayed?

A: A line, just a solid pink line.

Q: And what showed up if you were not pregnant?

A: Nothing.

Q: So the pink line was real obvious?

A: Yes.

Q: What time of the day did you take that test?

A: It was at nighttime.

Q: On the day after Thanksgiving.

A: Yes, sir.

(R. Vol. 6 at 67-69.) Mrs. Speck took a second pregnancy test on either Friday, November 27, 2009 or Saturday, November 28, 2009. She testified as follows regarding the second pregnancy test:

Q: When did you take the second pregnancy test?

A: I don't recall if I took it that night or the next day.

Q: What did the second test show?

A: Positive. Immediately.

Q: Did you tell Mr. Speck about the pregnancy tests?

A: Yes, sir.

(R. Vol. 6 at 69.) Mrs. Speck admitted that the positive pregnancy test confirmed that she was pregnant, but she thought she was pregnant prior to taking the pregnancy test. Her testimony was as follows:

Q: At that point you had confirmed that you were pregnant; right?

A: The test said I was pregnant.

Q: Well, that's what you thought before the test.

A: Yes, sir.

(R. Vol. 6 at 69.)

According to Mr. Speck, he and Mrs. Speck knew or should have known of the alleged malpractice prior to Sunday, November 29, 2009. Mr. Speck testified that he told Mrs. Speck to get a pregnancy test when she mentioned that she had missed a period and thought she was pregnant. He testified as follows:

Q: When did she mention to you that she had missed a period and thought she was pregnant?

A: Around the week of Thanksgiving, that 2009 or '8. I can't remember exactly the year.

Q: Was it before Thanksgiving Day or after Thanksgiving Day?

A: Well, it was the week of – – and I think – – I was at work, and I remember telling her, You need to go have a pregnancy – – you need to go get a pregnancy test.

We were talking on the phone. I told her, I said, "Look, you need to go have a pregnancy test done."

Q: Was that before she went to Dollar General and bought them?

A: I cannot remember.

Q: And did you know about those two home pregnancy tests that you did?

A: Yes, sir.

Q: She did?

A: Yes, sir. Yes, sir.

Q: Did you see them, or did she tell you about them?

A: She told me about them because I was at work. She called me on the phone and told me.

Q: Do you know what day it was?

A: No, sir. I cannot remember. I just know it was around Thanksgiving. That's all I know. I can't remember what exact day it was.

Q: She described the day after Thanksgiving. Does that sound consistent – –

A: Yes, sir.

Q: – – with what you remember?

A: Yes, sir. That's – – yes, sir.

Q: Do you think you worked on Friday after Thanksgiving in 2009?

A: Oh, I know I did.

Q: Did you work the Saturday after Thanksgiving 2009?

A: Yes, sir.

Q: Sunday?

A: No, sir. My days off then were Sunday, Monday, Tuesday.

Q: So it would had to have been Friday or Saturday just because –

A: Yes, sir.

Q: -- of your work schedule.

A: Yes, sir.

Q: Friday or Saturday after Thanksgiving.

A: Right. Yes, sir.

Q: And she told you she'd taken two pregnancy tests.

A: Yes, sir.

Q: And they were both positive.

A: Yes, sir.

(R. Vol. 7 at 33-35.) Mrs. Speck told him that she had taken two positive pregnancy tests. Before Mrs. Speck took the pregnancy tests, Mr. Speck thought she was pregnant. He testified as follows:

Q: What did she tell you when she called you after she'd taken the home pregnancy tests?

A: She just -- all I remember is **she told me she was pregnant**. And then it **come up positive**, and **she was upset**.

Q: Before she took the home pregnancy test, did she tell you she was pregnant?

A: She she was in denial. I felt like she was, and I think she did too. But she didn't actually come out and say, I'm pregnant.

Q: What did she come out and say?

A: I can' t remember.

Q: Why –

A: I just know that she didn't say that.

(R. Vol. 7 at 35.)(emphasis added.) Mr. Speck thought Mrs. Speck was pregnant before she took either pregnancy test based on their history. He testified as follows:

Q: Why did you think she was pregnant even before she took the pregnancy test at home?

A: Because I know my wife, and I know -- I know how easily we got pregnant with the first two children. And I just -- I just -- and my gut told me she was pregnant.

Q: So you thought those pregnancy tests were going to be positive when she took them at home, didn't you?

A: Yes, sir.

(R. Vol. 7 at 36.) Plaintiffs were aware that there was still a chance that Mrs. Speck could get pregnant after having the Essure procedure. (R. Vol. 6 at 45.)

Based on the sworn testimony of Plaintiffs, the Court of Appeals appropriately found that Plaintiffs were on inquiry notice that Mrs. Speck was pregnant by Friday, November 27, 2009. Therefore, Plaintiffs' cause of action began accruing by Friday, November 27, 2009. The fact that Mrs. Speck had undergone a pregnancy avoidance procedure does not change the indications for pregnancy or the Plaintiffs' sworn testimony. Plaintiffs were required by Tennessee Code Annotated § 29-26-116 to file the present action within one year. Plaintiffs failed to file the present action until over a year after the cause of action accrued. Even giving Plaintiffs additional time for providing Notice pursuant to Tennessee Code Annotated § 29-26-121, Plaintiffs' Complaint was

still untimely. Therefore, the Court of Appeals appropriately found that Plaintiffs' action was time barred by the statute of limitations applicable to medical malpractice actions.

5. It is well-settled that the statute of limitations in a medical malpractice action is not tolled until an individual obtains actual knowledge of a breach of the standard of care nor until an individual obtains diagnosis by a medical professional.

The Court of Appeals applied well-settled law and appropriately found that plaintiffs did not require additional testing and diagnosis of pregnancy by a physician before she could reasonably have known that she was pregnant. *See Sherrill,* 325 S.W.3d 584, 595. Plaintiffs do not dispute that Mrs. Speck's pregnancy test taken on November 27, 2009, and the second one on either November 27, 2009 or November 28, 2009 were both positive. (R. Vol. 6 at 68, 69; R. Vol. 7 at 35.) Plaintiffs do not dispute that Mrs. Speck signed an Essure Hysteroscopic Tubal Occlusion Consent form. (R. Vol. 6 at 125.) Plaintiffs do not dispute that Mrs. Speck knew that there was still a chance she could get pregnant after having the Essure procedure. (R. Vol. 6 at 45.) Plaintiffs do not dispute that the Essure Hysteroscopic Tubal Occlusion Consent form states: "Failure. Like all methods of birth control, the Essure procedure should not be considered one hundred percent effective." (R. Vol. 6 at 45.)

However, Plaintiffs continue to argue that Mrs. Speck could not have known that she was pregnant despite the numerous reasons supporting Plaintiffs' belief that she was pregnant and Plaintiffs' own sworn testimony that they believed she was pregnant by November 27, 2009. Plaintiffs' argue that the Court of Appeals ignored the fact that an ultrasound pregnancy test was

necessary. Plaintiffs ignore the fact that the uncontroverted expert proof before the Court was that ultrasound is not used to "confirm whether or not a patient is pregnant," the Woman's Clinic uses the same type of pregnancy tests as the one Mrs. Speck purchased, and the pregnancy tests used by Mrs. Speck were over 99% accurate. (R. Vol. 1 at 96-97.) Additionally, Mrs. Speck has previously taken pregnancy tests to confirm whether or not she was pregnant. (R. Vol. 1 at 2-3.)

Plaintiffs would have the Court ignore the undisputed expert proof, all of the reasons why Plaintiffs were on inquiry notice that Mrs. Speck was pregnant, and the sworn testimony of Plaintiffs. Plaintiffs try to make their case unique by arguing that Mrs. Speck could not have known because she had never undergone a pregnancy avoidance procedure before. Yet whether or not Mrs. Speck had undergone a pregnancy avoidance procedure before is irrelevant in the determination of whether Plaintiffs were on inquiry notice that Mrs. Speck was pregnant by November 27, 2009. The physical symptoms attendant to pregnancy and indications for pregnancy are the same whether or not one has undergone a pregnancy avoidance procedure. The results of the home pregnancy tests used by Mrs. Speck that were over 99% accurate would be the same whether or not one has undergone a pregnancy avoidance procedure. Furthermore, it is well-settled that Mrs. Speck did not require any additional testing or a diagnosis of pregnancy by a physician before she could be put on inquiry notice that she was pregnant. In fact, the undisputed expert proof in this

matter establishes that no additional testing was required to confirm Mrs. Speck's pregnancy.

The Court of Appeals decision was based on well-settled law applicable to this case. Contrary to Plaintiffs' assertions, *Wyatt v. ACandS, Inc.*, 910 S.W.2d 851 (Tenn. 1995) is not controlling in this matter and the Court of Appeals did not fail to acknowledge any controlling authority. *Wyatt* was a case involving a diagnosis of asbestos lung disease. This Court determined that in *Wyatt*, the plaintiffs "did not know the general cause and results of the tort until the asbestosis diagnosis were made." *Id.* at 857. Plaintiffs fail to mention that this Court's decision was based in part on the uncontroverted medical testimony that an x-ray was not enough to diagnosis asbestos lung disease and Plaintiff required a physical examination. *Id.* at 856. Furthermore, unlike asbestos lung disease, a woman can determine that she is pregnant without consulting a doctor. Pregnancy can be diagnosed by an over the counter test. In fact, the pregnancy test(s) taken by Mrs. Speck on November 27, 2009 were over 99% accurate. (R. Vol. 1 at 96.) The Woman's Clinic uses the same type of pregnancy test that is purchased over the counter. (R. Vol. 1 at 96.) A pregnancy test purchased over the counter, like the ones purchased by Mrs. Speck, has the same accuracy as those used at the Woman's Clinic. (R. Vol. 1 at 96.) Unlike *Wyatt*, Mrs. Speck did not require an examination by a healthcare provider or additional testing. The uncontroverted medical testimony in this case is that ultrasound is not required to diagnose pregnancy. (R. Vol. 1 at 96.)

Therefore, there is no evidence in the record to support Plaintiffs' claim that Mrs. Speck required examination or testing by a physician to confirm her pregnancy.

B. Rule 59.04 Motions to Alter or Amend a Judgment serve a limited purpose and are not required to be granted, especially where the motion fails to meet the Rule 59 grounds.

"[T]he purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) *perm. to appeal denied* Sept. 12, 2005. Motions to Alter or Amend a Judgment pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure "should not be used to present new, previously untried or unasserted theories or legal arguments." *In re M.L.D.*, 182 S.W.3d 890, 895 (finding that the movant waived the issue of whether father was the legal parent for failure to timely raise the issue). A Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003) *perm. to appeal denied* Dec. 15, 2003 (R. Vol. 2 at 235.)

Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment failed to meet the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 2 at 234-239.) First, controlling law did not change. *See* Tenn. Code Ann. § 29-26-116; See also, *Roe,* 875 S.W.2d 653, 656-57(*quoting Hoffman v.*

Hospital Affiliates, 652 S.W.2d 341, 344 (Tenn. 1983)); *Sherrill,* 325 S.W.3d 584, 595. Second, no previously unavailable evidence became available. Instead, in support of the Motion to Alter and/or Amend Judgment Granting Defendants' Motion for Summary Judgment, Plaintiffs submitted a Supplemental Affidavit of Julie Speck. (R. Vol. 1 at 130-132.) Plaintiffs failed to offer any plausible argument that the new evidence and theories were not available to Plaintiffs or why they were not provided in response to Defendants' Motion for Summary Judgment, Defendants' Reply to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, or the Affidavit of Ryan Roy, M.D. Third, no errors of law were presented in the case.

The Court of Appeals has held that Tennessee courts are not required to consider supplemental or amended affidavits after summary judgment is entered. *See Chambliss*, 124 S.W.3d 116 (holding that the Trial Court did not abuse its discretion in refusing to consider an amended affidavit of an expert witness); *See also*, *Denton-Preletz v. Denton*, No. E2010-01756-COA-R3-CV, 2011 WL 5375141 (Tenn. Ct. App. Nov. 8, 2011) *perm. to appeal denied* Apr. 11, 2012; *Robinson v. Currey*, 153 S.W.3d 32 (Tenn. Ct. App. 2004) *perm. to appeal denied* Dec. 6, 2004.

Applying the factors set forth in *Stovall v. Clark*, the trial court appropriately determined that the new evidence presented in the Supplemental Affidavit should not be considered. However, even if considered it would not change the decision. The Court of Appeals appropriately found that "even if Mrs. Speck's Supplemental Affidavit were considered, it does not create a genuine

issue of material fact on the issue of notice." *Speck*, 2013 WL 5296886 at *10. The Court of Appeals further stated, Mrs. Speck was on inquiry notice prior to any alleged statements by Dr. Roy "and she remained on inquiry notice after his statements. This conclusion is bolstered by the further undisputed fact that Mrs. Speck continued to investigate whether she was pregnant after speaking to Dr. Roy." *Id.* Therefore, "even giving the Specks the benefit of every reasonable inference, they still had knowledge of facts that placed them on inquiry notice about Mrs. Speck's pregnancy." *Id.* (*citing Roe*, 875 S.W.2d at 656-57).

III. The scope of damages recoverable by a Plaintiff in an action for wrongful pregnancy or wrongful conception is well-settled and well-reasoned.

In 1987, this Court evaluated and ascertained the scope of damages recoverable by a plaintiff in an action for wrongful pregnancy or wrongful conception. *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). In *Smith*, the Plaintiff underwent a sterilization procedure following the birth of twins. Approximately four months after the procedure, Smith was informed that she was pregnant with her fifth child. She gave birth to a healthy, normal baby boy. Smith filed a Complaint seeking damages for "emotional distress, loss of income, medical expenses, and the expenses of rearing the child to majority." *Id.* at 740. Defendants filed Motions to Dismiss Plaintiff's claims "for the recovery of the rearing expenses of a normal, healthy child." *Id.*

This Court evaluated the various theories of recovery for wrongful pregnancy or wrongful conception, specific public policies and Tennessee law, and concluded that the extent of recovery was limited "to those damages

immediately flowing from the failed pregnancy avoidance technique." *Id.* at 751. This Court held that the Defendants' were not liable for the support of a normal child

> because legislative enactment of such comprehensive statutory schemes controlling child custody and support demonstrates that the public policy of Tennessee is that the obligation for support of minor children is affirmatively placed on the parents of the children. The fact that a normal child is the result of a failed pregnancy avoidance technique will not shift this responsibility from the parents to the defendant in such a case. Application of general common law principles of tort recovery is not appropriate in this case because both the common law itself and statutory law have specifically established responsibility for the support of children.

Id. Furthermore, "[i]f this responsibility is to be shifted away from the parents, **such a determination is for the Legislature and not the Judiciary**. Significant and far-reaching questions of social policy are involved, 'and it is the prerogative of the General Assembly to declare the policy of the State touching the general welfare.'" *Id.* At 751 (quoting *Baptist Memorial Hosp. v. Couillens, supra*, 140 S.W.2d at 1093)(emphasis added).

This Court held, "[l]egal causation does not extend to the consequence of the necessity of support. The extent of recoverable damages is limited by this State's law and policy, which impose the obligation to support minor children on the parents. This does not, however, and cannot relieve the defendant in these cases of all liability for the injuries caused by his negligence; it only establishes a boundary on the extent of recoverable damages." *Id.* at 752. The Court went on to state, "[i]f liability is to be extended by shifting the obligation to support from the parents to defendants in wrongful pregnancy actions, **the Legislature is the proper forum in which the competing social policies should be considered**

in changing the law." *Id.*(emphasis added.) Importantly, in over twenty-five years since the *Smith* decision, the Legislature has not acted to shift the responsibility for supporting a normal child away from the parents. Legislative silence on the subject can be interpreted as indicating legislative approval of the *Smith* decision.

This Court, like the majority of courts, has adopted a remedy of limited recovery which follows the view that the costs of raising a healthy child are not recoverable in a wrongful pregnancy action. *See*, *Boone v. Mullendore*, 416 So.2d 718 (Ala. 1982); *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975), *ovrld on other gr by Garrison v. Medical Center of Delaware, Inc.* (Del. 1990); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. App. 1984); *Fassoulas v. Ramey*, 450 So. 2d 822, *rehearing denied*, (Fla. 1984); *Fulton-DeKalb Hospital Authority v. Graves*, 314 S.E.2d 653 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385, cert. denied, (Ill. 1983); *Chaffee v. Seslar*, 786 N.E.2d 705 (Ind. 2003); *Johnson v. University Hospital of Cleveland*, 540 N.E.2d 1370 (Ohio 1989); *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987); *Jackson v. Bumgardner*, 347 S.E.2d 743 (N.C. 1986); *Garrison v. Foy*, 486 N.E.2d 5 (Ind.Ct.App.1985); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984); *Byrd v. Wesley Medical Center*, 699 P.2d 459 (Kan. 1985); *Schork v. Huber*, 648 S.W.2d 861 (Ky.1983); *Pitre v. Opelousas General Hospital*, 530 So.2d 1151 (La.1988); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988); *Macomber v. Dillman*, 505 A.2d 810 (Me.1986); *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); *Hitzemann v. Adam*, 518 N.W.2d 102 (Neb.

1994); *P. v. Portadin*, 432 A.2d 556 (N.J. 1981); *O'Toole v. Greenberg*, 477 N.E.2d 445 (N.Y. 1985); *Mason v. Western Pennsylvania Hospital*, 453 A.2d 974 (Pa.1982); *Crawford v. Kirk*, 929 S.W.2d 633 (Tex.App.1996); *Miller v. Johnson*, 343 S.E.2d 301 (Va. 1986); *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo.1982); and *Mississippi State Federation of Colored Women's Housing for the Elderly in Clinton, Inc. v. In the Interest of L.R.*, 62 So.3d 351 (MS 2010).

The *Smith* case and the instant case are very similar. First, both involve a failed pregnancy avoidance procedure that resulted in a normal, healthy baby. Second, both cases involve a family with multiple children. In *Smith*, this Court did not overlook, but instead recognized "the economic realities that accompany the raising of children." *Id.* However, this Court found, "this is not a case involving a natural evolution of the common law due to changed social conditions." *Id.*

IV. There is no need for the exercise of the Supreme Court's supervisory authority.

Because the questions presented are well-settled and settled correctly, there is no need for the exercise of supervisory authority by this Court. In fact, Plaintiffs do not even attempt to argue that this Court should exercise supervisory authority in this case.

Defendants' Motion for Summary Judgment was appropriately granted, and the Court of Appeals appropriately affirmed, because Plaintiffs filed their claim after expiration of the applicable statute of limitations. (R. Vol. 1 at 135-

142; Speck, 2013 WL 5296886 at * 9.) Based on the undisputed facts established by Plaintiffs' own testimony and actions, Plaintiffs were at least on inquiry notice of Mrs. Speck's pregnancy by November 27, 2009. (R. Vol. 1 at 1-9, 96-97, 126, ;R. Vol. 2 at 228-231; R. Vol. 6 at 28, 35, 45-46, 50, 54, 66-70, 125; R. Vol. 7 at 33, 35-37). Pursuant to Tennessee Code Annotated § 29-26-116(a)(2), the statute of limitations was one year from the date of discovery of the alleged injury. Under Section 29-26-121,

> When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider. Personal service is effective on the date of that service.

Tenn. Code Ann. § 29-26-121(c). Because Section 29-26-121(c) only extends the applicable statute of limitations for one hundred twenty (120) days from the date of the expiration of the statute of the limitations, and the 120-day period expired on March 29, 2011, Plaintiffs' complaint, filed on March 30, 2011, was clearly untimely. Non-compliance with the statute of limitations does not necessitate the supervisory authority of the Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Application of Plaintiffs for Permission to Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on this 19th day of November, 2013, by Email or U.S. Mail, postage prepaid to:

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APPENDIX

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(Cite as: 1989 WL 25598 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Middle Section at Nashville.
Linda CANTRELL and Jewell Cantrell, Plaintiffs-Appellants,
v.
Robert N. BUCHANAN, Jr., M.D., Defendant-Appellee.

March 22, 1989.
Permission to Appeal Denied by Supreme Court June 5, 1989.

No. 88-334-II, Davidson Law, Appealed from the Circuit Court of Davidson County at Nashville, Matthew J. Sweeney, III, Judge.
James V. Barr, III, Nashville, James A. Johnson, Johnson, Weis, Paulson & Priebe, S.C., Rhinelander, Wis., for plaintiffs-appellants.

C.J. Gideon, Jr., North & Gideon, Nashville, for defendant-appellee.

OPINION

CANTRELL, Judge.

*1 The trial court dismissed the plaintiffs' medical malpractice claim on the grounds that it is barred by the applicable statute of limitations, Tenn.Code Ann. § 29-26-116(a) (1980). The plaintiffs appeal.

The facts relevant to this appeal can be briefly stated. From April of 1967 until January of 1975, plaintiff-appellant Linda Cantrell received intermittent radiation treatments while under the care of defendant-appellee Dr. Robert Buchanan for acne. In late August or early September of 1986, Mrs. Cantrell learned that she had cancer. According to the plaintiffs, on either September 12 or September 19 of 1986, Mrs. Cantrell first discovered that her cancer was caused by the radiation therapy she received under Dr. Buchanan's care.

On September 11, 1987, the plaintiffs filed this malpractice action against Dr. Buchanan alleging negligence and intentional deceit. The defendant moved for summary judgment. The trial court granted the motion on the ground that Tenn.Code Ann. § 29-26-116(a)(3) bars the action.

Under Tenn.Code Ann. § 29-26-116(a)(1), the statute of limitations in medical malpractice actions is one year. Tenn.Code Ann. § 29-26-116(a)(2) codifies the discovery rule. However, Tenn.Code Ann. § 29-26-116(a)(3) establishes a 3-year statute of repose:

In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred....

Only in cases involving fraudulent concealment or negligent leaving of a foreign object in a patient's body is the three-year cap inapplicable. *See* Tenn.Code Ann. § 29-26-116(a)(3)-(4).

In the present case, the latest date on which any alleged negligence occurred is January of 1975. Suit was filed in September of 1987, more than three years after the negligent act. This case does not involve a foreign object. In their appeal, the plaintiffs do not assign error to the trial court's finding that there is no evidence to indicate fraudulent concealment. Therefore, Tenn.Code Ann. § 29-26-116(a)(3) bars the claim.

On appeal, the plaintiffs request that this court avoid the harsh consequences of Tenn.Code Ann. § 29-26-116(a)(3) by applying the discovery rule. The discovery rule would not bar this action filed on September 11, 1987 since Mrs. Cantrell did not discover the alleged source of her cancer until, at the earliest, September 12, 1986. *See Foster v. Harris*, 633 S.W.2d 304 (Tenn.1982).

The circumstances of this case are compelling: Tenn.Code Ann. § 29-26-116(a)(3) bars the plaintiffs' right to seek redress before they even knew about the injury. Despite the harshness of this result, this court cannot simply abrogate the legislature's enactment. The Supreme Court upheld the constitutionality of Tenn.Code Ann. § 29-26-116(a)(3) in *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn.1978). (The court took notice of the medical malpractice insurance crisis which prompted the legislature to enact the three-year cap.) The court noted that, in the absence of constitutional defects, such policy matters are for the legislature, not for the courts. *Id.*

***2** At oral argument, the plaintiffs raised a constitutional issue not addressed in *Harrison v. Schrader*. Relying on *Jones v. Morristown-Hamblen Hospital Assn., Inc.*, 595 S.W.2d 816 (Tenn.Ct.App.1979), the plaintiffs assert that applying Tenn.Code Ann. § 29-26-116(a)(3) to the present case constitutes a denial of due process. In the present case, as in *Jones*, the alleged malpractice occurred prior to July 1, 1975, the effective date of the Medical Malpractice Review Board and Claims Act of 1975, ch. 299, 1975 Tenn.Pub. Acts 662, of which Tenn.Code Ann. § 29-26-116 was a part. The plaintiffs urge that it is a denial of due process to apply Tenn.Code Ann. § 29-26-116(a)(3) retrospectively so as to cut off the plaintiffs' right to redress before they had discovered the injury.[FN1]

The constitutional issue raised by the plaintiffs was addressed and rejected in *Jones*. *Jones* held that, under due process principles, "[a] statute of limitation ... may not be given retrospective application so as to bar an accrued right of action, but may bar a cause of action which has not yet accrued or vested." *Jones*, 595 S.W.2d at 820. After *Teeters v. Currey*, 518 S.W.2d 512 (Tenn.1974), discovery became a condition precedent to the accrual of a right of action for medical malpractice. When the Medical Malpractice Review Board and Claims Act took effect on July 1, 1975, the plaintiff in *Jones* had not discovered her injury and, therefore, had no accrued right of action. Since retrospective application of what is now Tenn.Code Ann. § 29-26-116(a) would not impair a vested right, the court held such application constitutional.

In the present case, as in *Jones*, the plaintiffs had not discovered the injury as of July 1, 1975 when the Medical Malpractice Review Board and Claims Act took effect. Since there was no accrued right of action, retrospective application of Tenn.Code Ann. § 29-26-116(a)(3) does not constitute a denial of due process.

The *Jones* dissent does not help the plaintiffs' case. The dissenting judge based his opinion on factors not involved in the present case.

Courts have rejected similar due process challenges to Tennessee's statute of repose for products liability cases. *See Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir.1984), *cert. denied*, 469 U.S. 1159 (1985); *Mathis v. Eli Lilly and Co.*, 719 F.2d 134 (6th Cir.1983). Both *Wayne* and *Mathis* include discussions as to the rationality of the products liability statute of repose. In its equal protection analysis in *Harrison*, the Supreme Court concluded:

This Court cannot say that there is no reasonable basis for the separate classification of health care providers or that this classification bears no reasonable relation to the legislative objective of reducing and stabilizing insurance and health costs and protecting

the public as a whole. Indeed, at the time Sec. 23-3415(a) [now § 29-26-116(a)] was passed, "there was indubitably a valid reason for the distinction made" by the statute.

*3 *Harrison*, 569 S.W.2d at 827 (quoting *Dobbins v. Terrazzo Machine & Supply Co.*, 479 S.W.2d 806, 810 (Tenn.1972)). Moreover, rational basis analysis is unnecessary where there is no right deserving of due process protection. Thus, the court in *Mathis* stated:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer, as in the instant case, does not give rise to due process protection.

Mathis, 719 F.2d at 141. This reasoning was the basis of the majority opinion in *Jones*.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for the collection of the costs in that court. Tax the costs on appeal to the appellant.

TODD, P.J., and KOCH, J., concur.

FN1. Tenn.Code Ann. § 29-26-103 (repealed 1985) provided that the Medical Malpractice Review Board and Claims Act would "not affect any malpractice actions commenced or filed before July 1, 1975." From this provision, the *Jones* court concluded that the legislature intended the Act to have retrospective application "since any suit filed after July 1, 1975, would fall within the Act's provisions without regard to the date of the negligent act giving rise to the cause of action." *Jones*, 595 S.W.2d at 819. In 1985, the legislature repealed all sections of the Act concerning the medical malpractice review board, including Tenn.Code Ann. § 29-26-103. *See* Act of April 8, 1985, ch. 184, § 4, 1985 Tenn.Pub.Acts, 340, 341. However, the plaintiffs do not argue (and this court should find no reason to conclude) that this repeal indicated a legislative intent to preclude retrospective application of the remaining provisions of the Act. Rather, the legislature repealed the review board provisions because the board had gone out of existence pursuant to statute. *See* Act of April 8, 1985, ch. 184, § 4(a), 1985 Tenn.Pub.Acts 341.

Tenn.App.,1989.
Cantrell v. Buchanan
Not Reported in S.W.2d, 1989 WL 25598 (Tenn.Ct.App.)

END OF DOCUMENT

Slip Copy, 2011 WL 5375141 (Tenn.Ct.App.)
(Cite as: 2011 WL 5375141 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Carolyn L. DENTON–PRELETZ, et al.
v.
Susan L. DENTON.

No. E2010–01756–COA–R3–CV.
May 4, 2011 Session.
Nov. 8, 2011.
Application for Permission to Appeal Denied by Supreme Court April 11, 2012.

Appeal from the Chancery Court for Cumberland County, No.2008–CH–126; Ronald Thurman, Chancellor.

Robert L. Barr, Jr., Atlanta, Georgia, and D. Brent Gray, Jacksboro, Tennessee, for the appellants, Carolyn L. Denton–Preletz and Carolyn L. Denton–Preletz, as Trustee of the Carolyn L. Preletz, Living Trust.

Joe M. Looney, Crossville, Tennessee, for the appellee, Susan L. Denton.

JOHN W. McCLARTY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

OPINION

JOHN W. MCCLARTY, J.

***1** This appeal concerns a note executed by Robert Denton ("Husband") and Susan L. Denton ("Wife") and payable to Husband's sister, Carolyn L. Denton–Preletz ("Lender"). When Lender sought recovery of the note, Wife denied liability and filed a motion for summary judgment, asserting that the statute of limitations for recovery of the note had passed. The trial court granted the motion and dismissed the case as it related to Wife. Lender filed a motion to alter or amend the order and a motion to amend the complaint, which were denied. Lender appeals. We affirm the decision of the trial court.

I. BACKGROUND

Lender agreed to loan Husband and Wife (collectively the "Borrowers") $309,000. On October 24, 1986, Borrowers executed a note evidencing the loan. The note provided,

> For value received, the undersigned promise to pay to the order of [Lender] [t]he sum of [$309,000], with interest at the rate of [8 percent] per annum; said principal and interest shall be payable as follows: Payments will be made at the rate of $12,000 annually following the retirement of the FHA obligation.
>
> All installments of principal and interest are payable in lawful money of the United States at Crossville, Tennessee, or at such place as the holder of this note may designate.
>
> If default should be made in the payment of this note when due, or if any installment payment under this note should be in default for as much as 365 days, the entire principal sum and accrued interest shall be, at once, due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of default in the payment of this note, and if the note is collected by an attorney at law, the undersigned agree to pay all costs of collection, including a reasonable attorney's fee.

> The makers and endorsers severally waive presentment, protest, and demand, notice of protest, demand and dishonor and nonpayment of this note, and expressly agree that this note, or any payment thereunder, may be extended from time to time without in any way affecting [the] liability of the makers and endorsers hereof.
>
> This note is secured by a trust conveyance of even date herewith.

The "FHA obligation" referred to the Borrowers' execution of a deed of trust to the Farmers Home Administration on December 7, 1979. The deed was not attached to the note. The maturity date of the FHA obligation was December 7, 1999. The Borrowers satisfied the FHA obligation in 1991 but failed to inform Lender that the obligation had been fulfilled.

In February 2007, Lender asked Husband when the FHA obligation would be fulfilled. Husband told Lender that the obligation had been fulfilled, and Lender demanded payment. Husband eventually agreed that the note was due and payable, but Wife refused payment. Lender filed suit on May 28, 2008, claiming that the Borrowers had breached their contract by failing to remit payment when the FHA obligation was fulfilled, that she did not know the terms of the FHA obligation, that she believed the FHA obligation remained unpaid, and that she relied on the Borrowers' representations. Husband provided an affidavit for Lender, acknowledging that the "FHA obligation was satisfied early and did not go to term" and that he and Wife "forgot to inform" Lender. An agreed judgment was entered against Husband for $861,589.40, including the principal amount of the note, interest, and attorney fees.

*2 Following the filing of Lender's complaint, Wife again denied liability on the note. Wife alleged that the complaint failed to state a claim upon which relief could be granted, that the debt had been forgiven, and that Lender was barred from recovery on the note because the applicable statute of limitations had passed and because of the equitable doctrine of laches. Wife filed a motion for summary judgment, asserting that there were no genuine issues of material fact. She said the note did not "state a final maturity date" and would "never pay out because the annual accrual of interest exceed[ed] the annual payment called for." She opined that the note was a demand note, that the applicable statute of limitations was ten years, and that demand for payment should have been made in 1996. She stated that no payments had been made and that no demand for payment was made prior to 2007. She claimed recovery on the note was barred by the statute of limitations.

Lender conceded that the note was a demand note and that the applicable statute of limitations was ten years. She alleged that the earliest date she could have demanded payment was December 7, 1999, the maturity date of the FHA obligation, and that the statute of limitations did not begin to run until that date. She said that it would have been "disingenuous, if not fraudulent," for the Borrowers to prepare a note that precluded demand for payment until after the passing of the statute of limitations. She claimed that summary judgment was inappropriate because the facts of the case required application of the discovery rule, necessitating a factual determination regarding whether she made a timely demand for payment. She claimed that Wife could not assert a statute of limitations defense because by failing to inform her that the FHA obligation had been fulfilled, Wife did not meet the implied contractual obligation of good faith and fair dealing.

Following a hearing, the trial court granted Wife's motion for summary judgment and dismissed the case as it related to Wife. The court found that the note was a demand note and that the applicable statute of limitations was ten years pursuant to Tennessee Code Annotated section 47-3-118(b). The court further

found that the FHA obligation was satisfied in 1991. The court held that the discovery rule did not apply because evidence of the satisfaction of the FHA obligation was filed in Cumberland County, providing notice "to all of the world of their contents" pursuant to Tennessee Code Annotated section 66–26–102. The court dismissed the case, further holding that there was "no genuine issue of any material fact and that [Wife was] entitled to a judgment of dismissal as a matter of law."

Shortly thereafter, Lender filed a motion to alter or amend the order dismissing the case, alleging that the court improperly granted summary judgment following its erroneous reliance on Tennessee Code Annotated section 66–26–102. She claimed that she should not have been bound by a "duty to search land records on a continual basis for an event that might trigger a subsequent duty to act." She claimed that the discovery rule applied to her case, requiring a weighing of the evidence and precluding summary judgment. She asserted that the recording of the satisfaction of the FHA obligation was "a factor to be considered when determining the reasonableness of [her] conduct" under the discovery rule.

*3 After hiring new counsel, Lender filed a motion to amend her complaint. She asserted that Husband's reaffirmation of the debt and Wife's fraudulent misleading of Lender tolled the statute of limitations. Lender said she asked family members about the Borrowers' financial condition "repeatedly and directly" and was told "they were not doing well." Lender claimed the Borrowers accepted expensive gifts and travel, leading her to believe that "they were financially inept and unable to provide for themselves." She asserted that the Borrowers knew she relied on their trustworthiness because she lived across the country and would not be able to check whether the FHA obligation had been fulfilled.

Wife responded to the motion to alter or amend the order by asserting that Lender had attempted to "reargue" the same issues. She believed the statute of limitations could not be tolled because Lender had agreed at the hearing on the motion for summary judgment that there were no allegations of fraud or misrepresentation. She opined that the discovery rule did not apply because Lender failed to exercise reasonable care and diligence in determining when the obligation had been fulfilled and because application of the rule would be inconsistent with the statute of limitations applicable to demand notes. She claimed that application of Tennessee Code Annotated section 66–26–102 was merely one item the court took into account in granting the motion for summary judgment.

Wife responded to the motion to amend the complaint by asserting that the motion was untimely and raised issues that had not been suggested in prior pleadings but that were discoverable prior to the filing of the initial complaint. She claimed that the issues raised in the motion were also contradictory to the positions taken by Lender in prior pleadings and hearings and that the doctrine of judicial estoppel should prevent Lender from raising those issues. She said that the reaffirmation of the debt occurred 18 months prior to the filing of the motion. Wife asserted that Lender's attorney "conceded and stipulated" at the hearing on the motion for summary judgment "that there was no suggestion that [Wife] had at anytime engaged in any fraud or misrepresentation [ ] or that [Wife] had fraudulently concealed the running of the statute of limitations."

Lender's prior attorney subsequently filed an affidavit in which he stated,

> To the best of my knowledge, recollection, and belief no stipulation as to the issue of fraud was made. As there was no allegation raised in the pleadings that we filed that [Wife] had engaged in fraud or misrepresentation or that affirmative action to conceal the running of the statute of limitations was taken, I, as [Lender's] counsel, do not recall having specifically addressed the same.

Shortly thereafter, Lender's attorney filed another affidavit. He said Lender was not present at the hearing on the motion for summary judgment. He had "no specific recollection" of the discussion of fraud but said that if the court inquired on that issue, he "would have responded that [he] had not alleged fraud as a cause of action at that juncture." He asserted that he had engaged in "minimal discovery" prior to the hearing and that "all issues and theories are rarely known until all discovery is completed." Relative to whether he provided a stipulation, he said, "I state definitively that no such stipulation was ever made, nor was one contemplated. Any such stipulation would have been made in writing or, at a minimum, made on the record." He further stated, "At no time would I or anyone from my firm, to my knowledge, enter into such a stipulation that would effectively dismiss a possible issue at such an early stage of the proceedings in the absence of further discovery."

***4** Following arguments of counsel, the trial court denied the motion to alter or amend the order and the motion to amend the complaint. Relative to the complaint, the court found that "in answer to a specific inquiry by the [c]ourt," Lender's counsel had "represented that fraud and misrepresentation were not issues in the case[ ] and that [Lender] made no allegation of fraud and misrepresentation." The court held that Lender's attempts to "raise the issues of fraud and misrepresentation [were] foreclosed." This appeal followed.

II. ISSUES

We restate and consolidate Lender's issues on appeal as follows:

A. Whether the trial court erred in granting the motion for summary judgment after finding that Lender's suit was time-barred.

B. Whether the trial court erred in denying Lender's motion to alter or amend the court's order of summary judgment.

C. Whether the trial court erred in denying Lender's motion to amend the complaint after summary judgment had been granted.

III. STANDARD OF REVIEW

On appeal, the factual findings of the trial court are accorded a presumption of correctness and will not be overturned unless the evidence preponderates against them. *See* Tenn. R.App. P. 13(d). The trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn.2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). Mixed questions of law and fact are reviewed de novo with no presumption of correctness; however, appellate courts have "great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal." *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn.1995).

IV. DISCUSSION

A.

Lender contends that the court erred in granting summary judgment because there were genuine issues of material fact. Lender asserts that the trial court improperly relied on Tennessee Code Annotated section 66–26–102 and that pursuant to the discovery rule, the statute of limitations did not begin to run until she became aware that the FHA obligation had been fulfilled. Wife responds that the trial court did not err in granting the motion for summary judgment. She asserts that the court could not apply the discovery rule because Lender was not delayed or deterred from demanding payment when the satisfaction of the condition precedent was documented in public records and when she could have asked the Borrowers whether the condition had been fulfilled.

Summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion and (2) the moving party is entitled to judgment as a matter of law on the undisputed facts. Tenn. R. Civ. P. 56.04. A properly supported motion for summary judgment "must either (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn.2008). When the moving party has made a properly supported motion, the "burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id.* at 5; *see Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993). The nonmoving party may not simply rest upon the pleadings but must offer proof by affidavits or other discovery materials to show that there is a genuine issue for trial. Tenn. R. Civ. P. 56.06. If the nonmoving party "does not so respond, summary judgment, if appropriate, shall be entered." Tenn. R. Civ. P. 56.06.

*5 On appeal, this court reviews a trial court's grant of summary judgment de novo with no presumption of correctness. *See City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn.1997). In reviewing the trial court's decision, we must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn.1999); *Muhlheim v. Knox County Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn.1999). If the undisputed facts support only one conclusion, then the court's summary judgment will be upheld because the moving party was entitled to judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn.1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995).

The applicable statute of limitations for demand notes is ten years when no demand for payment is made and when "neither principal nor interest on the note has been paid for a continuous period of ten (10) years." Tenn.Code Ann. § 47–3–118(b). Additionally, actions on demand notes must be "commenced within ten (10) years after the cause of action accrued." Tenn.Code Ann. § 28–3–109(c).

The note was executed on October 24, 1986, and Lender did not demand payment until 2007. The complaint on the note was not filed until May 28, 2008. The terms of the note provided that payment should be remitted when the FHA obligation was fulfilled. We believe the cause of action accrued in 1991, when the condition precedent was fulfilled. Thus, Lender's claim was barred because she waited 16 years from that date to inquire about the obligation and demand payment and because no payments of principal or interest were made for a continuous period of 10 years.

Lender asserts that the discovery rule should be applied to her case to toll the statute of limitations. She believes that the statute of limitations should run from 2007, the time in which she learned that the obligation had been fulfilled. We, like the trial court, believe that application of the discovery rule to this case was unwarranted. The discovery rule applies "only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he [or she] has a right of action." *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn.1983). "Furthermore, the statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Id.* When applying the discovery rule, determining "[w]hether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a fact question for the jury to determine." *Wyatt v. A–Best, Co., Inc.*, 910 S.W.2d 851, 854 (Tenn.1995); *see McIntosh v. Blanton*, 164 S.W.3d 584, 586 (Tenn.Ct.App.2004). Nevertheless, if undisputed facts show "that no reasonable trier of fact could conclude that a plaintiff did not know, or in

the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of defendant's wrongful conduct, Tennessee case law has established that judgment on the pleadings or dismissal of the complaint is appropriate." *See* *Schmank v. Sonic Auto., Inc.*, No. E2007-01857-COA-R3-CV, 2008 WL 2078076, at *3 (Tenn.Ct.App. May 16, 2008) (citations omitted).

*6 Records indicating the FHA obligation had been fulfilled were filed in the county register's office, providing some form of notice to Lender that the obligation had been fulfilled. *See* Tenn.Code Ann. § 66-26-102; *see also* Tenn.Code Ann. § 66-24-101(a)(9). We acknowledge that Lender did not live in Tennessee and that it would be cumbersome for Lender to continually check the records of the register's office in Tennessee to ascertain when the FHA obligation had been fulfilled. *See generally* *Hutchison v. Estate of Nunn ex rel. Ozier*, No. W2004-00578-COA-R3-CV, 2004 WL 3048970, at *5 (Tenn.Ct.App. Dec.30, 2004). However, at the very least, Lender should have inquired about the FHA obligation at the time the note was executed.[FN1] Instead, Lender waited 21 years to inquire about the note and 22 years to bring a cause of action on the note. Given these facts, the discovery rule cannot be applied to Lender's case because she failed to exercise reasonable care and diligence in discovering her injury, namely the failure of the Borrowers to remit payment according to the terms of the note.

> FN1. We recognize that the terms of the FHA obligation provided a maturity date of December 7, 1999, several years after the obligation was actually fulfilled. If Lender had inquired about these terms, she would have been able to demand payment within ten years of the accrual of the cause of action, thereby complying with the applicable statute of limitations.

Lender asserts that she delayed demand on the note because of the Borrowers' representations. Absent allegations of fraud, her reliance on the Borrowers' representations was not enough to obviate her duty to exercise reasonable care and diligence in discovering her injury. Lender used the Borrowers' representations as the basis for her allegations of fraud that were included in the motion to amend the complaint but stopped short of alleging fraud in the initial complaint or in response to Wife's motion for summary judgment. At the hearing on the motion for summary judgment, the trial court inquired as to whether Lender was asserting fraud as a defense to the statute of limitations. While counsel's response on Lender's behalf at that hearing is a source of contention in this appeal, counsel admitted that they had not raised fraud as an issue at that point in the case.

Following Wife's properly supported motion for summary judgment, Lender bore the burden of production "to show that a genuine issue of material fact exist [ed]." *Hannan*, 270 S.W.3d at 5; *see Robinson*, 952 S.W.2d at 426; *Byrd*, 847 S.W.2d at 215. Lender simply failed to carry that burden. If Lender had raised allegations of fraud at the hearing on the motion for summary judgment, she would have raised a material question of fact, precluding summary judgment. *See* *Pero's Steak and Spaghetti House v. Lee*, 90 S.W.3d 614, 625 (Tenn.2002); *Benton v. Snyder*, 825 S.W.2d 409, 414 (Tenn.1992). Accordingly, we conclude that the trial court did not err in granting the motion for summary judgment because no genuine issues of material fact existed at that time.

B.

Lender contends that the court erred in failing to reverse the order dismissing the case because the court's application of Tennessee Code Annotated section 66-26-102 was erroneous and because the discovery rule tolled the statute of limitations. Lender asserts that when allegations of fraud were raised, the trial court should have allowed her to conduct discovery on the issue. Wife responds that the trial court did not err in applying the statute because the satis-

faction of the condition precedent was not inherently undiscoverable. Wife asserts that the doctrine of judicial estoppel precluded the court's consideration of fraud and that the alleged fraud occurred before the complaint was filed and was discoverable.

*7 A party may file a motion to alter or amend a judgment within 30 days after the entry of the judgment. Tenn. R. Civ. P. 59.04. This court reviews a trial court's decision to deny a motion to alter or amend a judgment under an abuse of discretion standard. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn.2003). "The purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn.Ct.App.2005). These motions should "be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice." *Id.* These motions "should not be used to present new, previously untried or unasserted theories or legal arguments." *Id.* If new evidence is raised in a motion to alter or amend a grant of summary judgment, the court should consider "the moving party's effort to obtain the evidence in responding to the summary judgment; the importance of the new evidence to the moving party's case; the moving party's explanation for failing to offer the evidence in responding to the summary judgment; the unfair prejudice to the non-moving party; and any other relevant consideration." *Stovall*, 113 S.W.3d at 721 (citing *Harris v. Chern*, 33 S.W.3d 741, 744 (Tenn.2000)).

The arguments regarding the application of Tennessee Code Annotated section 66–26–102 and the rejection of the discovery rule did not raise any new issues but were merely objections to the trial court's reasoning contained in the order granting summary judgment. While Lender may disagree with the court's application of the notice statute and the court's rejection of the discovery rule, the trial court did not apply an incorrect legal standard in reaching either decision. Additionally, we affirmed the court's grant of summary judgment. *See generally Stovall*, 113 S.W.3d at 723 (concluding that reversal of a court's grant of summary judgment necessarily required reversal of that court's denial of a motion to alter or amend the grant of summary judgment). Accordingly, we conclude that the trial court did not err in denying the motion to alter or amend on these grounds.

The allegations of fraud and Husband's revival of the debt were not raised in the motion to alter or amend the order dismissing the case but were raised in the motion to amend the complaint. Argument on both motions was considered simultaneously and rejected in the same order. Thus, we will consider these arguments as they relate to the motion to alter or amend the order. These arguments had not been raised in the complaint or at the hearing on the motion for summary judgment; thus, Lender presented new evidence for the court's consideration.

Relative to the allegations of fraud, Lender asserts that Wife had an implied duty to disclose that the condition precedent had been satisfied and that once this issue was raised, the court should have considered the evidence and determined that factual issues remained, precluding summary judgment. Lender's argument on this issue may have prevailed at the hearing on the motion for summary judgment but is without merit at this point in the case. Likewise, Lender's assertion that the court erroneously relied on counsel's alleged stipulation that fraud was not raised is equally without merit. Whether counsel stipulated that fraud was not an issue in response to the court's questioning is of no importance at this point in the case. At issue is whether the evidence regarding fraud and Husband's revival of the debt was discoverable prior to the hearing on the motion for summary judgment because a motion to alter or amend a court's order should not raise evidence that was available prior to the court's ruling, absent a satisfactory reason. *Id.* at 721. The evidence regarding fraud was available

but was not raised as an allegation of fraud. Additionally, Husband's alleged act of revival of the debt occurred prior to the court's hearing on the motion for summary judgment. In support of her argument regarding Husband's alleged revival of the debt, Lender points to Husband's affidavits that were filed prior to the hearing on the motion for summary judgment. Thus, this evidence was also available.

*8 Lender offers no reason as to why these arguments were not submitted to the court once the motion for summary judgment had been filed other than to say that only minimal discovery had been completed at that point in the case. As stated previously, Lender bore the burden of production to show that a genuine issue of material fact existed once Wife filed a properly supported motion for summary judgment. Lender should have raised the allegations of fraud and Husband's alleged revival of the debt at that point in the case because these allegations were readily discoverable and extremely important to her case. Parties have been "admonished repeatedly that [those] facing a summary judgment motion cannot rest on the mere allegations or denials in their pleadings but rather must respond with appropriate evidentiary materials demonstrating that there is a genuine issue for trial." *Bradley v. McLeod*, 984 S.W.2d 929, 932 (Tenn.Ct.App.1998), *overruled on other grounds by Harris*, 33 S.W.3d at 744. Accordingly, we conclude that the trial court did not err in denying the motion to alter or amend the order on these grounds because Lender failed to submit a valid reason as to why these allegations were not presented when they were discoverable and available prior to the hearing on the motion for summary judgment.

C.

Lender contends that the trial court erred in denying her motion to amend the complaint, which alleged that Wife's fraudulent concealment of the satisfaction of the FHA obligation should toll the running of the statute of limitations. Wife responds that denial of the motion to amend the complaint was appropriate because it was filed after the judgment of dismissal was entered. Wife asserts that the doctrine of judicial estoppel precluded amendment of the complaint.

The rule at issue here provides, in pertinent part, that "a party may amend [its] pleadings ... by leave of court; and leave shall be freely given when justice so requires." Tenn. R. Civ. Pro. 15.01. While requiring leave to be freely given lessens the discretion of the trial court in granting or denying such motions, the court's grant or denial of a motion to amend the pleadings is still generally subject to an abuse of discretion standard. *Merriman v. Cont'l Bankers Life Ins. Co.*, 599 S.W.2d 548, 559 (Tenn.Ct.App.1979); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

In determining whether to grant such a motion, the court must consider the following factors: "[u]ndue delay in filing; lack of notice to the opposing party; bad faith by the moving party; repeated failure to cure deficiencies by previous amendments[;] undue prejudice to the opposing party[;] and futility of amendment." *Merriman*, 599 S.W.2d at 559 (citing *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir.1973)). "Once a judgment dismissing a case has been entered, the plaintiff cannot seek to amend its complaint without first convincing the trial court to set aside its dismissal pursuant to" Rule 59 or 60 of the Tennessee Rules of Civil Procedure. *Lee v. State Volunteer Mut. Ins. Co., Inc.*, No. E2005–03127–COA–R3–CV, 2005 WL 123492, at *11 (Tenn.Ct.App. Jan.21, 2005) (citations omitted); *see also Morris Properties, Inc. v. Johnson*, No. M2007–00797–COA–R3–CV, 2008 WL 1891434, at *2 (Tenn.Ct.App.2008). Accordingly, we conclude that this issue is without merit because we have already concluded that the trial court did not err in denying the motion to alter or amend the order dismissing the case.

V. CONCLUSION

*9 The judgment of the trial court is affirmed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellants, Carolyn L. Denton–Preletz and Carolyn L. Denton–Preletz, as Trustee of the Carolyn L. Preletz, Living Trust.

Tenn.Ct.App.,2011.
Denton-Preletz v. Denton
Slip Copy, 2011 WL 5375141 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2007 WL 2751803 (Tenn.Ct.App.)
(Cite as: 2007 WL 2751803 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Jason DiGREGORIO
v.
C. Gary JACKSON, M.D., et al.

No. M2006-01547-COA-R3-CV.
April 10, 2007 Session.
Sept. 21, 2007.

Appeal from the Circuit Court for Davidson County, No. 04C-2621; Marietta Shipley, Judge.
Michael C. Skouteris, Milton E. Magee, Jr., Memphis, Tennessee, for the appellant, Jason Digregorio.

C.J. Gideon, Jr., Nashville, Tennessee, for the appellees, C. Gary Jackson, M.D. and the Otology Group.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J ., joined.

OPINION

PATRICIA J. COTTRELL, J.

*1 The defendant otologist performed surgery on the right ear of a man who suffered from a congenital condition. The patient claimed that for more than nine years after the surgery he suffered from chronic infections and a foul-smelling discharge from that ear. Another otologist finally revised the earlier surgery and discovered a small piece of sponge-like material in the patient's mastoid cavity, which the patient alleged had caused his infections and had been left there by the defendant almost ten years earlier. The defendant filed a motion for summary judgment, contending that the patient's complaint was time-barred because of the passing of the one-year statute of limitations and the three-year statute of repose for medical malpractice. The trial court granted the motion. The plaintiff argues on appeal that the trial court erred because it failed to properly consider Tenn.Code Ann. § 29-26-116(a)(4) of the medical malpractice act, which sets out a separate statute of limitations "in cases where a foreign object has been negligently left in a patient's body...." We affirm the trial court's judgment.

I. A SURGICAL PROCEDURE AND ITS AFTERMATH

Jason DiGregorio, the plaintiff herein, was born with two congenital ear abnormalities. The first abnormality, a malformation of the external ear, was corrected by plastic surgery when Mr. DiGregorio was a small child. The second abnormality, congenital atresia, is the absence of an external auditory ear canal. That condition is generally treated when the patient is fully grown. When Mr. DiGregorio was nineteen years old, his plastic surgeon referred him for treatment to an otologist, Dr. Gary Jackson, the defendant.

Dr. Jackson determined that surgery was advisable, and he explained the details of the proposed operation and its possible risks and complications to the plaintiff, who signed a pre-operative informed consent form. Plaintiff was also furnished with a written disclosure of those risks and complications, which included the following: "Infection may develop following surgery in rare occasions (1%). Should infection occur, hospitalization for antibiotic therapy may be prolonged. Severe infections may jeopardize the surgical result requiring later re-operation."

On July 22, 1994, Dr. Jackson performed surgery on Mr. DiGregorio's right ear. The procedure was a

modified radical mastoidectomy, in which the surgeon removes the posterior walls that separate the external ear canal from the mastoid space, which is located behind the ear. That allows the surgeon to reconstruct the middle ear and to insert a permanent prosthesis into the ear to improve the patient's hearing.

During the procedure, skin grafts from Mr. DiGregorio's hip were used to line the newly formed external ear canal. The grafts were supported by an overlayment of parachute silk. Pieces of a special spongy kind of material called Weck-Cel were wetted with gentamicin solution and inserted into the ear canal as a stent or expansive packing to hold the parachute silk and skin grafts in place. A dry sterile compressive dressing was also applied over the ear, and the patient was instructed to change the dressing periodically. He was told not to be alarmed if some of the packing fell out of the ear as he changed the dressing.

***2** On August 23, 1994, Dr. Jackson followed up on his initial surgery by removing the parachute silk and the packing from Mr. DiGregorio's ear. Dr. Jackson later stated that there was no indication at the conclusion of the procedure that anything had been retained in the operative site.

Mr. DiGregorio returned for several more follow-up appointments in 1994. Dr. Jackson examined the patient and observed that his hearing had dramatically improved, but he did not note any abnormal drainage from the ear during those visits. Dr. Jackson referred Mr. DiGregorio for a hearing aid, which did apparently cause a problem, for Mr. DiGregorio called Dr. Jackson's office on November 1, 1994, and his secretary took a message: "Please call-ear bleeding, just had ear molds made."

Another phone message from the patient's mother was dated December 12, 1994, just prior to a December 15 follow-up visit, which indicated that she was concerned about an unpleasant smell coming from her son's ear. There is no evidence that Dr. Jackson observed anything amiss during that appointment. A return appointment was scheduled for January 9, 1995, but Mr. DiGregorio did not appear or call to cancel or reschedule. Nor did he contact Dr. Jackson at any time thereafter to seek services, advice, assistance, or a referral. Mr. DiGregorio lived in Memphis, and Dr. Jackson practiced in Nashville.

According to Mr. DiGregorio's complaint, over the next nine years he suffered from recurrent ear infections and foul-smelling drainage from the right ear. In 2003, Mr. DiGregorio was referred to Dr. Mary McCalla. She recommended that exploratory surgery be performed. During the course of the surgery, which Dr. McCalla performed on September 16, 2003, she found a foreign body in the tip of the mastoid cavity, close to the problematic ear, which she thought was "a possible nidus of infection and persistent disease." She removed the object and sent it to pathology, which reported that it was an "irregular shaped spongy fragment with a flat surface on two sides measuring approximately 0.7 x 0.5 x 0.3 cm."

II. PROCEEDINGS IN TRIAL COURT

On September 10, 2004, Mr. DiGregorio filed suit against Dr. Jackson and his practice group in the Circuit Court of Davidson County.[FN1] The complaint alleged that Dr. Jackson had committed medical malpractice by failing to remove all the packing from Mr. DiGregorio's ear during the procedure in August of 1994 and by failing to detect the presence of the retained sponge during several follow-up appointments. Mr. DiGregorio asked the court to award him compensatory damages of "not less than $925,000" for the pain and suffering he endured over a period of almost ten years from ear infections and drainage allegedly resulting from the presence of the retained sponge, as well as for the additional medical expenses incurred to remove it.

FN1. Baptist Hospital was originally named

as an additional defendant. The trial court dismissed Mr. DiGregorio's claim against Baptist Hospital on summary judgment on March 6, 2006. That judgment was not appealed.

Dr. Jackson's answer denied that he had left any packing behind and asserted that the plaintiff's claim was barred by the passing of the one year statute of limitations and the three year statute of repose for medical malpractice. *See* Tenn.Code Ann. § 29-26-116. He also raised the affirmative defense of comparative fault, essentially contending that the plaintiff's own delay in seeking treatment substantially increased his alleged injury.

***3** Mr. DiGregorio filed a motion for partial summary judgment on the issue of liability, and Dr. Jackson also filed a motion for summary judgment. On July 5, 2006, the court filed a memorandum opinion and an order denying the plaintiff's motion for summary judgment and granting the defendant's motion for summary judgment on the ground that the action was time barred.

This appeal followed.

III. THE QUESTION OF TIMELINESS

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield*, 181 S.W.3d 283, 288 (Tenn.2005); *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn.2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 284 (Tenn .2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn.2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn.2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn.2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn.2000).

The question of the timeliness of Mr. DiGregorio's lawsuit is the determinative issue in this case. The statutes of limitation and repose for medical malpractice cases are set out in Tenn.Code Ann. § 29-26-116 as follows:

(a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

(4) The time limitation herein set forth shall not apply in cases where a foreign object has been negligently left in a patient's body, in which case the action shall be commenced within one (1) year after the alleged injury or wrongful act is discovered or should have been discovered.

More than ten years elapsed between the alleged negligent act of Dr. Jackson and the filing of the complaint herein. Consequently, there can be no dispute that the action was untimely under either the one year statute of limitations or the three year statute of repose unless its facts brought it within one of the exceptions. The fraudulent concealment exception to the three year statute of repose is not at issue.

Instead, Mr. DiGregorio insists that his claim should be considered timely because of the "foreign object exception" found in Tenn.Code Ann. § 29-26-116(a)(4). This exception applies to both the one year statute of limitation and the three year statute of repose. *Chambers v. Semmer*, 197 S.W.3d 730, 737 (Tenn.2006). Mr. DiGregorio notes that his complaint was filed less than a year after Dr. McCalla discovered the foreign object in his mastoid space and argues that the statute only began to run upon the date of that discovery.

***4** The trial court analyzed the requirements of Tenn.Code Ann. § 29-26-115(a)(4) and their application to the undisputed facts in this case. Following a detailed recitation of the relevant facts and quotation of the "foreign object" exception in the statute, the trial court held that the statute of limitations begins to run when the patient discovers, or in the exercise of ordinary care and diligence for his own health and welfare, should have discovered the resulting injury, relying on *Teeters v. Currey*, 518 S.W.2d 512 (Tenn.1974). The trial court concluded:

> A reasonable person would have discovered that there was some problem with his ear, which would have related back to the surgery in 1994.... Ten years is simply too long a time from any symptoms occurring and the filing of the lawsuit. It was simply not justified for him to wait from 1996 to 2003. Thus, the plaintiff's cause of action fails because he failed to file an action within one year of his discovery of the injury or when he reasonably should have discovered the injury.

We agree with the trial court that the plain language of Tenn.Code Ann. § 29-26-115(a)(4) imposes a reasonableness requirement on a plaintiff's discovery of an injury. The statute extends the time limitation for filing a lawsuit until one year after "the alleged injury or wrongful act is discovered or **should have been discovered.**" Thus, the statutory exception does not extend the time until one year after the discovery of a foreign object regardless of the reasonableness or diligence of the plaintiff. Instead, in order to obtain the benefit of the extension of the normally applicable statute of limitations, the plaintiff's delay in discovering the injury must have been reasonable.

The "should have been discovered" language of Tenn.Code Ann. § 29-26-115(a)(4) imposes the reasonableness requirement. The generally applicable "discovery rule" set out in Tenn.Code Ann. § 29-26-115(a)(2) does not include such language. Nonetheless, our courts have held that that subsection incorporates a duty of reasonable diligence, *i.e.*, a plaintiff may not wait to file suit until he achieves certainty as to the fact, extent or cause of his injury. Rather, "the statute does not commence to run until the patient discovers his injury, or through the **exercise of reasonable diligence** should have discovered it." *Teeters v. Currey*, 518 S.W.2d at 516 (emphasis added).

For the medical malpractice statute of limitations to begin running, "... a plaintiff need not actually know the type of legal claim he or she has so long as the plaintiff is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Stanbury v. Bacardi*, 953 S.W.2d 671, 678 (Tenn.1997). *See also Shadrick v. Coker*, 963 S.W.2d 726, 733-34 (Tenn.1998); *Roe v. Jefferson*, 875 S.W.3d 653, 657 (Tenn.1994); *Bennett v. Hardison*, 746 S.W.2d 713, 714 (Tenn.Ct.App.1987). Contrary to Mr. DiGregorio's argument in this appeal, this standard, which was applied by the trial court, does not require that he have self-diagnosed the cause of his persistent infections, drainage, or related problems before the 2003 surgery. It merely requires that he have made reasonable efforts to discover that cause.

***5** Therefore, the question for this court is whether Mr. DiGregorio was aware of facts sufficient

to put a reasonable person on notice that he had sustained an injury or complication related to the surgery on his ear. In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, herein Mr. DiGregorio, and we must afford that party all reasonable inferences. *Draper*, 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn.2001).

Mr. DiGregorio testified in his deposition that he began to experience drainage of a thick yellowish and foul-smelling fluid from his right ear on a near daily basis in the spring of 1996 and that he had never had that kind of drainage before Dr. Jackson's surgery. During this period of time he was going to college and was living with his parents. His mother testified that the drainage actually began in 1994, soon after the surgery, but that it increased or decreased at different times. She usually did the laundry and became aware of the discharge because of the stains she saw on her son's pillowcase.

Mr. DiGregorio's mother and father both urged their son to see a doctor for the drainage and for the pain he sometimes suffered in his right ear,[FN2] but he did not take their advice because he was embarrassed about his condition. He sought medical attention for other problems he had prior to the year 2000, but during those appointments he did not bring up the chronic ear problems he was suffering. In his daily life, he tried to hide the problem as much as possible, cleaning his ear constantly, and putting cologne in the area to disguise the smell.

> FN2. Sonia DiGregorio testified that she told her son to see a doctor "at least several times a year." Jason DiGregorio was asked at his deposition how many times his mother urged him to go to the doctor to have his ears examined. He responded "I would say less than ten times."

On September 14, 2000, the plaintiff finally went to a doctor for the specific purpose of receiving treatment relating to the problems with his ear. Dr. Summers of the Hickory Hill Family Medical Clinic examined the plaintiff, gave him ophthalmic drops for his ear, and an appointment to return one week later. The plaintiff did not return.

The drainage continued however, and at some point (it is unclear from the record exactly when) a new symptom arose in the form of additional drainage from the area directly behind the plaintiff's ear. On May 20, 2002, the plaintiff went to Dr. Jordan, who referred him to Dr. Hodge, an ear, nose and throat specialist. Dr. Hodge cleaned Mr. DiGregorio's ear out and gave him antibiotics. The procedure was painful and produced a lot of discharge and blood. The plaintiff did not return to Dr. Hodge because he felt the doctor was too rough with him. In 2003, Doctor Jordan referred Mr. DiGregorio to Dr. McCalla, who as we discussed earlier, performed the surgery that resulted in the discovery of the object in his mastoid tip.

Mr. DiGregorio began experiencing malodorous drainage from his ear "around the year [19]96." Even though the condition continued for the next seven years, at no time did Mr. DiGregorio contact Dr. Jackson to inquire about this problem, to clarify any instructions he may have been given, or to otherwise seek follow-up treatment or guidance. Further, he did not seek medical attention from anyone for his condition until September 14, 2000. Thus, he delayed medical attention that could have led to the discovery of the "foreign object" for more than four years after the drainage began. He did not return for a scheduled follow-up visit after that appointment. It was twenty months before he sought medical treatment again.

*6 In light of the chronic nature of his symptoms, the discomfort and embarrassment they caused him, and the urgings of others to seek medical attention, we

fail to see how Mr. DiGregorio's delay in seeking treatment can be considered reasonable. Although the precise alleged cause of the infections and drainage was not discovered until the second surgery in 2003, Mr. DiGregorio admitted that he believed the drainage was related to the earlier surgery by Dr. Jackson.[FN3] Regardless, he did not exercise ordinary care or diligence for his own health or welfare.

> FN3. In fact, Mr. DiGregorio testified that he assumed the drainage came from a persistent infection, and that he thought the problem might stem from the skin grafts that Dr. Jackson had used.

On appeal, plaintiff attempts to salvage his claim by alleging that Dr. Jackson told him during a follow-up appointment that some drainage from the ear was normal and that he should only seek medical intervention if he actually saw blood coming from the ear. Assuming that such an instruction was given, it does not relieve Mr. DiGregorio from taking reasonable steps to determine whether the type and duration of drainage he suffered was normal or, in fact, resulted from some other cause. It also does not make reasonable his failure to seek medical attention for the persistent, embarrassing, and sometimes painful symptoms he experienced.

In *Bennett v. Hardison,* the plaintiff attempted to avoid the statute of limitations by arguing that he did not discover his injury, permanent numbness resulting from extraction of a wisdom tooth, until he saw a dentist eight months after the extraction, because the dentist who extracted the tooth had told him he would experience some temporary numbness. This court found that his claim was barred by the statute of limitations, stating,

> even though plaintiff may have been justified in accepting a brief period of numbness as a necessary incident of the surgery, absent **evidence of some unusual cause for the delay,** the defendant was not justified in delaying the "discovery" of the permanence of his injury from February 24, 1984, until "around October, 1984", a period of some 8 months. At some time during that 8 months, any reasonable person would have concluded that the brief, temporary numbness normally incident to oral surgery had outlasted its welcome and had become an unacceptable incident to the surgery.

Bennett v. Hardison, 746 S.W.2d at 714 (emphasis added). The same reasoning applies herein.

After our own *de novo* review, we reach the same conclusion as the trial court. Mr. DiGregorio is not entitled to rely on the exception in Tenn.Code Ann. § 29-26-116(a)(4) because he did not bring his lawsuit within one year of when, through reasonable diligence, he should have discovered the injury he alleges was caused by Dr. Jackson.

IV.

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant.

Tenn.Ct.App.,2007.
DiGregorio v. Jackson
Not Reported in S.W.3d, 2007 WL 2751803 (Tenn.Ct.App.)

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Not Reported in S.W.2d, 1996 WL 560534 (Tenn.Ct.App.)
(Cite as: 1996 WL 560534 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Jeannie FARROW, Plaintiff/Appellant,
v.
Charles F. BARNETT and Fort Sanders Parkwest Medical Center, Defendants/Appellees.

No. 03A01-9603-CV-00084.
Oct. 3, 1996.

Appeal from the Knox Circuit Court at Knoxville, Tennessee the Honorable Harold Wimberly, Judge.
CARL R. OGLE, JR. P.O. Box 129 Jefferson City, TN 37760 ATTORNEY FOR PLAINTIFF/APPELLANT

ROBERT H. WATSON, JR.JOHN C. DUFFYWatson, Hollow and Reeves, P.L.C. 1700 First TennesseePlaza Tower 800 South Gay Street Post Office Box 131 Knoxville, Tennessee 37901-0131 ATTORNEYS FOR DEFENDANT/APPELLEE CHARLES F. BARNETT, M.D.

F. MICHAEL FITZPATRICKArnett, Draper & Hagood 2300 First Tennessee Plaza Knoxville, Tennessee 37929-2300 ATTORNEY FOR DEFENDANT/APPELLEE FORT SANDERS PARKWEST MEDICAL CENTER

MEMORANDUM OPINION [FN1]

FN1. Court of Appeals Rule 10(b):

> The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

LEWIS, Judge.

***1** This is an appeal by plaintiff/appellant, Jeannie Farrow, from two orders of the trial court which granted the motion to dismiss filed by defendant/appellee, Charles F. Barnett, M.D. ("Dr.Barnett"), and the motion for summary judgment filed by defendant/appellee, Fort Sanders Parkwest Medical Center ("the Medical Center"). In its orders, the trial court concluded that plaintiff failed to file her action within the applicable statute of limitations. The facts out of which this controversy arose are as follows.

On 17 August 1995, plaintiff filed a complaint for medical malpractice and alleged the following. Plaintiff visited Dr. Barnett's office on 10 August 1994. He ordered plaintiff to have an MRI performed at the Medical Center. Dr. Barnett gave plaintiff a prescription for Xanax and told her to take the Xanax thirty minutes prior to having the MRI performed. Plaintiff went to the Medical Center on 18 August 1994 to have the MRI performed.[FN2] As ordered by Dr. Barnett, plaintiff ingested the prescribed dosage of Xanax and the Medical Center performed the MRI. Employees of the Medical Center placed plaintiff in a chair following the MRI procedure and left her unattended. Plaintiff passed out because of the effects of the Xanax and fell from the chair. She was injured when her shoulder and other parts of her body struck the floor.

FN2. Appellants later established the actual

date of the procedure was 13 August 1994.

On 18 September 1995, Dr. Barnett filed a motion to dismiss and an alternative motion for summary judgment. He claimed that plaintiff filed her claim outside the statute of limitations and that he was entitled to a judgment as a matter of law. He also alleged that he did not deviate from the recognized standard of acceptable professional practice. In support of his motion, he filed his own affidavit and a memorandum.

On 21 September 1995, the Medical Center filed a motion for summary judgment. The Medical Center provided affidavit testimony and numerous exhibits proving that it actually performed the MRI on 13 August 1994, not 18 August as alleged in plaintiff's complaint. Because plaintiff filed her complaint on 17 August 1995, the Medical Center contended she filed it outside the applicable statute of limitations.

On 3 January 1996, the trial court entered an order dismissing plaintiff's claims against the Medical Center. The trial court stated: "The Court considered the ... record as a whole, and found that the motion was well taken and should be sustained on the basis that the statute of limitations had expired prior to the filing of the plaintiff's lawsuit." On the same day, the court entered a second order that addressed Dr. Barnett's motion to dismiss. The court stated: "After hearing arguments of counsel, and considering the record as a whole, the Court found the Motion to be well taken and ruled that Plaintiff had failed to file her action within the applicable statute of limitations." Thereafter, the court dismissed plaintiff's claims against both defendants.

***2** Plaintiff filed her notice of appeal on 30 January 1996. Plaintiff notified the court that she was appealing both the court's orders entered on 3 January 1996. On appeal, plaintiff raised the following issue: "Whether the circuit judge erred in finding that the Plaintiff's complaint was barred on the statute of limitation grounds."

I. STANDARD OF REVIEW

Pursuant to the Tennessee Rules of Civil Procedure and Tennessee case law, we must review the court's orders as if both had granted defendants summary judgment. To explain, Rule 12 of the Tennessee Rules of Civil Procedure provides as follows:

> If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Tenn. R. Civ. P. 12.02 (West 1996). Moreover, the Tennessee Supreme Court has held that a trial court converts a Rule 12.02(6) motion into a Rule 56 motion when it considers matters outside the pleadings. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn.1976). A trial court, however, can "prevent a conversion from taking place by declining to consider extraneous matters." *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 952 (Tenn.App.1995). A matter outside the pleadings is " 'any written or oral evidence in support of or in opposition to a pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.' " *Kosloff v. State Auto. Mut. Ins. Co.*, Ch.App. No. 89-152-II, 1989 WL 144006, at *2 (Tenn.App. 1 Dec. 1989)(quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (1969)).

It is clear that the trial court considered matters outside the pleadings when ruling on both the motion for summary judgment and the motion to dismiss. Thus, the court converted the motion to dismiss into a motion for summary judgment. In both orders, the trial

court stated that it had considered the entire record. The record in this case contained numerous matters which did more than reiterate what was in the pleadings. For example, the Medical Center attached the affidavit of Lisa Little, the radiology technologist who performed the MRI, and three other exhibits to its motion for summary judgment. The affidavit and the exhibits provided information that was not in plaintiff's complaint and corrected information, the date of the MRI procedure, which was stated incorrectly in plaintiff's complaint. This evidence became part of the record. Because the trial court considered the entire record, we must review this case and address appellant's issue pursuant to summary judgment standards.

A trial court must grant a motion for summary judgment when there are no genuine issues of material fact and the law entitles the moving party to a judgment. *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn.1993). "In making its determination, the court is to view the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor." *Id.* at 215. These same principles apply to this court's review of a trial court's decision to grant summary judgment. *See Gonzales v. Alman Constr. Co.,* 857 S.W.2d 42, 44 (Tenn.App.1993).

II. STATUTE OF LIMITATIONS

***3** The applicable statute of limitations provides that medical malpractice cases "shall be commenced within one (1) year after the cause of action accrued...." Tenn.Code Ann. § 28-3-104(a)(1) (Supp.1996). In addition, the statutes also provide:

> (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
>
> (2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

Id. § 29-26-116(a)(1) & (2) (1980). The Tennessee Supreme Court has had numerous occasions to interpret and apply the language of this statute.

Prior to the codification of the discovery rule, the Tennessee Supreme Court recognized its importance in medical malpractice cases. *Teeters v. Currey,* 518 S.W.2d 512 (Tenn.1974). The *Teeters* court defined when the cause of action accrues as "when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury." *Id.* at 517.

Since the codification of the discovery rule, the Tennessee Supreme Court has defined when the statute of limitations begins to run in cases similar to the one currently before this court. As recognized by the Tennessee Supreme Court, Tennessee Code Annotated section 29-26-116(a) does not "specifically address what the appropriate period of limitations would be if the alleged negligent act is discovered within the one year period but after the date of injury." *Hoffman v. Hospital Affiliates, Inc.,* 652 S.W.2d 341, 344 (Tenn.1983). In *Hoffman,* the Court used the common law to "fill in the crack left by the legislature's silence." [FN3] The *Hoffman* court relied on *Teeters* and concluded that the interpretation of when a cause of action accrues found in *Teeters* "fits squarely with both the wording of the statute and prior case law." *Id.* The court then held that the discovery rule applies only when the "plaintiff does not discover and reasonably could not be expected to discover that he has a right of action." *Id.* In addition, the court held that the statute is tolled only when "the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Id.*

> FN3. *Id.* At the intermediate level, the Middle Section of the Court of Appeals held that Tennessee Code Annotated section 29-26-116(a)(2), the "savings statute," did

> not apply because the plaintiff discovered the injury within one year of the negligent act. Thus, the court concluded that the plaintiff had one year from the negligent act in which to file his or her complaint. *Hoffman v. Hospital Affiliates, Inc.*, slip op. at 3-4 (Tenn.App. 1 Feb. 1982), *rev'd*, 652 S.W.2d 341 (Tenn.1982). The facts of *Hoffman* are similar to the present case. In this case, plaintiff claimed that she discovered her injuries twelve to thirteen days after the negligent act.

In another case, the Tennessee Supreme Court defined the date of discovery. *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn 1982); *see Hoffman*, 652 S.W.2d at 343. Specifically, discovery occurs when the plaintiff discovers or reasonably should have discovered: "(1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty." *Foster*, 633 S.W.2d at 305. In a more recent opinion, the Tennessee Supreme Court held that a plaintiff does not have to have actual knowledge "that the injury constitutes a breach of the appropriate legal standard." *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). Instead, the Court held that the plaintiff only needs to be "aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Id.*

*4 To summarize, Tennessee's discovery rule prevents the statute of limitations in medical malpractice case from beginning to run until the plaintiff discovers or in the exercise of reasonable care and diligence should have discovered: 1) facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct and 2) the existence or identity of a wrongdoer. *Id.*; *Hoffman*, 652 S.W.2d at 343; *Foster*, 633 S.W.2d at 305. Moreover, this rule applies even if the plaintiff discovers the injury within one year of the negligent act. *Hoffman*, 652 S.W.2d at 344. Finally, the rule will not apply if the plaintiff could have reasonably been expected to discover that he or she had a cause of action. *Id.*

The dates relevant to a determination of the issue in this case are as follows. The first date, 10 August 1994, is the date that Dr. Barnett prescribed what plaintiff claims was an excessive dosage of Xanax. Next, plaintiff claims the Medical Center was negligent on 13 August 1994, the date it performed the MRI. Plaintiff contended that her shoulder and back were sore and that she called the hospital on 25 August 1994. The hospital called plaintiff back on 26 August 1994 and requested she come in for x-rays. [FN4] Plaintiff filed her complaint on 17 August 1995.

> FN4. There is no evidence in the record as to what the x-rays revealed.

It is the opinion of this court that the trial court correctly determined that the statute of limitations bars plaintiff's claims. As previously stated, the discovery rule tolls the statute until a person discovers or in the exercise of reasonable care should have discovered certain facts. Assuming that plaintiff had no knowledge of the fall, it is reasonable to expect that plaintiff would discover the injury, at least the soreness, within a few days after the fall. Had plaintiff exercised reasonable care and diligence for her own health and welfare, she would have discovered facts sufficient to place her on notice prior to 17 August 1994. Note, the record does not contain any evidence that plaintiff was unconscious other than when she passed out on 13 August 1994. Plaintiff was admitted as an out-patient, and as such, she did not remain in the hospital overnight. The record also reveals that plaintiff claims to remember nothing about the MRI or the period she claims Medical Center employee's left her unattended, yet she never inquired into the reasons for her blackout. There is no evidence that plaintiff expected the Xanax to have such an affect. Thus, the simple fact that plaintiff did not remember the MRI or the period thereafter should have, at the very least, put

her on notice that something was wrong and caused her to inquire further. *See* *Housh v. Morris*, 818 S.W.2d 39, 42-43 (Tenn.App.1991).

For these reasons, the trial court correctly determined that plaintiff's claims were barred by the statute of limitations. The judgment of the trial court is affirmed and remanded for any further necessary proceedings. The costs on appeal are taxed to plaintiff/appellant, Jeannie Farrow.

CRAWFORD and FARMER, JJ., concur.

Tenn.App.,1996.
Farrow v. Barnett
Not Reported in S.W.2d, 1996 WL 560534 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2006 WL 3783534 (Tenn.Ct.App.)
(Cite as: 2006 WL 3783534 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Bobby L. HOLLAND and wife, Rita Holland
v.
Amelia Jo DINWIDDIE, DDS d/b/a Jo Dinwiddie, DDS.

No. W2006-00523-COA-R3-CV.
Sept. 19, 2006 Session.
Dec. 27, 2006.
Application for Permission to Appeal Denied by Supreme Court May 21, 2007.

Direct Appeal from the Circuit Court for Benton County, No. 05CCV-998; Julian P. Guinn, Judge.
Dixie W. Cooper and Catherine Corless, of Nashville, Tennessee, for the Appellants.

W. Scott Sims, of Nashville, Tennessee, for the Appellee.

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

OPINION

ALAN E. HIGHERS, J.

***1** The plaintiff patient visited the defendant dentist periodically between 1998 and 2003. Between 2001 and 2003, the defendant performed dental work on the plaintiff including root canals, fillings, and crown work. Over this period, the plaintiff's dental condition became significantly worse. The plaintiff developed abscesses and infection in his mouth and suffered from substantial dental pain. The plaintiff's last visit to the defendant was in October of 2003. Over the 2003 holidays, the plaintiff unsuccessfully attempted to contact the defendant for relief from his increasingly painful condition. The plaintiff ultimately received treatment from another dentist throughout 2004. After receiving the plaintiff's dental records from the defendant in October of 2004, the treating dentist informed the plaintiff that the defendant's treatment had been negligent. The plaintiff filed a dental malpractice action against the defendant on January 12, 2005. The trial court granted the defendant's motion for summary judgment based on the one-year statute of limitations for medical malpractice claims, finding that the plaintiff should have discovered the injury by the time of the plaintiff's last visit to the defendant in October of 2003. The plaintiff filed a timely notice of appeal. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This is an appeal from a dental malpractice case that the trial court dismissed on the defendant's motion for summary judgment. The plaintiff Bobby Holland ("Holland" or "Appellant") received dental care periodically from the defendant Amelia Jo Dinwiddie ("Dr. Dinwiddie" or "Appellee") in Camden, Tennessee, between the years of 1998 and 2003. Holland's first series of visits to Dr. Dinwiddie occurred between September of 1998 and February of 1999. Holland's second series of visits to Appellee took place between August of 2001 and October of 2003. During the first series of visits, Dr. Dinwiddie cleaned Holland's teeth and replaced a pre-existing crown on a tooth. In June of 1999, Holland began visiting a different dentist in Columbia, Tennessee, where his daughter and new grandchild lived.

Holland returned to Dr. Dinwiddie on August 8, 2001. At this time, Holland had all of his natural teeth except for his wisdom teeth, which had been extracted years earlier. Upon recognizing gaps between Hol-

land's gums and pre-existing crowns on two of his teeth, Dr. Dinwiddie referred Holland to a specialist for crown lengthening surgery. Holland ultimately decided against having the crown lengthening surgery, and he sought an alternative remedy from Dr. Dinwiddie. Dr. Dinwiddie removed the existing crowns and took their impressions in order to make modified replacements, but the replacement crowns did not fit. Dr. Dinwiddie gave Holland two temporaries for these teeth, but the temporaries did not fit properly and often "popped off." Holland claimed that he was charged for the replacement crowns, and that despite his repeated inquiries with the dentist's office, the crowns were not replaced.

*2 In March of 2002, after Dr. Dinwiddie performed a root canal, Holland developed painful abscesses and infections in his mouth which caused severe swelling. This lasted several months, with multiple visits to Dr. Dinwiddie, until one tooth broke off at the root in August or September. Dr. Holland removed the remainder of this tooth in September of 2002. Holland was given a partial replacement for the tooth, with which Holland experienced dissatisfaction. Holland experienced significant deterioration and decay of several other teeth in the following months, and he experienced more pain, abscesses, and infection. Dr. Dinwiddie continued to perform treatment on Appellant, including root canals, placement and replacement of fillings, and extraction of at least two more of Holland's teeth. Holland claims that because of the swelling, pain and difficulty speaking, he "was not able to work on a regular enough basis to be much of an influence." He claims that this led to the loss of several valuable insurance accounts. Holland's last office visit to Dr. Dinwiddie was on October 30, 2003, and the record indicates that Dr. Dinwiddie filled a prescription for Holland in early January of 2004.

In late 2003, the pain in Holland's mouth worsened. During the Christmas holidays, he attempted to reach Dr. Dinwiddie, but he was unsuccessful. Upon the recommendation of his son-in-law, Holland made an appointment to see Dr. Victor C. Beck, Jr. ("Dr.Beck"), who was a dentist in Columbia, Tennessee. On January 12, 2004, Holland filled out a patient registration form from Dr. Beck's office and when asked, "[have] your past experiences in a dental office always been positive?", he responded, "no." On this form, Holland identified Dr. Dinwiddie as his previous dentist. On January 13, Holland visited Dr. Beck's office for a brief consultation with one of Dr. Beck's associates ("Dr. Follis" or "DF") who documented the visit as follows:

> DF talked to [patient] and went over health [history]. DF took initial look at [patient] and noticed that [patient] had many dental issues that needed prompt attention. DF discussed need for NP exam to do comprehensive [treatment] plan for him, rather than just looking at his front teeth. [Patient] agreed and stated that he knew he needed a lot of work and was ready to get started. *He confided in us that his past dentist was very nice, but has not been able to help his condition and he feels his teeth have gotten much worse over the last two years under her care.* [Patient]'s daughter lives in Columbia and is a [patient] here.... I informed [patient] that he will more than likely need a full mouth reconstruction (implants, crown and bridge, etc.) due to the extensive breakdown of his teeth. [Patient] is ready to get started and stated that he "trusted us and would do whatever we said."

(emphasis added). Holland returned on January 20 for a complete examination by Dr. Beck, and Holland reported having "been in significant pain for the last couple of years, dental pain." Dr. Beck noted in his records that Holland related "some unpleasant experiences with his previous dentistry."

*3 Holland thereafter visited Dr. Beck many times throughout 2004. At some point during these visits, Holland said that Dr. Beck informed him that his mouth was "a wreck" and "beyond professional belief." Dr. Beck identified multiple abscesses that

had developed on many of Holland's teeth. Dr. Beck performed significant work on all but a few of the teeth in Holland's mouth, including root canals, crown work, and the extraction of at least nine teeth. The total cost of this treatment by Dr. Beck was in excess of $27,000. In October of 2004, Dr. Beck examined Holland's previous dental records and x-rays and expressed his opinion that Dr. Dinwiddie had committed dental malpractice in her treatment of Holland.

Holland and his wife filed a complaint against Dr. Dinwiddie on January 12, 2005, in the Circuit Court for Benton County, Tennessee. Holland alleged that Dr. Dinwiddie had been negligent in the treatment she provided since 2001, through her failure to:

> (a) properly fill and crown teeth that she determined needed these dental services to avoid more permanent damage to his teeth; (b) timely evaluate and treat conditions indicating the need for dental interventions including: replacing fillings, filling areas of his teeth that indicated the presence of decay resulting in permanent damage to gums and bones, placement of permanent crowns on teeth that she was paid for but never performed, and performance of a root canal, which was started but never finished; (c) timely treat Bobby Holland's dental conditions which resulted in the development of multiple abscesses and overwhelming infection, requiring extensive additional work, removal of many permanent teeth and pain and discomfort; (d) timely and accurately advise Bobby Holland of the nature, extent and severity of his condition in time to allow him to seek alternative dental care to correct the problem before permanent damage occurred;

Included in the malpractice claim were allegations that Dr. Dinwiddie had:

> falsely blam[ed] a[W]ater [P]ik for the damage to Bobby Holland's teeth and gums caused by her failure to adequately and timely treat the infection and other problems created by her negligence; ... charg[ed] and g[otten] paid for services that were never completed, including seeding of permanent crowns; ... [and] fail[ed] to adhere to the accepted standard of practice for dentist [sic] treating patients under the same or similar circumstances that she treated Bobby Holland.

Holland sought damages for dental expenses, physical and mental pain and suffering, lost wages, income and earnings due to his ability to conduct his business, and damages for loss of consortium with his wife.

Dr. Dinwiddie filed a motion for summary judgment on November 28, 2005, in which Appellee asserted that Holland's claims were barred by the statute of limitations and statute of repose of the Medical Malpractice Act, located at Tenn.Code Ann. §§ 29-26-116. In an order entered on January 19, 2006, the trial court granted Appellee's motion for summary judgment. The court found that Holland was "aware of facts sufficient to put a reasonable person on notice that he had suffered an injury as a result of wrongful conduct more than one year prior to filing this lawsuit on January 12, 2005." The trial court held that the claims were time-barred pursuant to the statute of limitations provision under Tenn.Code Ann. § 29-26-116(a). On February 3, 2006, Holland filed a motion to alter or amend the judgment pursuant to Tennessee Rules of Civil Procedure Rule 59.04, which the trial court denied in an order entered on February 21, 2006. Holland filed a timely notice of appeal to this Court.

II. ISSUE PRESENTED

*4 On appeal, Holland presents the following issue for review:

Whether there exists a material factual dispute as to when Appellant discovered or reasonably should have discovered his injury.

For the following reasons, we affirm.

Not Reported in S.W.3d, 2006 WL 3783534 (Tenn.Ct.App.)
(Cite as: 2006 WL 3783534 (Tenn.Ct.App.))

III. STANDARD OF REVIEW

Summary judgment is appropriate when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. ***McIntosh v. Blanton,*** 164 S.W.3d 583, 585 (Tenn.Ct.App.2004) (citing TENN. R. CIV. P. 56.04; ***Byrd v. Hall,*** 847 S.W.2d 208, 214 (Tenn.1993)). When a motion for summary judgment is used defensively, the plaintiff must present evidence sufficient to establish the essential elements of the claim on which he or she will bear the burden of proof at trial. ***Blair v. Allied Maint. Corp.,*** 756 S.W.2d 267, 269-70 (Tenn.Ct.App.1988). We review an award of summary judgment *de novo,* with no presumption of correctness afforded to the trial court. ***Guy v. Mut. of Omaha Ins. Co.,*** 79 S.W.3d 528, 534 (Tenn.2002).

IV. ANALYSIS

On appeal, Appellant argues that the trial court erred when it granted Appellee's motion for summary judgment on his dental malpractice action, because a genuine issue of material fact existed as to when Appellant could have discovered his injury. Holland argues that when the trial court applied the discovery rule exception to the one year statute of limitations for his claims, it erroneously concluded that Holland was "aware of facts sufficient to put a reasonable person on notice that he had suffered an injury as a result of wrongful conduct more than one year prior to filing this lawsuit on January 12, 2005." Appellant relies on his deposition testimony and affidavits, and those of his expert witness, Dr. Beck, in attempting to establish that he did not, and could not, discover his injury until January 20, 2004, "at the earliest." Appellant maintains that the trial court incorrectly granted Dr. Dinwiddie's motion for summary judgment because the date of discovery was a material fact to be determined by a jury. As counsel for Appellant admitted at oral argument upon questioning by this Court, Holland does not allege that Dr. Dinwiddie caused his underlying injuries, but that she was negligent in treating Holland's dental problems. Holland proposes that the exacerbation of decay and infection in his teeth and mouth was a direct result of Appellee's improper interpretation of x-rays showing decay, inadequate filling of root canals, inadequate placement of fillings, and ignoring x-ray findings. Holland states that he had no reason to suspect that Dr. Dinwiddie's treatment led to these problems, because Appellee had opined that they stemmed from aggressive brushing and/or the use of a "Water-Pik."

Conversely, Dr. Dinwiddie contends that summary judgment should be affirmed because of the extent of Holland's dental problems occurring between 2001 and late 2003, Holland's decision to visit another dentist in early 2004, and his statements to Dr. Beck and his employees regarding his dissatisfaction with Dr. Dinwiddie's treatment. Dr. Dinwiddie argues that by October of 2003, when she last treated Appellant, Holland was undeniably aware that his dental condition had significantly worsened under her care.[FN1] Appellee directs us to Holland's own deposition testimony that he had suffered unrelenting pain and infection in his mouth during the final two years of Dr. Dinwiddie's treatment in support of the contention that these facts were more than sufficient to put a reasonable person on notice of the wrongs alleged in Appellant's complaint. [FN2]

> FN1. Appellee also notes that while Holland attributes his dental condition to her medical negligence, "[t]he cause of the deterioration process is the subject of intense debate among the parties[,]" and that her experts "assert that the deterioration process was directly caused by Mr. Holland's clandestine abuse of substantial quantities of prescription narcotics, which dramatically escalated in late 2000 and 2001 and continued, unbeknownst to Dr. Dinwiddie, throughout the time that Mr. Holland was under her care." This argument is beyond the scope of our review on appeal, and we express no opinion

as to its merit.

FN2. Appellee alternatively urges us to affirm the trial court's judgment on the basis of the three-year statute of repose for medical malpractice actions. This defense was not addressed by the trial court's final order and similarly will not be considered on appeal.

***5** The applicable statute of limitations in this case provides:

Statute of limitations-Counterclaim for damages.

(a) (1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) *In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.*

TENN.CODE ANN. § 29-26-116(a)(1)-(2) (2000) (emphasis added). This "discovery rule" for medical malpractice cases involving negligence was first adopted by our Supreme Court in ***Teeters v. Currey***, 518 S.W.2d 512 (Tenn.1974), and codified in 1975. ***Shadrick v. Coker***, 963 S.W.2d 726, 733 (Tenn.1998); TENN.CODE ANN. § 29-26-116(a)(2) (2000). Within the meaning of the statute, "discovery" refers to the "discovery of the existence of a right of action, that is, facts which would support an action for tort against the tortfeasor," or "when in the exercise of reasonable care and diligence, it should have been discovered." *McDaniel v. Clare,* No. 02A01-9510-CV-00237, 1996 Tenn.App. LEXIS 786, at *6 (Tenn.Ct.App. Dec. 12, 1996) (citing ***Hathaway v. Middle Tenn. Anesthesiology, P.C.***, 724 S.W.2d 355, 359 (Tenn.Ct.App.1986); ***Bennett v. Hardison***, 746 S.W.2d 713, 714 (Tenn.Ct.App.1987)). A cause of action in tort does not accrue until a judicial remedy is available to the plaintiff. ***Wyatt v. ACandS, Inc.***, 910 S.W.2d 851, 855 (Tenn.1995). A judicial remedy is available when a breach of a legally recognized duty owed to the plaintiff by the defendant causes the plaintiff legally cognizable damage. ***Id.*** (citing ***Potts v. Celotex Corp.***, 796 S.W.2d 678, 681 (Tenn.1990)).

A plaintiff may not, however, delay filing suit until all injurious effects or consequences of the actionable wrong are actually known. ***Id.*** (citing ***Chambers v. Dillow***, 713 S.W.2d 896, 898 (Tenn.1986); ***Security Bank and Trust Co. v. Fabricating, Inc.***, 673 S.W.2d 860, 864-65 (Tenn.1983); ***Taylor v. Clayton Mobile Homes, Inc.***, 516 S.W.2d 72, 74-75 (Tenn.1974); ***Bennett v. Hardison***, 746 S.W.2d 713, 714 (Tenn.Ct.App.1987); ***National Mortg. Co. v. Washington***, 744 S.W.2d 574, 579 (Tenn.Ct.App.1987)). Furthermore, the statute of limitations is not tolled until the plaintiff actually knows the "specific type of legal claim he or she has," or that "the injury constituted a breach of the appropriate legal standard." ***Roberts v. Bicknell***, 73 S.W.3d 106, 110 (Tenn.Ct.App.2001) (citing ***Stanbury v. Bacardi***, 953 S.W.2d 671, 677 (Tenn.1997); ***Roe v. Jefferson***, 875 S.W.2d 653, 657 (Tenn.1994)). "[T]he statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant." ***Shadrick***, 963 S.W.2d at 733; *see also* ***Hoffman v. Hosp. Affiliates, Inc.***, 652 S.W.2d 341, 344 (Tenn.1983) ("[T]he statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry.").

***6** As it appears to be undisputed that the occurrence of injury in this case took place more than one year before Appellant filed suit on January 12, 2005, the only issue we will consider is whether Appellant had sufficient information to have discovered his injury as of January 12, 2004, one year before filing suit. Based upon our review of the record, including

Appellant's own deposition testimony regarding his dental condition while under Dr. Dinwiddie's care, Dr. Beck's deposition testimony, and the allegations set forth in Holland's complaint, we conclude that Appellant discovered, or reasonably should have discovered, his injury and sufficient facts to support his allegations in tort well before January 12, 2004. We believe that Appellant's somewhat inconsistent positions as to the date of discovery, as well as his contentions that he could not have reasonably discovered his injury until he received an expert opinion from Dr. Beck, fail to establish any material dispute of fact as to when Appellant should have discovered his injury.

From his visits to Appellee in August of 2001 to October of 2003, Holland's dental health regressed significantly. Holland admitted that when he began his second round of treatment with Appellee in August of 2001, he had all of his teeth except for his wisdom teeth. Dr. Dinwiddie performed fillings and crown extractions on Holland over several months. In March of 2002, after a root canal by Appellee, Holland claimed that he developed painful abscesses in his mouth:

> I immediately started to swell, and I had-my face-actually, it was distorted. I couldn't close my mouth. Within about ten days, I couldn't shut my mouth, it was so swollen. Had a knot that came up underneath at the-it would have been at the root, at the base of the root ... She opened-took the top off the seal, I guess it is. It's a hard-hard seal. And hoped-and she said that we'd see if it would drain ... It drained on-it was quite-it was very sickening. I kept a-an abscess that erupted with a knot here (indicating), and it-when it went down, it ended up splitting open where it oozed infections constantly. And so I did that for-I don't know how long. You know, at least a couple months.

Holland claimed that as many as eight teeth were eventually affected by abscesses. By September of 2002, Holland testified that one of his teeth had snapped off at the gum line, and that he was experiencing significant swelling, decay, and infection affecting several other teeth. Holland continued to experience throbbing pain around the teeth whose crowns had been removed and never replaced. In addition, other teeth had become affected with decay and infection, which he also described in his deposition testimony:

> I mean, I know I had infection because I could taste it, you know, constantly. And I know that some of the teeth were repaired repeatedly. I don't know. I can't recall which ones. The numbers seven and eight-I know this one here was repaired. Number 20 was repaired a lot. And also the bottom lower in the front here (gesturing), they were-they became-I call it angry at the gum line then. All my teeth were getting to look angry at the ... gum line. And of course I was kind of obsessed with it, I guess. In my business, if you can't talk, it's very difficult to do business. And of course, the pain was bad. But I don't-I don't know how many times they were all repaired. They were repaired quite often.

*7 Another tooth had deteriorated beyond repair, which Dr. Dinwiddie extracted in September of 2002, and yet another in March of 2003. Holland claimed that in late 2003, the pain became worse, and that he only contacted Dr. Beck in early 2004 after he had been unable to reach Dr. Dinwiddie for relief.

In Holland's complaint, filed on January 12, 2004, he alleged that he "did not discover the Defendant's negligence or have reason to suspect the Defendant had negligently treated [him], or the extent of the Defendant's negligence, until January 20, 2004, when [he] was evaluated by another dentist in Columbia, TN who described his condition as a 'train wreck.' " In his brief on appeal, Holland claims that the only way that he could know or discover that his injuries were the result of Dr. Dinwiddie's negligent treatment was by having a dentist "review the records and x-rays and advise [Holland] that Dr. Dinwiddie had either neg-

ligently interpreted the x-rays or simply ignored the findings." Dr. Beck did not review Holland's records from Dr. Dinwiddie until October of 2004.

We find Appellant's position, that it was necessary to obtain Dr. Beck's expert opinion of Dr. Dinwiddie's treatment before Holland could file suit, to be incorrect as a matter of law. "Advice from another health care professional that a claim exists is not a prerequisite to accrual of a medical malpractice cause of action." ***Stanbury v. Bacardi***, 953 S.W.2d 671, 678 (Tenn.1997); *see also* ***Wansley v. Refined Metals Corp.***, No. 02A01-9503-CV-00065, 1996 Tenn.App. LEXIS 552, at *9-10, 1996 WL 502497 (Tenn.Ct.App. Sept. 9, 1996) ("[T]here is no requirement of a formal medical diagnosis in order for a claim to accrue ... The fact that plaintiff may not have had the proof necessary to sustain his cause of action until within a year prior to filing suit is immaterial in determining when his cause of action accrued."). For the purposes of TENN.CODE ANN. § 29-26-116(a)(2), a plaintiff discovers an injury after he or she has "discovered the existence of facts which would support an action in tort against the tortfeasor" including "not only the existence of an injury, but the tortious origin of the injury." ***Wyatt***, 910 S.W.2d at 855 (citing ***Hathaway v. Middle Tenn. Anesthesiology, P.C.***, 724 S.W.2d 355, 359 (Tenn.Ct.App.1986)). A plaintiff need not actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a right of action. ***Stanbury***, 953 S.W.2d at 678 (citing ***Roe v. Jefferson***, 875 S.W.2d 653, 657 (Tenn.1994)).

At oral argument, Appellant's counsel conceded that the very earliest his injury could have been discovered was in January of 2004, when he first visited Dr. Beck. However, Holland's statements in January of 2004 to Dr. Beck and his staff regarding his dissatisfaction with Dr. Dinwiddie's treatment over the previous two years, which he does not dispute, further lead us to conclude that the trial court correctly found as a matter of law that Appellant had, or should have, discovered his injuries and their tortious origins more than a year prior to January 12, 2005. "When the facts material to the application of a rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury in favor of one party or the other." ***Timmons v. HCA Regional Hosp. of Jackson***, No. 02A01-9301-CV-00023, 1993 Tenn.App. LEXIS 800, at *7, 1993 WL 541077 (Tenn.Ct.App. Dec. 30, 1993) (citing *Byrd v. Hall*, 847 S.W.2d 208, 214). Holland admitted to Dr. Follis, Dr. Beck's associate, that he felt his teeth had "gotten much worse over the last two years under [Dr. Dinwiddie's] care" and reported to Dr. Beck that he had been in significant dental pain for the previous two years. Holland did not see any other dental professional between his last visit to Dr. Dinwiddie on October 30, 2003, and his first visit to Dr. Beck's office on January 12, 2004. His knowledge, therefore, that his dental condition had gotten worse during his treatment by Appellee appears to have been based upon his own reasonable conclusions from his experiences over this two year period. We believe that the trial court was correct in holding as a matter of law that a reasonable person should have discovered the injury by the time of the last visit to Dr. Dinwiddie in October of 2003. This was the latest date at which Holland's cause of action could reasonably have accrued. Therefore, the one-year statute of limitations set forth at TENN.CODE ANN. § 29-26-116(a)(1) barred Appellant's claims of malpractice against Dr. Dinwiddie.

***8** We hold that the trial court correctly granted Appellee's motion for summary judgment. We find that the only reasonable conclusion that could be reached in light of the record before us is that Holland had discovered, or should have discovered through reasonable diligence, his injury and cause of action against Dr. Dinwiddie by October 30, 2003, which was the date of his last office visit to Dr. Dinwiddie and fourteen months before he filed his complaint on January 12, 2004.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs are assessed against Appellants, Bobby and Rita Holland, and their surety, for which execution may issue if necessary.

Tenn.Ct.App.,2006.
Holland v. Dinwiddie
Not Reported in S.W.3d, 2006 WL 3783534 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2000 WL 354405 (Tenn.Ct.App.)
(Cite as: 2000 WL 354405 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Doris HUTTCHSON,
v.
Donald COLE, M.D., et al.

No. M1999-00204-COA-R10-CV.
April 7, 2000.

Appeal from the Circuit Court for Wilson County No. 10357; Clara Byrd, Judge.
Thomas W. Lawrence, Jr., and Richard F. Russell, Nashville, TN, for appellant Donald Cole, M.D.

William C. Moody, Jr., Nashville, TN, for appellant National Medical Hospital of Wilson County, Inc.

F. Michie Gibson, Jr., and T.J. Cross, Nashville, TN, for appellee, Doris Huttchson.

FARMER, J., delivered the opinion of the court, in which HIGHERS and LILLARD, JJ., joined.

OPINION

*1 Defendants Donald Cole, M.D., and National Medical Hospital of Wilson County, Inc., appeal the trial court's nonfinal order denying their motions for summary judgment in this medical malpractice action brought against them by Plaintiff/Appellee Doris Huttchson. We granted the Defendants' application for an extraordinary appeal [FN1] to determine the sole issue of whether Huttchson's cause of action is barred by the one-year statute of limitations applicable to medical malpractice actions.[FN2] Based upon the undisputed record evidence, we conclude that Huttchson's action against Dr. Cole and the Hospital is time-barred, and we reverse the trial court's order denying their motions for summary judgment.

FN1. *See* Tenn.R.App.P.10.

FN2. *See* Tenn.Code Ann. §§ 28-3-104(a)(1), 29-26-116(a) (1980 & Supp.1996).

For purposes of these summary judgment proceedings, the following facts were undisputed. On January 27, 1997, Huttchson underwent an endoscopic examination of her gastrointestinal tract. Defendant Donald Cole, M.D., performed the procedure at the Defendant Hospital's surgical facilities, and Defendant Maurice Gilbert served as the anesthesiologist for the procedure.[FN3] Prior to performing the endoscopic procedure, Dr. Cole agreed that Huttchson would "be put to sleep" during the procedure. Huttchson specifically requested general anesthesia because of difficulties she had experienced during a prior endoscopic procedure.

FN3. Defendant Maurice Gilbert is not a party to this appeal.

The endoscopic procedure required Dr. Cole to "run a tube down" Huttchson's throat. Prior to the procedure, a nurse visited Huttchson in the Hospital's preoperative area and told Huttchson that "she needed to see [her] throat." When Huttchson opened her mouth, the nurse, without warning, sprayed a local anesthetic in her throat. The spray startled Huttchson, and she choked and turned her head to one side. As a result, the nurse accidentally sprayed Huttchson's face. The spray caused Huttchson's skin to tingle and her eyes to burn. Huttchson complained to the nurse that she had sprayed the anesthetic in Huttchson's face, but the nurse "never offered [her] something to get it off

with."

When Huttchson regained consciousness after the procedure, she discovered that her "eyes were burning and they were red." Later in the day, when Huttchson returned home, she noticed that her eyes were watering and "itching real bad." By this time, her skin also felt like it was burning, so Huttchson placed a cold, wet cloth on her face. Later that night, Huttchson observed that her face was beginning to swell, especially in the area around her left eye. When Huttchson awoke the next morning, her eyes were swollen shut. In the days following the procedure, Huttchson developed a blister under one eye, and a green discharge began to ooze from her eyes. Huttchson subsequently sought treatment for these conditions from an optometrist and a dermatologist. On February 11, 1997, Huttchson's optometrist confirmed that Huttchson had an eye infection and that her eye injury was caused by the anesthetic spray.

In the months following the accident, Huttchson continued to experience symptoms that she attributed to being sprayed in the face with the anesthetic. In September 1998, when she gave her deposition, Huttchson still suffered from headaches, recurring eye infections, blurred vision, alternately watery and dry eyes, swelling around the left eye, increased sensitivity to sunlight, burning, and other discomfort.

***2** Although Huttchson's injury occurred on January 27, 1997, Huttchson did not file her complaint against the Defendants until January 28, 1998, more than one year later. Apparently, Huttchson mistakenly believed that her injury occurred on January 28, 1997, because a statement she received from Dr. Cole erroneously identified that as the date of the procedure. Huttchson's amended complaint correctly identified the date of the procedure as January 27, 1997. [FN4]

FN4. Huttchson also conceded on appeal that January 27, 1997, was the correct date. In any event, we note that Huttchson's mistaken belief as to the date of her injury did not toll the limitations period. *See* *Brashears v. Knoxville Police Dep't*, No. 03A01-9809-CV-00298, 1999 WL 93582, at *4 (Tenn.Ct.App. Feb. 25, 1999) (*no perm. app. filed*).

Dr. Cole filed a motion to dismiss Huttchson's complaint on the ground, *inter alia,* that Huttchson's claim for medical malpractice was barred by the one-year statute of limitations. Dr. Cole attached several exhibits to his motion, including an affidavit and an operation report, thereby effectively converting his motion into one for summary judgment.[FN5] The Hospital likewise moved for summary judgment based upon the statute of limitations.

FN5. *See* *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 951 (Tenn.Ct.App.1995) (concluding that, pursuant to Tenn.R.Civ .P. 12.02, movant's reliance upon matters outside pleadings converts motion to dismiss into motion for summary judgment).

In opposing the Defendants' motions, Huttchson contended that her cause of action did not accrue until February 11, 1997, when she visited her optometrist and discovered that the source of her eye injury was a chemical burn. The trial court denied the Defendants' motions, and this appeal followed.

In Tennessee, the statute of limitations for medical malpractice actions is one year. *See* Tenn.Code Ann. § 29-26-116(a)(1) (1980); *see also* Tenn.Code Ann. § 28-3-104(a)(1) (Supp.1996). The statute provides, however, that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn.Code Ann. § 29-26-116(a)(2) (1980). Our supreme court has in-

terpreted this codification of the discovery rule to mean that the statute of limitations commences to run when the patient discovers, or reasonably should have discovered, in the exercise of reasonable care and diligence, "(1) the occasion, the manner, and the means by which a breach of duty occurred that produced [the patient's injury]; and (2) the identity of the defendant who breached the duty." *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn.1998) (quoting *Stanbury v. Bacardi*, 953 S.W.2d 671, 677 (Tenn.1997)). In order to trigger the commencement of the limitations period, the patient's knowledge need not include the precise nature of the patient's claim or the extent of her injury. *See Shadrick*, 963 S.W.2d at 733. The patient need only be aware that she has sustained an injury and that the injury resulted from the defendant's wrongful or tortious conduct. *See id.* at 733-34.

Applying these principles to the record before us, we conclude that Dr. Cole and the Hospital were entitled to summary judgment on their statute of limitations defense. We reach this conclusion because Huttchson's own testimony revealed that, on the date of her outpatient surgery, January 27, 1997, Huttchson knew both (1) that she had sustained an injury and (2) that the injury was caused by the nurse's action of accidentally spraying an anesthetic in her face and eyes.

*3 First, Huttchson's deposition testimony revealed that she was aware at the time of the accident that the nurse had sprayed the anesthetic in her face. Huttchson testified that "the nurse came along and said to me she needed to see my throat, and when I opened my mouth she started spraying, and it went all over my face." Huttchson also testified that she was aware some of the spray actually landed in her eyes. Right after the accidental spraying, Huttchson wiped her face and both eyes.

Huttchson's deposition testimony further revealed that, on the day the procedure was performed, she was aware that the nurse's act of spraying the anesthetic had caused injuries to her face and eyes. Huttchson testified that, after the nurse sprayed the anesthetic in her face, her skin tingled and her eyes burned. Later the same day, Huttchson noticed that her face and eyes were "real red" and that her eyes began to itch "real bad."

Huttchson also testified to a conversation that she had with her daughter after she arrived home on the evening of January 27, 1997:

Q. Did you have any visitors at home that night?

A. My youngest daughter came by.

....

Q. Did you mentioned [sic] to her what happened with the spray?

A. Yes.

Q. Do you remember what you told her?

A. She was asking me why my face was red and my eyes, and I told her what happened, and she told me I needed to see a doctor.

....

Q. She said you need to see a doctor. Did you agree with her?

A. Yes, I did.

According to Huttchson, she tried to call Dr. Cole's office that day to complain about the injuries to her face and eyes, but Dr. Cole did not return her call. Huttchson did talk to an employee in Dr. Cole's office, and she described the conversation that took place between them:

Q. You called [Dr. Cole's] office once that day?

A. Yes.

Q. Did you get an answer?

A. Someone answered, I don't know who.

Q. A lady?

A. Yes.

Q. What did you tell her?

A. I told her about the spray in my eyes, and that I was having headaches and my face was itching and burning.

Q. What did she say?

A. She said I'll let you talk with Dr. Cole, and I gave the number for him to call me, and he never called.

Based on the foregoing testimony, we conclude that Huttchson either knew, or should have known, on January 27, 1997, (1) the occasion, manner, and means by which a breach of duty occurred that produced her injuries; and (2) the identity of the defendant who breached the duty. *See* Shadrick, 963 S.W.2d at 733. On the morning of January 27, 1997, Huttchson knew that a nurse at the Hospital had accidentally sprayed an anesthetic in her face and eyes. Huttchson also knew that, as a result of this accident, she suffered injuries to her face and eyes in the form of redness, itching, and burning. These injuries were sufficiently serious to convince Huttchson and her daughter, by the evening of January 27, 1997, that Huttchson should see a doctor. Under these circumstances, Huttchson cannot avoid summary judgment by claiming that she did not know the extent of her injuries until February 11, 1997, when her optometrist confirmed that her eye condition resulted from a chemical burn. *See id.*

***4** Accordingly, the trial court's order is reversed, and this cause is remanded for further proceedings. Costs of this appeal are taxed to Plaintiff/Appellee Doris Huttchson, for which execution may issue if necessary.

Tenn.Ct.App.,2000.
Huttchson v. Cole
Not Reported in S.W.3d, 2000 WL 354405 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2002 WL 1800905 (Tenn.Ct.App.)
(Cite as: 2002 WL 1800905 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Vickie LEWIS,
v.
Otis CAMPBELL and Robert M. Dinwiddie, Jr.

No. M2000-03092-COA-R3-CV.
Aug. 7, 2002.

An Appeal from the Circuit Court for Warren County, No. 464; Charles Haston, Judge.
Aubrey Harper and Billy K. Tollison, III, McMinnville, Tennessee, for the appellant, Vickie Lewis.

Daniel H. Rader, III, Cookeville, Tennessee, for the appellee, Otis Campbell.

Henry Hine, Franklin, Tennessee, for the appellee, Robert M. Dinwiddie, Jr.

OPINION

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

HOLLY KIRBY LILLARD, J.

***1** This case involves allegations of medical malpractice and misrepresentation. In September 1998, the plaintiff patient began visiting the office of the defendant physician for medical treatment. In February or March 1999, the patient discovered that the person treating her was not the defendant physician. In June 1999, the patient discovered that the person treating her was a pharmacist. In April 2000, the plaintiff patient filed a lawsuit against the physician and the pharmacist, asserting medical malpractice and misrepresentation. The trial court granted summary judgment to the defendants based on the one-year statute of limitations. The plaintiff now appeals. We affirm, finding that plaintiff had sufficient knowledge in February or March 1999 to put her on notice of her cause of action, and, consequently, her April 2000 lawsuit was barred by the statute of limitations.

On September 22, 1998, Plaintiff/Appellant Vickie Lewis ("Lewis") made her first visit to the office of Defendant/Appellee Otis Campbell, M.D. ("Dr.Campbell"), for medical treatment. From the beginning, Lewis was treated by Defendant/Appellee Robert Dinwiddie ("Dinwiddie"), whom Lewis believed to be Dr. Campbell. Sometime after a February 9, 1999 office visit, Lewis learned that Dinwiddie was not Dr. Campbell and found out that he was Dr. Campbell's assistant.[FN1] Lewis visited Dr. Campbell's medical office again on March 2 and March 24, 1999, and she again saw Dinwiddie. The March 24 visit was her last. In June 1999, Lewis went to Dr. Campbell's office and approached Dinwiddie and asked to see his license. At that time, Dinwiddie told her that he was not a doctor, nurse, or nurse practitioner, but that he was a licensed pharmacist.

> FN1. Lewis discovered that Dinwiddie was not Dr. Campbell when she was told that Dr. Campbell is a black man. Dinwiddie is white.

On April 5, 2000, Lewis sued Dr. Campbell and Dinwiddie for medical negligence and misrepresentation. After Lewis's deposition was taken on August 15, 2000, both Dr. Campbell and Dinwiddie filed motions for summary judgment, based on the applicable one-year statute of limitations. *See* Tenn.Code Ann.

§§ 28-3-104, 29-26-116. The motions were premised on Lewis's admission in her deposition that she discovered in February 1999 that she was not being treated by Dr. Campbell. Lewis acknowledged that, after this discovery, she visited Dinwiddie two more times, knowing that he was not Dr. Campbell. From this, the defendants argue that in February or March 1999, Lewis knew or should have known, through the exercise of reasonable diligence, about the basis for her claims of malpractice and misrepresentation. This was more than one year prior to April 5, 2000, the date on which she filed suit. On November 3, 2000, the trial court entered an order granting the defendants' motions for summary judgment on the basis of the statute of limitations. Lewis now appeals.

On appeal, Lewis argues that the trial court improperly determined as a matter of fact that she should have known that Dinwiddie was not a physician as early as February or March of 1999. She argues that the issue of whether she exercised reasonable diligence in determining Dinwiddie's true status as a licensed pharmacist is a question that should have been left to the jury. Lewis also argues that the trial court erred in viewing the evidence in a light most favorable to the defendants, rather than in a light most favorable to her. She claims that if the trial court had construed the facts in her favor, it would have concluded that she did not discover that Dinwiddie was not a medical doctor until June 1999.

***2** We review the trial court's grant of summary judgment de novo with no presumption of correctness. *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn.1997); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn.1997). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

It is undisputed that the statute of limitations in a medical malpractice action is one year.[FN2] Tenn.Code Ann. § 29-26-116(a)(1). The cause of action accrues, and the limitations period begins to run, when the plaintiff discovers the injury or when the plaintiff, through reasonable diligence, should have discovered (1) the occasion, manner, and means by which the breach of duty occurred, and (2) the identity of the defendant that breached the duty. *See Stanbury v. Bacardi*, 953 S.W.2d 671, 676-77 (Tenn.1997). In *Stanbury,* the Tennessee Supreme Court explained:

> FN2. Though it appears that a one-year statute of limitation would also apply to Lewis's claim of misrepresentation, see Tennessee Code Annotated § 28-3-204, Lewis does not focus that theory of recovery in this appeal. Therefore, we will address the statute of limitations issue only as it relates to Lewis's medical malpractice claim.

> We emphasize that under the discovery rule, the statute begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know, that an injury has been sustained. It is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial. Again, a plaintiff need not "actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action.' "
> *Id.* at 678 (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994)). Thus, the "plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Id.* at 677 (quoting *Roe*, 875 S.W.2d at 657).

Lewis first argues that summary judgment was inappropriate because there was a disputed issue of material fact with respect to whether she should have discovered that Dinwiddie was not a physician in

February or March 1999. She acknowledges that, in February or March 1999, she knew that Dinwiddie was not Dr. Campbell. However, she claims that she assumed that Dinwiddie was a nurse or a nurse practitioner and did not know that he was a pharmacist until June 1999 when she confronted him directly.

In response, the defendants maintain that the undisputed facts compel the conclusion that Lewis was aware of facts sufficient to put a reasonable person on notice that she was being treated by a non-physician. They cite to Lewis's deposition, in which she testified that she became suspicious that Dinwiddie was not a physician in February 1999:

> Q. What made you first suspicious that Mr. Dinwiddie was not a medical doctor?
>
> A. When I found out that they were calling him Rob.
>
> Q. When was that-it had to be in March of '99 or February?
>
> ***3** A. It was somewhere around there. And he began to act like he didn't know what he was doing.
>
> Q. Is that when he took you off Prozac in [sic] February 9th?
>
> A. February 9th.

Lewis testified that she was "shocked" to learn in February 1999 that the person who had been treating her was not Dr. Campbell. Based on this testimony, the defendants argue, Lewis's cause of action began to accrue in February or March 1999.

Lewis's complaint alleges that Dinwiddie committed malpractice by "exceeding the scope of his professional license and breaching his duty to Ms. Lewis by not informing her that he could not treat her and prescribe medication but could only fill prescriptions." As to Dr. Campbell, the complaint alleges that he "breached the duty of care he owed to Ms. Lewis by employing Defendant Dinwiddie, a pharmacist, to treat and prescribe medication for Ms. Lewis." Therefore, Lewis's cause of action accrued when she knew, or in the exercise of reasonable care and diligence should have known, that she was being treated by a non-physician. As in *Stanbury,* "[i]t is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial." Stanbury, 953 S.W.2d at 678. In her deposition testimony, Lewis asserts that, in February 1999, she was "shocked" to learn that Dinwiddie was not Dr. Campbell and was suspicious that Dinwiddie was not a physician. At that time, Lewis was on notice of facts that would have prompted a reasonable person to determine whether Dinwiddie was a physician. Indeed, she had adequate opportunity to make such inquiries at her last two office visits in March 1999. Under these circumstances, we must conclude that Lewis's cause of action against Dinwiddie and Dr. Campbell accrued no later than March 1999. Therefore, her lawsuit, filed in April 2000, was barred by the one-year statute of limitations. Consequently, the trial court did not err in granting the defendants' motion for summary judgment.

The decision of the trial court is affirmed. Costs are to be taxed to the appellant, Vickie Lewis, and her surety, for which execution may issue, if necessary.

Tenn.Ct.App.,2002.
Lewis v. Campbell
Not Reported in S.W.3d, 2002 WL 1800905 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2006 WL 1044142 (Tenn.Ct.App.)
(Cite as: 2006 WL 1044142 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
William B. McCULLEY and Jean McCulley, n/o/k and Administrators of the Estate of Robin McCulley,
v.
Dr. Brian GARBER, M.D.

No. E2005-01606-COA-R3-CV.
Feb. 7, 2006 Session.
April 20, 2006.

Direct Appeal from the Circuit Court for Knox County, No. 1-279-03; Dale C. Workman, Circuit Judge.
Brandon K. Fisher, Clinton, Tennessee, for appellants.

Robert M. Stivers, Knoxville Tennessee, for appellee.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

OPINION

HERSCHEL PICKENS FRANKS, P.J.

***1** In this action based on defendant's alleged medical malpractice, the Trial Court granted defendant summary judgment on the grounds the statute of limitations had run on the claim. On appeal, we affirm.

Plaintiffs, as next of kin and administrators of the estate of Robin McCulley, brought this action against Dr. Brian Garber, alleging medical malpractice in defendant's treatment of Robin McCulley.

The Complaint states that McCulley died on January 13, 2002, after battling crohn's disease, that she had been treated by Dr. Wray for more than a year prior to her death, and that she went to the emergency room at St. Mary's LaFollette in December 2001 and was diagnosed with a visceral perforation. The Complaint further alleges that she was airlifted to St. Mary's in Knoxville, where defendant performed exploratory surgery on her on December 10 and took samples, but did not perform a diverting ileostomy. She eventually lapsed into a coma, and defendant performed a second surgery on December 19, 2001, where he found a perforation and performed a colon resection and colostomy. McCulley did not improve, and died on January 13, 2002.

The Complaint alleges that plaintiffs were never told of defendant's failure to find the perforation during the first surgery, and that defendant and his staff led plaintiffs to believe that McCulley's problems were the result of substandard care by Dr. Wray.

Plaintiffs allege that they initially filed suit against Dr. Wray, and then found out during discovery in that case that Dr. Garber was responsible. They allege that Dr. Garber was negligent in his treatment of their daughter, and that his negligence caused her death.

Defendant's Answer asserts that during the first surgery, both he and another surgeon inspected the decedent's abdomen and found no perforation. He further asserted that the perforation he found during the second surgery was not present during the first surgery, and thus, he was not negligent.

Defendant then filed a Motion for Summary Judgment, alleging that plaintiffs' Complaint was filed beyond the applicable statute of limitations. He filed a Statement of Undisputed Facts, stating that the Com-

plaint filed on May 5, 2003, alleged malpractice in the surgery he performed on December 10, 2001, some 17 months before the Complaint was filed. Defendant stated that Mr. McCulley testified in his deposition that he believed from the date of that first surgery that Dr. Garber's carelessness caused his daughter's death, and that neither the defendant nor anyone on his staff did anything to make plaintiffs believe that Dr. Wray was negligent.

Defendant attached the deposition of Mr. McCulley, wherein he testified that his wife had passed away during the pendency of this action, and that a doctor at St. Mary's LaFollette showed him his daughter's x-ray before she was airlifted to Knoxville, and told him that it showed there was a perforation in her colon. Mr. McCulley testified that after being taken to Knoxville, his daughter underwent surgery by defendant, and that defendant told him that he could not find the tear, but he "cleaned her up real good" and that she would be all right. McCulley testified that his daughter initially improved, but then worsened again, and defendant advised them that she needed a second surgery or she would die. McCulley testified the second surgery was performed by Dr. Garber on December 19, 2001, and he then told them he found the tear and fixed it. McCulley thought it was the same tear they had found in LaFollette. He stated that he could not remember defendant ever telling him anything bad about Dr. Wray. McCulley testified that after his daughter died, he obtained copies of her hospital records (he could not remember exactly when) and he delivered the records to his attorney.

***2** McCulley testified that he always thought Dr. Garber was negligent and that his carelessness caused the daughter's death, from the time she died or even before. McCulley discussed the fact that Dr. Garber could not find the perforation that the doctor in LaFollette saw on the x-ray, and testified that a nurse at the hospital told his niece that Dr. Wray had not administered proper treatment to his daughter, but he had no information that the nurse worked for Dr. Garber.

Defendant also attached a copy of the Complaint plaintiffs filed against Dr. Wray, and the Order of Voluntary Dismissal in that case.

Plaintiffs' unsworn Response asserted that Dr. Garber's nurse told Mrs. McCulley and their niece that Dr. Wray was negligent, that Dr. Garber told plaintiffs that the tears occurred after the first surgery, and that during discovery in the Wray lawsuit, plaintiffs discovered that Dr. Garber was not truthful about the first surgery.

Dr. Garber filed an Affidavit, asserting that none of his employees cared for Ms. McCulley nor had any contact with her family while she was in the hospital, and that all nursing personnel at the hospital were employees of St. Mary's.

The Trial Court granted defendant Summary Judgment, because the suit was filed outside the applicable statute of limitations, Tenn.Code Ann. § 29-26-116, and stated in the hearing that the discovery rule would not apply because Mr. McCulley testified he thought Dr. Garber was negligent from the beginning.

Plaintiffs' issue on appeal is whether the Trial Court erred in holding that this action was barred by the statute of limitations?

The issue before this Court is reviewed *de novo* but accorded no deference to the conclusions of law made by the Trial Court. *Southern Constructors, Inc., v. Loudon County Board of Education*, 58 S.W.3d, 706, 710 (Tenn.2001).

Plaintiffs insist that the statute of limitations is not a bar to their cause of action by virtue of the tolling provisions of Tenn.Code Ann. § 29-26-116, which state:

(a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

McCulley testified that he did not discover the actual injury to his daughter and the alleged wrongful conduct by defendant that caused said injury until it was revealed in discovery in his lawsuit against Dr. Wray, which was within one year of the filing of this Complaint. However, the Trial Court ruled that the action was time-barred, because of McCulley's statement during his deposition that he believed from the time of his daughter's death that Dr. Garber's carelessness caused her death.

***3** Tenn. R. Civ. P. 56.03 provides that summary judgment is appropriate where (1) there is no genuine issue of material fact relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn.1993); *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn.1993). The moving party has the burden of proving that it has satisfied the requirements of Rule 56.03. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn.1991). Summary judgment should be granted only when the facts and conclusions drawn from the facts permit a reasonable person to reach only one conclusion, that the movant is entitled to judgment as a matter of law. *Staples v. CBL & Assoc.*, 15 S.W.3d 83 (Tenn.2000).

As our Supreme Court has explained:

The statutory period of limitations in medical malpractice cases is one year after the cause of action accrues. Tenn.Code Ann. § 29-26-116(a)(1). The point in time at which the cause of action accrues is governed by § 29-26-116(a)(2), which provides that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." This Court has interpreted § 29-26-116(a)(2) to mean that the statute of limitations in a medical malpractice case is tolled until the plaintiff "discovered, or reasonably should have discovered, (1) the occasion, the manner, and the means by which a breach of duty occurred that produced his injuries; and (2) the identity of the defendant who breached the duty." *Foster v. Harris*, 633 S.W.2d 304 (Tenn.1982). Moreover, we have held that the discovery rule applies only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he has a right of action .... the statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry.

Hoffman v. Hospital Affiliates, 652 S.W.2d 341, 344 (Tenn.1983). It is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a "right of action"; the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.

Roe v. Jefferson, 875 S.W.2d 653, 656-657 (Tenn.1994).

Generally, the question of when a plaintiff is deemed to have constructive knowledge of the injury and its cause, and whether the plaintiff acted reasonably in trying to ascertain the cause based on the facts known to him, is a question of fact, *McIntosh v. Blanton*, 164 S.W.3d 584 (Tenn.Ct.App.2004); *Fluri v. Fort Sanders Regional Medical Center*, 2005 WL 3038627 (Tenn.Ct.App. Nov. 14, 2005); *Matz v. Quest Diagnostics Clinical Labs., Inc.*, 2003 WL 22409452 (Tenn.Ct.App. Oct. 22, 2003).

***4** McCulley testified that he had a subjective belief that the defendant was careless somehow and that his carelessness contributed to his daughter's death. He also testified that defendant told him that the perforations he repaired during the second surgery were not present during the first surgery. McCulley testified that Dr. Garber told him after the first surgery that he did not find a tear, and that his daughter would be fine. McCulley further stated that a nurse at the hospital told his wife and niece that it was Dr. Wray who was negligent in his treatment of the decedent. McCulley testified that he did not learn that defendant was negligent until such information came out during the discovery phase of his lawsuit against Dr. Wray.

We held in *McIntosh v. Blanton, et al.*, 164 S.W.3d 584, (Tenn . Ct.App.2004):

> Under the discovery rule, ... the determination of when the statute of limitations begins to run requires a determination of when the plaintiff had sufficient knowledge that she had sustained an injury.... The inquiry does not require that the plaintiff had knowledge that a "breach" of the appropriate legal standard" had occurred. *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). The statute of limitations begins to run when the plaintiff is "aware of the facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct," and the plaintiff knows the identity of the person who engaged in the conduct.

In this case, while the plaintiff did not know that a breach of the appropriate legal standard had occurred, the record reveals he had sufficient information to put him on notice that an injury had occurred and that the injury was caused by a wrongful act. *Id.* The information plaintiff had from the medical records at St. Mary's LaFollette and statements by third parties, established that he had sufficient knowledge that a wrong had occurred, and as a reasonable person, he would be put on inquiry.[FN1] *Roe.* Accordingly, we affirm the Trial Court's ruling that the statute of limitations bars plaintiffs' claim.

> FN1. In his deposition, plaintiff testified that the doctor at St. Mary's in LaFollette had pointed out to plaintiff "a break or a tear" on his daughter's colon, which constituted an emergency and required that she be airlifted to Knoxville as soon as possible, and that he didn't understand why defendant did not find the tear when he performed the initial surgery.
>
> Plaintiff testified in his deposition:
>
> Q. Now you did understand that your wife had been told by Dr. Wray's office that it was Dr. Garber's fault?
>
> A. Don't ask me where I got that, I heard that, yes....
>
> Q. Now is that based on the February 20, 03 letter from Salzburg, is that what you're talking about when you say you learned that?
>
> A. No.
>
> Q. What is it based on?

A. I assumed that all the time.

Q. I'm sorry?

A. I did blame Dr. Gerber for carelessness or whatever it was that caused her her life [sic].

Q. And you felt like that from when she died?

A. Yes.

The Judgment of the Trial Court is affirmed, and the cause remanded, with the cost of the appeal assessed to William B. McCulley and Jean McCulley.

Tenn.Ct.App.,2006.
McCulley v. Garber
Not Reported in S.W.3d, 2006 WL 1044142 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2007 WL 906760 (Tenn.Ct.App.)
(Cite as: 2007 WL 906760 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Jimmy Alan MURPHY, et al.
v.
LAKESIDE MEDICAL CENTER, INC.

No. E2006-01721-COA-R3-CV.
Feb. 23, 2007 [FN1] Session.

FN1. Oral arguments in this matter were heard as part of the Court's CASE Project (Court of Appeals Affecting Student Education), on February 23, 2007, at Sequoyah High School in Monroe County, Tennessee.

March 26, 2007.

Appeal from the Circuit Court for Hamilton County, No. 05 C 253; W. Neil Thomas, III, Judge.
Mark E. Whittenburg, Chattanooga, Tennessee, for the Appellants, Jimmy Alan Murphy and wife, Glenda Murphy.

Arthur P. Brock and Timothy J. Millirons, Chattanooga, Tennessee, for the Appellee, Lakeside Medical Center, Inc.

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, JJ., joined.

OPINION

SHARON G. LEE, J.

*1 The issue presented in this medical negligence case is whether the Plaintiffs' lawsuit was timely filed. At the request of Mr. Murphy's employer, physicians at Lakeside Medical Center (the "Medical Center") performed an annual physical examination, including a hearing test, on Mr. Murphy for over 20 years. Mr. Murphy was diagnosed with noise-induced hearing loss by an independent physician on January 21, 2004, and reported this information to his employer the next day. On February 13, 2004, Mr. Murphy obtained copies of the Medical Center's records indicating that Mr. Murphy had been experiencing hearing loss at a medically unacceptable rate for the past eight years. The Plaintiffs, Mr. Murphy and his wife, Glenda Murphy, filed their lawsuit on February 2, 2005, alleging that the Medical Center negligently failed to diagnose and treat Mr. Murphy's hearing loss over a period of several years, and that the Medical Center fraudulently concealed Mr. Murphy's hearing loss. The trial court granted the Medical Center's motion for summary judgment, finding that the Plaintiffs filed their complaint after the one-year statute of limitations had expired. After careful review, we hold that the Plaintiffs had notice of their claim no later than January 21, 2004, and their lawsuit was not timely filed. We also hold that the Plaintiff's allegation of fraudulent concealment is without merit. The decision of the trial court is affirmed.

I. Background

In 1972, Mr. Murphy was hired by W.R. Grace & Co., a Chattanooga chemical manufacturer. The work environment is noisy, and in the mid-1970s or early 1980s, W.R. Grace contracted with Lakeside Medical Center to perform annual physical examinations, including hearing tests, for its employees. Mr. Murphy had his hearing checked at the Medical Center almost every year. In the mid-1990s, Mr. Murphy and his wife began noticing that Mr. Murphy was not hearing as well as he previously had. Although Mr. Murphy did not discuss this gradual hearing loss with his pri-

mary care physician, Dr. Glenn Beasley, he testified that he discussed it with the Medical Center doctors several times. None of the Medical Center's doctors ever told Mr. Murphy that he was experiencing work-related hearing loss. Dr. Jim Davis, a physician at the Medical Center who examined Mr. Murphy, told Mr. Murphy that his hearing was fine. Dr. Bruce Johnson, another physician at the Medical Center, told Mr. Murphy several times, "You're going to lose a little hearing with age. It looks normal to me," "I don't see anything to be worried about at all," and similar comments.

Mr. Murphy's hearing continued to deteriorate over the next decade. On January 13, 2004, Mr. Murphy complained to Dr. Beasley of decreased hearing in both ears that had grown worse over the past six months. Dr. Beasley referred Mr. Murphy to Dr. Christopher St. Charles, an otolaryngologist.[FN2] On January 21, 2004, Dr. St. Charles diagnosed Mr. Murphy with "significant likely noise induced sensorineural hearing loss." Dr. St. Charles also indicated that Mr. Murphy was a hearing aid candidate and advised him to take additional precautions around loud noises in the future. The following afternoon, Mr. Murphy reported his hearing loss to Dusty Rominger, the safety supervisor at W.R. Grace, and filled out an "Employee First Report of Accident" form. On the form, Mr. Murphy listed January 21 as the date of the accident. He described the accident as "Exposer [sic] to loud noises over 32 year career caused permanent damage to my hearing," and stated that the resulting injury was "severe hearing loss in both ears."

FN2. An otolaryngologist is a physician who specializes in treatment of the ear, nose, and throat.

***2** On January 26, 2004, Mr. Rominger asked Mr. Murphy to return to the Medical Center to have his hearing evaluated by Dr. Johnson. Dr. Johnson disagreed with the diagnosis of Dr. St. Charles, so Mr. Rominger then asked Mr. Murphy to go to Dr. Jeffrey Adams for another hearing assessment. On February 9, 2004, Dr. Adams confirmed Dr. St. Charles' diagnosis. At that time, Mr. Murphy also received a copy of a graph that showed the results of Dr. Adams' testing and the extent of Mr. Murphy's hearing loss. After returning to work, Mr. Murphy submitted a written request to obtain copies of the Medical Center's graphs from his annual hearing tests. Those records were provided to him on February 13, 2004, by Mr. Rominger, who allegedly told Mr. Murphy that the Medical Center's records indicated that Mr. Murphy's hearing had been deteriorating at a medically unacceptable rate for the past eight years. Mr. Murphy stated that it was then that he realized that the Medical Center "had the numbers in front of them from year to year but that they fraudulently withheld, did not know how to interpret or negligently failed to interpret" the hearing exam results, resulting in further damage to Mr. Murphy's hearing.

On February 2, 2005, the Plaintiffs filed their lawsuit against the Medical Center, alleging negligence and fraudulent concealment. Upon motion of the Medical Center, the trial court entered summary judgment in favor of the Medical Center, finding that the Plaintiffs' complaint was not timely filed, based on expiration of the statute of limitations found in Tenn.Code Ann. § 29-26-116. The Plaintiffs appeal.

II. Issues

The issues we address in this appeal are restated as follows:

1. Whether the trial court erred in granting summary judgment to the Medical Center based upon the expiration of the statute of limitations.

2. Whether the trial court erred in finding that the Medical Center did not fraudulently conceal knowledge of Mr. Murphy's hearing loss, thus tolling the statute of limitations.

III. Analysis

A. Standard of Review

Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn.2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993)). The nonmoving party may not simply rely upon the pleadings, but must instead set forth specific facts, by affidavits or other discovery materials, demonstrating the existence of a genuine issue of material fact for trial. *Byrd*, 847 S.W.2d at 211. The Supreme Court has emphasized that "genuine issue" in this context "refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts." *Id.* (citing *Price v.. Mercury Supply Co.*, 682 S.W.2d 924, 929 (Tenn.Ct.App.1984)).

***3** The standards governing the assessment of evidence in the summary judgment context are well established. Courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. See *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997); *Byrd*, 847 S.W.2d at 210-211. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn.1995).

Because a trial court's decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. See *Staples*, 15 S.W.3d at 88; *Carvell*, 900 S.W.2d at 26. Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. *Staples*, 15 S .W.3d at 88.

B. Discovery of the Cause of Action

The Plaintiffs assert that the trial court erred in finding their claim barred by the statute of limitations. The statute of limitations for medical malpractice cases is one year, but "[i]n the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be (1) year from the date of discovery." Tenn.Code Ann § 29-26-116(a).

The Plaintiffs invoke the "discovery rule" set forth above as a means of saving their claim from summary judgment. Plaintiffs state that they did not learn of a potential cause of action against the Medical Center until February 13, 2004, when Mr. Murphy received copies of his records from the Medical Center. Therefore, the Plaintiffs assert that their lawsuit was not barred by the statute of limitations, because they filed the claim within a year of discovering their cause of action against the Medical Center.

The Tennessee Supreme Court adopted the discovery rule more than 30 years ago in *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn.1974). In *Teeters*, the plaintiff discovered that she was pregnant two and a half years after undergoing a tubal ligation for the purpose of sterilization. *Id.* at 512. Eleven months after learning of her pregnancy, she sued the doctor who had performed the surgery. *Id.* at 513. The trial court granted the defendant's motion for summary judgment based on the statute of limitations. *Id.* at 514. The Supreme Court reversed, stating, "We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown or unknowable." *Id.* at 515. The following year, the General Assembly codified the discovery rule in the Medical Malpractice Review Board and Claims Act. *Puckett v. Life Care of America*, No.

E2004-00803-COA-R3-CV, 2004 WL 2138337, at *4 (Tenn. Ct.App. E.S., filed Sept. 24, 2004); see Tenn.Code Ann. § 29-26-116(a)(2).

***4** Under the discovery rule, the statute of limitations in a medical malpractice case begins to run "when the patient discovers, or reasonably should have discovered (1) the occasion, the manner, and the means by which the breach of duty that caused his or her injuries occurred, and (2) the identity of the person who caused the injury." *Id.* However, the plaintiff is not entitled to wait until he or she knows all of the injurious consequences caused by the alleged negligence before filing suit. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn.1998).

According to Mr. Murphy, every doctor who has diagnosed him with severe hearing loss has said that the damage is irreparable. Dr. St. Charles also told Mr. Murphy that further damage could have been prevented if Mr. Murphy's hearing loss had been diagnosed sooner. Mr. Murphy recounted part of his conversation with Dr. St. Charles as follows:

> Dr. St. Charles, the day he diagnosed my severe hearing loss, ... he showed me the chart and where I fit in at the time. He said: "I wish we could have stopped it in this area [FN3] and put your hearing aids in, Jimmy, because every study indicates, if we get your hearing aids in, we can stop the progression of the loss."
>
> FN3. Mr. Murphy explained that Dr. St. Charles was pointing at the shaded area of the chart which indicated the normal hearing range for adults.

Although Dr. St. Charles did not explicitly state that the Medical Center had failed to diagnose Mr. Murphy's hearing loss, Dr. St. Charles did tell Mr. Murphy that his hearing loss had developed over a number of years and that further damage to his hearing could have been avoided if the problem had been diagnosed earlier. Mr. Murphy stated that when Dr. Johnson disagreed with Dr. St. Charles' diagnosis, he was confused and did not know who to believe. Even after Dr. Adams confirmed Dr. St. Charles' findings regarding Mr. Murphy's severe hearing loss, Mr. Murphy said he still was unaware of potential negligence on the part of the Medical Center until February 13, 2004, when he received the Medical Center's records from his annual hearing tests. Mr. Murphy therefore asserts that the statute of limitations did not begin to run until that date. However, the Plaintiffs' subjective reactions are not controlling of whether the statute of limitations should be tolled under the discovery rule. *Draper*, 1991 WL 7809, at *3. Rather, "the issue is not when the plaintiff realized he had a cause of action but when, in the exercise of reasonable care and prudence, an ordinary person could and should have realized that a cause of action existed." *Draper*, 1991 WL 7809, at *3. Considering the fact that the Medical Center was responsible for conducting Mr. Murphy's annual hearing tests, we believe that Dr. St. Charles' diagnosis and statements to Mr. Murphy would have placed an ordinary person in Mr. Murphy's position on notice of possible negligence.

The Plaintiffs argue that the conflicting diagnoses provided by Dr. St. Charles, Dr. Johnson, and Dr. Adams confused them to such a degree that they could not have reasonably been expected to know that Mr. Murphy's hearing loss was potentially the result of a wrongful act by the Medical Center. We disagree. It has been well established that the statute of limitations is tolled "only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person, is not put on inquiry." *Pugh v. State*, No. W2004-01609-COA-R3-CV, 2005 WL 280348, at *3 (Tenn. Ct.App. W.S., filed Feb. 3, 2005). On January 21, 2004, the date that Dr. St. Charles diagnosed Mr. Murphy with "significant likely noise induced sensorineural hearing loss," Mr. Murphy was put on notice that doctors at the Medical Center might have failed to diagnose his hearing loss

during his previous hearing tests. The fact that Dr. Johnson once again denied that Mr. Murphy had severe hearing loss following Dr. St. Charles' diagnosis is irrelevant for the purpose of determining when the statute of limitations began running. By the time of Dr. Johnson's assessment, Mr. Murphy had already been placed on notice of possible negligence by the Medical Center. Likewise, Mr. Murphy's acquisition of several years' worth of his hearing test records from the Medical Center, which confirmed that he had been experiencing significant hearing loss for at least the past eight years, does not change the fact that Mr. Murphy had already been placed on notice of possible negligence by the Medical Center. The focus of our inquiry is when a reasonable person should have been placed on notice of potential wrongful conduct which resulted in an injury, not when a plaintiff knows beyond doubt that his or her injury has been caused by wrongful conduct or when a plaintiff finds additional evidence of malpractice:

> ***5** [A] plaintiff is deemed to have discovered the right of action if he or she is aware or should be aware of facts sufficient to put a reasonable person on notice that an injury has been suffered as a result of wrongful conduct. The later discovery of additional acts of negligence would not toll the statute of limitations once the discovery rule has initially been satisfied.

Sommer v. Womick, No. M2004-01236-COA-R3-CV, 2005 WL 1669843, at *4 (Tenn. Ct.App. M.S., filed July 18, 2005) (internal citation omitted).

We have noted that "the statute of limitations is tolled only during that period of time when the plaintiff has neither actual nor constructive knowledge of (1) the injury, (2) the wrongful conduct causing that injury, and (3) the identity of the party or parties who engaged in that wrongful conduct." *Fluri v. Fort Sanders Regional Medical Center*, No. E2005-00431-COA-R3-CV, 2005 WL 3038627, at *4 (Tenn. Ct.App. E.S., filed Nov. 14, 2005). We find that Mr. Murphy had knowledge of all three of these facts on January 21, 2004, the date of Mr. Murphy's appointment with Dr. St. Charles. At that time, Mr. Murphy was aware that he had sustained an injury-partial loss of his hearing. Because of Dr. St. Charles' statements, Mr. Murphy should also have been aware that his injury was due, at least in part, to wrongful conduct, because an earlier diagnosis would have avoided much of the hearing loss that he has suffered. Finally, Mr. Murphy was aware of the identify of the alleged tortfeasor, as the Medical Center conducted Mr. Murphy's annual physicals and hearing tests.

Furthermore, statements by Mr. Murphy indicate he recognized that the Medical Center may have been negligent before he received the records from that facility. During his deposition, the following exchange took place between counsel for the Medical Center and Mr. Murphy:

> **Counsel:** At what point did you place blame or find fault or become angry or disgusted, discouraged, whatever, with Lakeside and Dr. Johnson?
>
> **Mr. Murphy:** I can't place a time. It's when I come to the realization that he had this information and that he had misdiagnosed me for as long as he had been there, and this was his fault.
>
> **Counsel:** And what-what brought that about? Did you go talk to a physician? Has a physician told you that Dr. Johnson misdiagnosed you?
>
> **Mr. Murphy:** No. From what the specialist told me, I realized him saying, "You lose some with age," was a lie. That's-
>
> **Counsel:** Okay.
>
> **Mr. Murphy:** At what day I come to that realiza-

tion, I can't tell you.

Counsel: And, by specialist, you mean by what Dr. St. Charles told you, you put together that, in your words, that Dr. Johnson had lied to you?

Mr. Murphy: Dr. St. Charles, and then the company ... sent me to their specialist....

Counsel: Okay.

Mr. Murphy: He give me the same diagnosis as Chris St. Charles.

Counsel: Okay.

*6 The Plaintiffs assert they were unaware of a potential claim against the Medical Center until they received the facility's records from Mr. Murphy's previous hearing tests. However, we find that the Plaintiffs already had knowledge of possible negligence by the Medical Center before Mr. Murphy received the records on February 13, 2004. As we have stated before, "[t]he discovery rule was not meant to allow a party to delay filing his claim until after he has completed the process of discovering all the factors that affect its merits." *Steele*, 1995 WL 623067, at *5.

After careful review, we find from the undisputed facts that the Plaintiffs had notice of their claim no later than January 21, 2004. Thus, the trial court did not err in finding that the Plaintiffs' suit was not timely filed within the one-year statute of limitations set forth in Tenn.Code Ann. § 29-26-116.

C. Fraudulent Concealment

The Plaintiffs also assert that the statute of limitations was tolled because the Medical Center fraudulently concealed knowledge of Mr. Murphy's hearing loss. The elements of a fraudulent concealment claim have been set forth by the Tennessee Supreme Court as follows:

> [A] plaintiff ... attempting to toll the statute of repose contained in T.C.A. 29-26-116(a)(3) by relying upon the fraudulent concealment exception to the statute must establish that (1) the health care provider took affirmative action to conceal the wrongdoing or remained silent and failed to disclose material facts despite a duty to do so, (2) the plaintiff could not have discovered the wrong despite exercising reasonable care and diligence, (3) the health care provider knew of the facts giving rise to the cause of action and (4) a concealment, which may consist of the defendant withholding material information, making use of some device to mislead the plaintiff, or simply remaining silent and failing to disclose material facts when there was a duty to speak.

Shadrick, 963 S.W.2d at 736. In the case at bar, the Plaintiffs allege that doctors at the Medical Center repeatedly misdiagnosed Mr. Murphy's hearing loss as a normal consequence of aging, rather than a work-related injury. However, the failure to correctly diagnose an ailment cannot be the basis for a fraudulent concealment claim unless the defendant had knowledge of the correct diagnosis. We have stated previously that "if the defendants failed to diagnose the condition of the plaintiff and such failure to diagnose the true condition fell below the applicable standard of care, it could not also consitute fraudulent concealment.... [H]ow can one fraudulently conceal that which one does not know?" *Mayers v. Miller Medical Group*, No. 01-A-01-9802-CV00101, 1998 WL 848095 (Tenn. Ct.App. M.S., filed Dec. 8, 1998). Furthermore, we find that the plaintiff could have discovered the Medical Center's alleged misdiagnosis by exercising reasonable care and diligence; the Medical Center promptly complied with Mr. Murphy's request to receive a copy of his medical records after he submitted the request to his safety supervisor at W.R. Grace. Thus, we hold that the Plaintiffs' allegations of fraudulent concealment by the Medical Center are without merit, and the statute of limitations was

not tolled for that purpose.

IV. Conclusion

*7 After careful review, we hold that the trial court was correct in granting summary judgment to the defendant Medical Center based on the expiration of the statute of limitations. We affirm and remand this case to the trial court for further proceedings consistent with this opinion. Costs of appeal are taxed against the Appellants, Jimmy Murphy and Glenda Murphy.

Tenn.Ct.App.,2007.
Murphy v. Lakeside Medical Center, Inc.
Not Reported in S.W.3d, 2007 WL 906760 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.2d, 1996 WL 455864 (Tenn.Ct.App.)
(Cite as: 1996 WL 455864 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Deborah PARRIS, Plaintiff/Appellant.
v.
Dr. Phillip LAND, Defendant/Appellee.

No. 53505-6 T.D.
Aug. 14, 1996.

From the Circuit Court of Shelby County at Memphis.
Honorable George H. Brown, Jr., Judge
Alan Bryant Chambers, Timothy R. Holton, CHAMBERS, CROW, DURHAM & HOLTON, Memphis, Tennessee Attorneys for Plaintiff/Appellant.

J. Cecil McWhirter, Sally F. Barron, McWHIRTER & WYATT, Memphis, Tennessee Attorneys for Defendant/Appellee.

FARMER, Judge.

*1 This is a dental malpractice case wherein Appellant, Deborah Parris, appeals from the summary judgment entered by the trial court in favor of the appellee, Dr. Phillip Land. For reasons hereinafter expressed, we agree that Appellant's action is time barred under T.C.A. § 29-26-116 and, therefore, affirm.

On April 30, 1993, Ms. Parris filed a complaint alleging that in November 1991, she underwent surgery by Dr. Land for the extraction of four wisdom teeth. She alleged that Dr. Land was negligent in performing the procedure which proximately caused the severing of the right lingual nerve in her mouth. It was alleged that Dr. Land also "split or otherwise injured [her] jaw bone" during the procedure. Parris alleged that following the procedure, the entire right side of her mouth and jaw "remained numb and without any feeling or sensation" and that "since the date of the surgery ... up to the present day, [she] continues to have no feeling or sensation on the right side of her mouth and jaw." Parris alleged that during the time period between the surgical procedure and January 1993, Dr. Land told her the numbness "would eventually wear off, and that she need not be concerned with it." It was alleged that in January 1993, Dr. Land suggested that Parris see an oral surgeon for treatment of the numbness. Parris alleged that Dr. Land fraudulently concealed her true condition and injuries from the time of the surgery until January 1993.

Dr. Land answered the complaint, denying all material allegations therein and affirmatively asserting that the action was barred by the applicable statute of limitations. Dr. Land moved for summary judgment relying upon the depositions of the parties and his own affidavit. In response, Ms. Parris submitted the affidavit of Dr. Richard Dixon and also relied upon the parties' depositions.

Appellant frames the issues on appeal as follows:

1. Whether material disputed facts prevented the grant of a summary judgment.

2. Whether the discovery rule tolled the one-year statute of limitations in a dental malpractice action.

Summary judgment is to be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *E.g.* Gray v. Amos, 869

S.W.2d 925, 926 (Tenn.App.1993); Rule 56.03 T.R.C.P. It is incumbent upon the party seeking summary judgment to persuade the court that no genuine and material factual issues exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn.1993). Once the moving party does so, the nonmoving party must then demonstrate, by affidavits or other discovery materials, that a genuine material factual dispute exists warranting a trial. *Byrd*, 847 S.W.2d at 211. The nonmoving party cannot rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. *Id.*

The affidavit of Dr. Land states, in pertinent part, as follows:

> ***2** I first saw [Parris] as a patient on September 23, 1991 during which time I, ... evaluated her third molars (also known as wisdom teeth). I again saw Ms. Parris on October 1, 1991 during which time we, ... discussed the subject of her wisdom teeth. On November 13, 1991 I extracted Ms. Parris' wisdom teeth.... In my opinion the technique I used in the removal of the teeth was proper....
>
> Shortly after the extractions Ms. Parris complained of paresthesia (numbness) within her mouth, particularly part of the right side of her tongue and gums. I felt that her paresthesia would improve with time, and so advised her. On January 8, 1992, March 22, 1992 and April 9, 1992, we had conversations about the numbness, and on each occasion I told her that I believed her numbness was transient and sooner or later the paresthesia would heal spontaneously. In making those remarks to her, I did so in a good faith belief that her feeling would return and that her numbness was not permanent. Never, at anytime, did I fraudulently conceal any information from her, and, in particular, I did not make any fraudulent remarks to her about her numbness. I felt that her lingual nerve might have been insulted during the removal of tooth number 32 causing the numbness but, as said, I did not feel the numbness was permanent, and so advised her.
>
> On the occasions when I saw plaintiff after the extractions and we discussed her numbness, I told her that I felt the numbness would be temporary and that I believed that sooner or later the numbness would heal spontaneously. In making those comments, I did so in good faith using my best judgment. I actually felt that the numbness was transient and was not permanent.

Ms. Parris states the following in her deposition, as here pertinent: She experienced numbness in the bottom right side of her jaw and tongue by the second or third day after Dr. Land performed the surgery. She informed Dr. Land of the numbness within days of the surgery and "[h]e kept saying don't worry about it. It will come back. Sometimes it takes a little longer for the feeling to come back in different areas." Dr. Land also told her that the healing process could take "up to a year to come back. If after a year nothing has happened then we will worry about it." Parris saw Dr. Land approximately every two to three days for the first two weeks following the surgery. She was last seen by Dr. Land in April 1992.[FN1] Parris first became concerned that her condition might be permanent three to four months following the procedure. Since first experiencing it, the numbness has never changed locations or spread to more or less parts of her mouth.

> FN1. It is undisputed that in January 1993, Dr. Land suggested that Parris consult an oral surgeon for her complaints.

Parris was further questioned as follows:

> Q. When Dr. Land would tell you that he felt the feeling would come back, did you gain the impression from listening to him that he was telling you a lie, or did you gain the impression that he in good faith believed it would come back whether it did or not?

*3 A. I believed he thought that it would.

Q. Come back?

A. Come back.

....

Q. .... Do you think he was being honest with you?

A. I don't know.

....

A. I now know that it hasn't come back that his statement was incorrect, but I don't know if he thought he was being honest.

....

Q .... did Dr. Land ever tell you anything that would make you think he would tell you a falsehood?

A. No.

Q. So insofar as you know, and you don't know for certain, but insofar as you know he may have been telling you with a good faith belief that the numbness would eventually wear off?

A. He may have been. I would have no way of knowing.

Q. If I understand what you're telling me, you knew that the numbness resulted from the extraction of the teeth and you knew you had the numbness within two or three days after the extraction of the teeth, but you thought it would be temporary based on what Dr. Land told you?

A. Yes, sir.

Parris consulted a Dr. Bernstein in November 1992 regarding her condition. After an examination, Bernstein informed her that he did not believe any sensation would return considering the amount of time that had passed since the surgery and that she should not have waited a year to correct the problem. She was referred to various other oral surgeons who basically relayed the same information. She was ultimately referred to a Dr. Meyer in Atlanta who agreed to attempt corrective surgery. Dr. Meyer informed her that something should have been done within the first three to six months and that her chances of the surgery being a success were 50/50. Parris underwent corrective surgery for her condition in June 1993 which was unsuccessful.[FN2]

FN2. Dr. Land's deposition corroborates his affidavit. Dr. Dixon's affidavit addresses the issue of Dr. Land's alleged deviation from the standard of care only; it does not concern the statute of limitations argument.

In ruling on motions for summary judgment, the trial court and this Court must consider the matter in the same manner as a motion for a directed verdict made at the close of the plaintiff's proof, i.e., all evidence must be viewed in a light most favorable to the motion's opponent and all legitimate conclusions of fact must be drawn in that party's favor. *Gray*, 869 S.W.2d at 926. It is Appellee's position that the present claim is time barred under the provisions of T.C.A. § 29-26-116, which provide as follows:

(a) (1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within the said one (1) year period, the period

of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

Appellant counters that the discovery rule applies in this case to toll the running of the statute. She argues that Dr. Land "persistently" informed her that her numbness was temporary and that she should wait a year before being concerned. Thus, she did not know her condition was permanent until after the year had passed and she sought a second opinion, whereupon she discovered the permanency of her condition and filed suit "approximately four months" later on April 30, 1993.

***4** Appellee relies primarily upon *Bennett v. Hardison*, 746 S.W.2d 713 (Tenn.App.1987). In almost identical facts to our own, the plaintiff in *Bennett* underwent surgery for the removal of a wisdom tooth by the defendant dentist on February 24, 1984. After the extraction, the defendant informed the plaintiff's companion that plaintiff would experience a "temporary" numbness. The numbness, however, was permanent. The plaintiff filed suit on October 3, 1985 alleging that the defendant failed to inform plaintiff of the risks of dental surgery. In response to the defendant's argument that the action was time barred, the plaintiff relied upon the discovery rule to argue that he did not learn his condition was permanent until October 1984 when another doctor told him the numbness was permanent. *Bennett*, 746 S.W.2d at 713. The trial court held the action time barred and entered summary judgment for the defendant. *Id.*

In affirming the trial court, the court of appeals, middle section, held:

It is uncontroverted that plaintiff experienced the numbness immediately after the surgery and that the extent or effect of the numbness did not change from the date of inception until the date of suit.... Plaintiff did not see defendant after the surgery, but Dr. Draper removed the stitches a week later and told plaintiff that nerve numbness was not an unusual result of the extraction performed by defendant....

Plaintiff's reliance upon the discovery rule is based upon the assumption that temporary numbness and permanent numbness are two entirely separate injuries or results, and that knowledge of temporary numbness is not knowledge of permanent numbness.

In *Security Bank & Trust Co. v. Fabricating, Inc.*, Tenn.1983, 673 S.W.2d 860, in discussing the one year statute of limitations on legal malpractice suits, the Supreme Court said:

.... A plaintiff cannot be permitted to wait until he knows all of the injurious effects as consequences of an actionable wrong. *Taylor v. Clayton Mobile Homes, Inc.*, Tenn.1974, 516 S.W.2d 72. (673 S.W.2d at 864, 865).

In *Hoffman v. Hospital Affiliates, Inc.*, Tenn.1983, 652 S.W.2d 341, the Supreme Court reversed a dismissal of a medical malpractice case based upon the statute of limitations and said:

The "discovery rule" would apply only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he had a right of action. Furthermore, the statute is tolled only during the period when the plaintiff had no knowledge at all that a wrong had occurred, and, as a reasonable person is not put on

inquiry. (652 S.W.2d 341 at 344.)

....

Even though plaintiff may have been justified in accepting a brief period of numbness as a necessary incident of the surgery, absent evidence of some unusual cause for the delay, the defendant was not justified in delaying the "discovery" of the permanence of his injury from February 24, 1984, until "around October, 1984", a period of some 8 months. At some time during that 8 months, any reasonable person would have concluded that the brief, temporary numbness normally incident to oral surgery had outlasted its welcome and had become an unacceptable incident to the surgery. This is especially true because there is no evidence of any improvement in the numbness during the period. An improvement might have justified a wait for further improvement,....

*5 *Id.* at 714.

The similarities between *Bennett* and our own case are quite apparent. As in *Bennett,* Parris experienced numbness in a relatively short time following the surgery (two to three days) and at no time since the surgery has she experienced any signs of improvement. Even accepting as true Dr. Land's statement to her that she should not be concerned for one year, she concedes that she began worrying that her condition was permanent well before that year's end (three to four months following the surgery), in February or March of 1992. Yet suit was not filed until over a year later on April 30, 1993. In light of *Bennett,* we conclude that Parris, in the exercise of reasonable care and diligence, should have discovered her cause of action prior to April 30, 1992, (more than five months after the surgery) and that the statute of limitations began running prior to this time.

We further do not find the record to support Appellant's claim that Appellee fraudulently concealed her cause of action. Fraudulent concealment is shown when the physician has knowledge of the wrong done and conceals such information from the patient. *Housh v. Morris,* 818 S.W.2d 39, 43 (Tenn.App.1991). Honest mistakes on the part of the physician, standing alone, are not sufficient evidence to establish fraudulent concealment. *Housh,* 818 S.W.2d at 43. The record before us does not suggest that Dr. Land was dishonest in his statements to Ms. Parris that her condition was temporary and that she should not be concerned until one year had passed. However mistaken Dr. Land may have been, the record does not suggest that he actually knew otherwise. Ms. Parris testified that she thought Dr. Land believed her condition was transient and she had no way of knowing whether or not he was conveying a falsehood. Moreover, we liken the present action to the situation in *Housh* wherein this court held that the physician's statements to his patient, who was rendered permanently disabled after undergoing surgery at his hands, that she would walk again merely concealed the "extent" of her injuries. *Housh* held that "[t]his simply will not operate to toll the statute of limitations." *Housh,* 818 S.W.2d at 43.

Viewing the evidence in a light most favorable to Ms. Parris, we are compelled to conclude that the one year statute of limitations applies to bar her suit. The judgment of the trial court entering summary judgment in favor of Appellee is, accordingly, affirmed. Costs are assessed against Deborah Parris, for which execution may issue if necessary.

HIGHERS and LILLARD, JJ., concur.

Tenn.App.,1996.
Deborah Parris v. Dr. Phillip Land
Not Reported in S.W.2d, 1996 WL 455864 (Tenn.Ct.App.)

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Slip Copy, 2013 WL 5296886 (Tenn.Ct.App.)
(Cite as: 2013 WL 5296886 (Tenn.Ct.App.))

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Julie SPECK and Kevin Speck
v.
WOMAN'S CLINIC, P.A. and Dr. Ryan Roy.

No. W2012–02111–COA–R3–CV.
July 16, 2013 Session.
Sept. 18, 2013.

Appeal from the Circuit Court for Madison County, No. C1187; Roy B. Morgan, Jr., Judge.
Richard Glassman and Jonathan Stokes, Memphis, Tennessee, for the Plaintiff/Appellants, Julie and Kevin Speck.

Marty R. Phillips and Michelle Greenway, Jackson, Tennessee, for the Defendant/Appellees, Woman's Clinic, P.A., and Ryan Roy, M.D.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

OPINION

HOLLY M. KIRBY, J.

***1** This appeal involves inquiry notice of the claimed injury for purposes of triggering the medical malpractice one-year statute of limitations. The plaintiffs, a married couple with four children, wanted to prevent the conception of another child. To that end, the plaintiff wife underwent a procedure to prevent pregnancy at the defendant medical clinic. About a year later, she became pregnant. The wife later gave birth to a healthy baby boy. The plaintiffs filed this medical malpractice lawsuit against the clinic and the treating physician, claiming the wife's pregnancy as the injury. The defendants filed a motion for summary judgment, arguing that the plaintiffs' claim was barred under the applicable one-year statute of limitations. The trial court held that the wife was put on notice of her pregnancy by, at the very latest, the day that she obtained a positive result on a home pregnancy test; it held that the claim was time-barred on that basis and granted the defendants' motion for summary judgment. The plaintiffs' subsequent motion to alter or amend was denied. The plaintiffs now appeal. Discerning no error, we affirm.

Plaintiff/Appellant Julie Speck and her husband, Plaintiff/Appellant Kevin Speck (collectively, "the Specks"), were married in 2005. Prior to the events that led to this lawsuit, Mr. and Mrs. Speck had full custody of four children—two children born during their marriage as well as two children from Mrs. Speck's previous marriage. At the time of the events outlined below, the Specks' children were all under 14 years old.

The responsibilities for their four young children left the Specks in financial straits, and Mrs. Speck also faced challenges regarding her mental and physical health. Consequently, in 2008, Mr. and Mrs. Speck decided to take steps to ensure that they would not conceive any more children. To this end, the Specks consulted with physicians at the Defendant/Appellee Woman's Clinic, P.A. They discussed having Mrs. Speck undergo an Essure sterilization procedure ("Essure Procedure") to prevent future pregnancy.[FN1] In the course of the Specks' discussions at the Woman's Clinic, Mr. Speck told a consulting physician that he was planning to undergo a vasectomy so that he and Mrs. Speck would have "double insurance" that they would not conceive another child. The physician assured the Specks that the Essure Procedure was so efficacious that a vasectomy for Mr. Speck would be a

waste of money. Convinced, the Specks scheduled Mrs. Speck for the Essure Procedure. Mr. Speck did not undergo the vasectomy at that time.

> FN1. The Essure Procedure involves the placement of coils inside the opening of the woman's fallopian tubes, which eventually creates a barrier to prevent conception.

On August 25, 2008, Defendant/Appellant Ryan Roy, M.D. ("Dr.Roy"), a physician at the Woman's Clinic, performed the Essure Procedure on Mrs. Speck. After the procedure, the Speck's were advised to use another form of birth control for three months until they could confirm that the procedure had accomplished its purpose. Three months later, Mrs. Speck underwent a test at the Woman's Clinic, which confirmed that the procedure was a success. The Specks were told at that time that they could begin relying solely on the Essure Procedure to prevent pregnancy. According to Mrs. Speck, Dr. Roy commented to her in that visit that if she later became pregnant, it would be a "miracle."

***2** About a year later, on November 27, 2009, the day after Thanksgiving, Mrs. Speck realized uneasily that her menstrual cycle was very late. This was unusual for her, and it caused Mrs. Speck to suspect that she was pregnant, so she purchased two home pregnancy tests at a local drugstore. Mrs. Speck took the first test that day, November 27, 2009. The result of the test showed that she was pregnant. On that same day or the next, Mrs. Speck took the second home pregnancy test; it likewise was positive for pregnancy. The box containing the home pregnancy tests Mrs. Speck used claimed that the tests are 99% accurate.

Soon thereafter, Mrs. Speck called the Woman's Clinic to tell them about the results of the home pregnancy tests. Mrs. Speck went to the Clinic on Monday, November 30, 2009, and was given a urine pregnancy test, similar to the two home pregnancy tests she had taken. The result of this test was also positive.

On December 1, 2009, Woman's Clinic personnel performed an ultrasound test on Mrs. Speck. The ultrasound showed that Mrs. Speck was pregnant and that the embryo was normally implanted in her uterus.[FN2] Several months later, on July 21, 2010, Mrs. Speck gave birth to her fifth child, a healthy baby boy.

> FN2. The ultrasound also showed that one of the coils inserted in the course of the Essure Procedure to block Mrs. Speck's fallopian tubes had become dislodged.

By letter dated November 29, 2010, the Specks served the Woman's Clinic and Dr. Roy (collectively, "Defendants") with written notice of a potential claim for medical negligence pursuant to Tennessee Code Annotated § 29–26–121.[FN3] On March 30, 2011, the Specks filed the instant lawsuit against the Defendants for medical malpractice, asserting wrongful pregnancy. Discovery ensued.

> FN3. That statute provides in part:
>
> > (a)(1) Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.
>
> Tenn.Code Ann. § 29–26–121(a)(1) (2012).

On September 21, 2011, the Defendants took the depositions of Mr. and Mrs. Speck.[FN4] In Mrs. Speck's deposition, she testified that she first suspected that she was pregnant on November 27, 2009, the day after

Thanksgiving. Her suspicion was triggered by the fact that her monthly menstrual cycle was "several days late," which she thought was unusual. [FN5] Mrs. Speck testified:

> FN4. The Plaintiffs took the deposition of Dr. Roy on the same day.
>
> FN5. A Woman's Clinic medical record dated November 30, 2009 indicates that Mrs. Speck's last menstrual cycle had occurred 5.5 weeks prior to that visit.

[Question:] When did you suspect that you were pregnant? ...

[Mrs. Speck:] ... It was the day after Thanksgiving in 2009.

...

[Question:] Why were you suspicious? Or why did you think you were pregnant?

[Mrs. Speck:] My period was several days late.

[Question:] And that was unusual—

[Mrs. Speck:] Yes, sir.

[Question:]—because you'd always had regular periods.

[Mrs. Speck:] They were always a couple days late, but not that many.

[Question:] And having been pregnant before, you knew what that likely—

[Mrs. Speck:] Yes, sir.

[Question:]—signified, didn't you.

[Mrs. Speck:] (The witness nodded.)

[Question:] And what did you do to confirm your suspicion that you were pregnant?

[Mrs. Speck:] I went and bought a home pregnancy test, two pregnancy tests.

...

[Question:] ... Why did you get two?

[Mrs. Speck:] To make double sure.

...

[Question:] And the only thing you had in mind was you were pregnant?

***3** [Mrs. Speck:] It's the only thing I could think of.

Mrs. Speck also testified that the results of the two home pregnancy tests she took were "clearly" positive. Mrs. Speck said that she called Mr. Speck to tell him about the test results after the first test was positive.

Mrs. Speck testified about going to the Woman's Clinic a few days after she took the home pregnancy tests, and about taking another urine pregnancy test there. She said that the ultrasound performed at the Clinic showed that "[t]he baby was where it was supposed to be in the uterus." When the Specks met with Dr. Roy a few days later, Mrs. Speck said, he was as "surprised and blown away as we were" that she was pregnant.

In Mr. Speck's deposition, he testified that he

knew his wife was pregnant even before she took the pregnancy tests. He said, "I know my wife, and I know—I know how easily we got pregnant with the first two children. And ... my gut told me she was pregnant." Like Mrs. Speck, Mr. Speck noted that the Woman's Clinic gave Mrs. Speck another pregnancy test that confirmed her pregnancy. He commented, however, that there "was never really any question" in his mind about Mrs. Speck being pregnant when they went to the Clinic that first time. After that visit, Mr. Speck testified, the Woman's Clinic called them and asked Mrs. Speck to undergo another round of tests to determine whether she had a tubal pregnancy. In that next visit, Clinic personnel performed an ultrasound on Mrs. Speck, which showed a normal pregnancy.

Based on the Specks' deposition testimony, the Defendants filed a motion for summary judgment on February 1, 2012. The Defendants asserted in their motion that the Specks' complaint was time-barred under the one-year statute of limitations set out in Tennessee Code Annotated § 29–26–116.[FN6] That same day, the Defendants also filed a motion for partial summary judgment in which they argued that the Specks' claimed damages for "the costs of raising, educating, nurturing, etc. of the child born subsequent to the procedure" are not recoverable in Tennessee as a matter of law pursuant to *Smith v. Gore*, 728 S.W.2d 738 (Tenn.1987).

FN6. That statute provides:

> (a)(1) The statute of limitations in health care liability actions shall be one (1) year as set forth in § 28–3–104.
>
> (2) In the event the alleged injury is not discovered within such one-year period, the period of limitation shall be one (1) year from the date of such discovery.

Tenn.Code Ann. § 29–26–116(a)(1) and (a)(2) (2012).

On April 5, 2011, the Specks filed the affidavit of Mrs. Speck in which she attempted to put her deposition testimony into context. In the affidavit, Mrs. Speck stated that she was not satisfied that the home pregnancy tests were accurate, so she "went to see [her] physician to find out if in fact [she] was pregnant via medical testing or ultrasound." Her affidavit states: "I was very suspicious that I would have had a false positive to the [home] pregnancy test ... because I had been assured by Dr. Roy that I could not get pregnant and therefore it came as a total shock to me when I was told by the doctor that in fact I was pregnant." Mrs. Speck explained her deposition testimony as follows: "[W]hen I said that I felt I was pregnant or thought that I was pregnant, or whatever word I used, that is with hindsight." Further clarifying her deposition testimony, the affidavit explains, "At the time I did the home pregnancy test, I did feel like I was pregnant but I know that home pregnancy tests have a certain percentage of false positives and I knew that until it had been confirmed by the doctor via appropriate medical testing and/or sonogram, that I would not know for sure." The affidavit states that Mrs. Speck went to the Woman's Clinic "to ascertain if in fact I was or was not pregnant regardless of my suspicions, feelings, thought processes, or home pregnancy test, I knew I would not be confirmed as pregnant until the doctor ran the appropriate medical test." Thus, she averred that the first time she "knew" that she was pregnant was on December 1, 2009, the date of the ultrasound test at the Clinic.

*4 On April 11, 2011, the Defendants filed the affidavit of Dr. Roy in support of their motions for summary judgment. Dr. Roy's affidavit states, *inter alia*, that the Woman's Clinic uses "the same type of pregnancy test that is purchased over the counter," and that the over-the-counter tests and the tests used at the Clinic have "the same accuracy," which is 99%. He averred in his affidavit that an ultrasound is not used to confirm whether a patient is pregnant, but rather is

used "to confirm whether or not a patient has an ectopic or intrauterine pregnancy."

On April 12, 2011, the trial court conducted a hearing on the Defendants' motions for summary judgment. At the hearing, the Defendants argued that the Specks discovered the injury—in this case, pregnancy—on or before November 27, 2009, when the home pregnancy test indicated that Mrs. Speck was pregnant. Based on this, the Defendants asserted that the Specks should have given the Defendants notice of their medical malpractice claim by November 27, 2010. Since the Specks gave their notice to the Defendants on November 29, 2010, the Defendants contended, the notice was too late. The Defendants also argued that, even if the cause of action began to accrue on November 29, 2009, and the initial notice was deemed timely, the Specks' lawsuit was nevertheless untimely filed. They noted that, to file suit within the grace period of 120 days after the expiration of the applicable statute of limitations, the Specks would have had to file their lawsuit no later than March 29, 2010, but the Specks filed their lawsuit on March 30, 2010.[FN7] Therefore, the Defendants argued, the Specks' lawsuit was untimely as a matter of law.

> FN7. The statute providing for the 120–day grace period provides:
>
> > (c) When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider. Personal service is effective on the date of that service. Service by mail is effective on the first day that service by mail is made in compliance with subdivision (a)(2)(B)....
>
> Tenn.Code Ann. § 29–26–121(c).

In response, the Specks asserted that the limitations period for their claim began to accrue on December 1, 2009, when Mrs. Speck underwent the ultrasound at the Woman's Clinic. The Specks reasoned that this was the date on which Mrs. Speck knew for certain that she was pregnant. The Specks claimed that their argument is bolstered by the fact that the Woman's Clinic did not instruct Mrs. Speck to stop taking her prescription medication until December 1, 2009, when the ultrasound *confirmed* that she was pregnant. The Specks characterized any knowledge Mrs. Speck had about her pregnancy before December 1, 2009 as based on hindsight. The Specks contended there is, at the very least, a fact question on the issue of when Mrs. Speck knew or should have known that she was pregnant, so summary judgment was inappropriate.

At the conclusion of the hearing, the trial court issued an oral ruling granting the Defendants' motion for summary judgment. The trial court held that the Specks were "on notice of the pregnancy by November 27th, 2009" as a matter of law. It agreed with the Specks that the November 29, 2010 notice was timely because the one-year deadline, November 27, 2010, fell on a Saturday, so giving notice on the following Monday was timely. It held however that the Specks' March 30, 2011 complaint was untimely because it was not filed within the 120–day grace period provided by statute. In the same oral ruling, the trial court granted the Defendants' motion for partial summary judgment on damages based on *Smith v. Gore,* thus resolving all issues before the court.[FN8]

> FN8. The Specks acknowledged at the hearing that child-rearing expenses are not recoverable in Tennessee under the holding in *Smith v. Gore,* but they sought to preserve the claim in order to advocate a change in the law at the appellate level.

***5** On April 27, 2012, the trial court entered a written order consistent with its oral ruling, granting summary judgment in favor of the Defendants based on the applicable statute of limitations and dismissing the Specks' action. The trial court recited the following undisputed facts:

1. On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant.

2. Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case.

3. Mrs. Speck had a history of regular and timely menstrual periods.

4. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009.

5. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant.

6. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results.

7. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time.

8. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate.

9. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs. Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant.

10. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive.

Based on these undisputed facts, the trial court concluded that Mrs. Speck "knew or should have known that she was pregnant no later than November 27, 2009," because "[b]y that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant...." The trial court also noted that Mrs. Speck was actually aware of the relevant facts, because she "undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy."

Therefore, consistent with its oral ruling, the trial court used November 27, 2009, as the accrual date for the Specks' cause of action. It also held, consistent with its oral ruling, that Section 29–26–121 notice was timely given, because November 27, 2010, fell on a Saturday, and "the statute of limitations did not run until November 29, 2010, the following Monday." [FN9] The trial court held, however, that the Specks' complaint was not filed within 120 days of the pre-suit notice, because Section 29–26–121(c) "only extends the applicable statute of limitations for one hundred twenty (120) days from the date of the expiration of the statute of limitations...." Because the 120–day

period expired on March 29, 2011, the trial court held that the filing of the Specks' complaint on March 30, 2011, was untimely. Accordingly, the trial court granted the Defendants' motion for summary judgment on that basis.

> FN9. The Defendants do not challenge on appeal the trial court's conclusion that the Specks' pre-suit notice was timely filed on November 29, 2009, based on the fact that November 27, 2009 fell on a Saturday, and we therefore do not address the issue in this opinion.

***6** Also on April 27, 2012, the trial court entered a separate written order granting the Defendants' motion for partial summary judgment. It held that the Specks are precluded from recovering any damages other than those permitted in *Smith v. Gore.*

Meanwhile, on April 16, 2011, after the trial court's oral ruling but before the trial court entered its written orders, the Specks filed a motion to alter or amend or to reconsider the trial court's oral ruling on summary judgment. The Specks asserted in the motion to alter or amend that they "have filed or will file the Supplemental Affidavit of Julie Speck," which would supply further information that would necessitate a reversal of the trial court's oral ruling. In the motion to alter or amend, the Specks did not challenge the trial court's grant of partial summary judgment based on *Smith v. Gore.*

On April 24, 2011, as indicated in the motion to alter or amend, the Specks filed the Supplemental Affidavit of Plaintiff Julie Speck ("Supplemental Affidavit"). In the Supplemental Affidavit, Mrs. Speck stated that she called the Woman's Clinic "on November 27, 28, or 29," 2009, and told the person who answered that she had undergone an Essure Procedure and "could not be pregnant but was suspicious and needed to talk to a doctor." When Dr. Roy returned her call, Mrs. Speck averred, he told her that "there was no way that I could be pregnant, it was not possible, you cannot be pregnant were his words." When Mrs. Speck told Dr. Roy about the positive results from her two home pregnancy tests, Mrs. Speck stated, Dr. Roy responded "that something was wrong, that you cannot be pregnant, that there have been some false positives on pregnancy test [s] and that apparently there was a batch of faulty or defective pregnancy tests in the Jackson area." Dr. Roy told Mrs. Speck to call the Clinic the next Monday to make an appointment to "be tested to see what was wrong, but that I could not be pregnant and that it would have to be something other than pregnancy that was going on physically." Based on Dr. Roy's assurances, the Specks argued, Mrs. Speck could not be certain that she was pregnant until the ultrasound performed at the Clinic confirmed it. At the very least, the Specks contended, Mrs. Speck's Supplemental Affidavit created a fact question on the issue of notice. After the trial court filed its April 27, 2012 written orders granting summary judgment in favor of the Defendants, the Specks refiled the same motion to alter or amend.

On July 13, 2012, the trial court conducted a hearing on the motion to alter or amend. At the conclusion of the hearing, the trial court denied the motion and reaffirmed its earlier ruling. The trial court first held that it would be inappropriate to consider the Supplemental Affidavit of Mrs. Speck, because that affidavit could have been submitted before the trial court issued its ruling on the summary judgment motions. Nevertheless, the trial court held, even if it considered the Supplemental Affidavit, it would nevertheless deny the motion to alter or amend, because the undisputed facts still showed that by November 27, 2009, Mrs. Speck was aware of sufficient facts to put her on notice of her pregnancy. The trial court reasoned that, "it's not a question of knowing absolutely that she was pregnant. It's a matter of putting—being put on notice of the possibility."

*7 On August 9, 2012, the trial court entered an order on the motion to alter or amend consistent with its oral ruling, stating that the motion failed "to meet any of the Rule 59 grounds for overturning the Order Granting the Defendants' Motion for Summary Judgment." The Specks now appeal.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, the Specks raise the following issues:

1. Whether the trial court erred in granting the Defendants' motion for summary judgment?

2. Whether the trial court erred in denying the Specks' motion to alter or amend?

3. Whether the trial court erred in granting the Defendants' motion for partial summary judgment?

"The granting or denying of a motion for summary judgment is a matter of law, and our standard of review is *de novo* with no presumption of correctness." *Kinsler v. Berkline, LLC*, 320 S.W .3d 796, 799 (Tenn.2010). In conducting our review, we are guided by the following well-established standards:

> A summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn.2008). When ruling on a summary judgment motion, the trial court must accept the nonmoving party's evidence as true and resolve any doubts concerning the existence of a genuine issue of material fact in favor of the nonmoving party. *Shipley v. Williams*, 350 S.W.3d 527, 536 (Tenn.2011) (quoting *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 84 (Tenn.2008)). "A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion." *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn.2009) (citing *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn.2000)).
>
> *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn.2013).

We review a trial court's decision to grant or deny a motion to alter or amend pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure under the more deferential abuse-of-discretion standard.[FN10] *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn.2003). Under this standard, "[a] trial court abuses its discretion only when it 'applie[s] an incorrect legal standard or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.' " *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)). If the trial court's discretionary decision is within the range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *See White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn.Ct.App.1999).

> FN10. The Specks did not cite Rule 59.04 of the Tennessee Rules of Civil Procedure in their motion to alter or amend, but the trial court properly treated the motion as such.

ANALYSIS

Summary Judgment

Tennessee Code Annotated § 29–26–116 states: "The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28–3–104." Tenn.Code Ann. § 29–26–116(a)(1). The statute refers to the so-called "discovery rule" by providing that, if "the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn.Code Ann. **29– 26– 116(a)(2)**. Thus, under the discovery rule, the statute of limitations in medical malpractice

actions "is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and as a reasonable person is not put on inquiry." *Roe v. Jefferson*, 875 S.W.2d 653, 656–57 (Tenn.1994); *see Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 458 (Tenn.2012) (discussing historical background of discovery rule). The discovery rule applies in cases in which the plaintiff does not discover and could not reasonably be expected to discover that he has a right of action; it does not permit the plaintiff to wait until he knows all of the injurious effects and consequences of a tortious act. *Potts v. Celotex Corp.*, 796 S.W.2d 678, 680–81 (Tenn.1990). The Tennessee Supreme Court recently summarized the discovery rule as applied in medical malpractice cases:

> ***8** In summary, a medical malpractice cause of action accrues when one discovers, or in the exercise of reasonable diligence should have discovered, both (1) that he or she has been injured by wrongful or tortious conduct and (2) the identity of the person or persons whose wrongful conduct caused the injury. A claimant need not actually know of the commission of a wrongful action in order for the limitations period to begin, but *need only be aware of facts sufficient to place a reasonable person on notice that the injury was the result of the wrongful conduct of another.* If enough information exists for discovery of the wrongful act through reasonable care and diligence, then the cause of action accrues and the tolling of the limitations period ceases. Neither actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action.

Sherrill v. Souder, 325 S.W.3d 584, 595 (Tenn.2013) (emphasis added). Knowledge of facts sufficient to give notice of the injury and the fact that the injury was the result of the wrongful or tortious conduct of another is "variously referred to as 'constructive notice' or 'inquiry notice.' " *Redwing*, 363 S.W.3d at 459. The plaintiff is deemed to have constructive notice or inquiry notice when the plaintiff "in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant." *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn.1998).

On appeal, the Specks argue that the trial court erred in holding as a matter of law that they "discovered the alleged injury no later than November 27, 2009." They claim that the trial court must presume that "whether a plaintiff exercised reasonable care and diligence in discovering the injury or wrong is a question of fact for the jury to determine." This presumption is overcome, the Specks assert, only if the facts viewed in a light most favorable to the moving party permit the trier of fact to reasonably reach only one conclusion. They claim that, in this case, the date on which the Specks had inquiry notice of their claim against the Defendants remains a question of fact for the jury, because some of the evidence in the record indicates that Mrs. Speck did not know for certain that she was pregnant until she was tested at the Woman's Clinic on November 30 and/or December 1, 2009. For that reason, the Specks maintain, the trial court erred in granting summary judgment in favor of the Defendants.

In this case, the claimed injury is a healthy pregnancy that occurred after the Defendants performed a pregnancy-avoidance medical procedure in an allegedly negligent manner. In this circumstance, the limitations period began to run when the Specks had knowledge of facts sufficient to put a reasonable person on notice that Mrs. Speck was "injured," *i.e.*, pregnant. *See Redwing*, 363 S.W.3d at 459 (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn.1995) (quoting *Roe*, 875 S.W.2d at 657)). The Supreme Court has explained that, "once a plaintiff gains information sufficient to alert a reasonable person of the need to investigate 'the injury,' the limitation period begins to run." *Sherrill*, 325 S.W.3d at 593 n. 7 (quoting *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461

(Iowa 2008)). "The discovery rule is not intended to permit a plaintiff to delay filing suit until the discovery of all the facts that affect the merits of his or her claim." *Redwing*, 363 S.W.3d at 459. "Neither actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." *Sherrill*, 325 S.W.3d at 595.

*9 Applying these principles to the undisputed facts in this case, we must agree with the trial court that the Specks were at least on inquiry notice of Mrs. Speck's pregnancy no later than November 27, 2009. All of the evidence submitted—the Specks' depositions and Mrs. Speck's affidavits—indicate that Mrs. Speck suspected she was pregnant on that date and received at least some confirmation of her suspicion in the form of a positive result on one of the home pregnancy tests she purchased. Under these circumstances, the Specks were on inquiry notice on November 27, 2009, regardless of the accuracy of the home pregnancy test,[FN11] regardless of whether the Specks subjectively believed that the test results were inaccurate, and regardless of whether the purpose of an ultrasound test is to confirm the results of other types of pregnancy tests. As we have indicated, one need not know "of all the facts that affect the merits of ... her claim," *Redwing*, 363 S.W.3d at 459, and "diagnosis of the injury by another medical professional" is not a prerequisite for inquiry notice, *see Sherrill*, 325 S.W.3d at 595. Accordingly, we must conclude that the trial court did not err in granting summary judgment in favor of the Defendants based on the applicable statute of limitations.[FN12]

> FN11. The boxes containing the home pregnancy tests indicate that the results are 99% accurate, and Dr. Roy's affidavit establishes that the urine tests performed in the Clinic have the same level of accuracy.

> FN12. The Specks do not dispute that, if November 27, 2009 is determined to be the accrual date for the statute of limitations, even if extended to the following Monday (November 29, 2009), then the lawsuit is untimely because it was not filed within 120 days of the applicable statute of limitations pursuant to Section 29–26–121(c).

Motion to Alter or Amend

The Specks argue further that the trial court abused its discretion in denying the motion to alter or amend the grant of summary judgment, and in refusing to consider Mrs. Speck's Supplemental Affidavit that was filed to support the motion to alter or amend.

In denying the Specks' motion to alter or amend, the trial court reasoned:

> The Court finds that a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn.Ct.App.2003). The Court finds that Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment fails to meet any of the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment.

The trial court then held that it would be inappropriate to consider the Supplemental Affidavit of Mrs. Speck in ruling on the motion to alter or amend because the affidavit "attempts to create an issue of material fact after an adverse ruling of this Court" and was inconsistent with Mrs. Speck's prior testimony. Furthermore, the trial court reasoned, the Specks offered "no plausible reason for failing to present the evidence contained in the Supplemental Affidavit of Julie Speck prior to the hearing on Defendants' Motion

for Summary Judgment." In the alternative, even if the Supplemental Affidavit were considered, the trial court held, it would nevertheless deny the Specks' motion to alter or amend. The trial court observed that the facts stated in the Supplemental Affidavit did not affect the ten undisputed facts set out in the trial court's summary judgment order. The Specks both admitted to early suspicions that Mrs. Speck was pregnant based on her late period and on the positive test results from home pregnancy tests that "were 99% accurate." For all of these reasons, the trial court denied the Specks' motion to alter or amend.

***10** We agree with the trial court that, even if Mrs. Speck's Supplemental Affidavit were considered, it does not create a genuine issue of material fact on the issue of notice. The Supplemental Affidavit states that Dr. Roy assured Mrs. Speck that "there was no way that [she] could be pregnant, it was not possible, [she] cannot be pregnant were his words." It also states that Dr. Roy told Mrs. Speck that "that there have been some false positives on pregnancy test[s] and that apparently there was a batch of faulty or defective pregnancy tests in the Jackson area." However, none of the alleged statements by Dr. Roy change the undisputed fact that by November 27, 2009, Mrs. Speck's menstrual period was late and she had tested positive for pregnancy on at least one home pregnancy test. Dr. Roy's alleged statements may have given Mrs. Speck some reason to hope that her suspicions were incorrect, but she was still placed on inquiry notice before Dr. Roy's alleged statements and remained on inquiry notice after his statements. This conclusion is bolstered by the further undisputed fact that Mrs. Speck continued to investigate whether she was pregnant after speaking to Dr Roy. Thus, even giving the Specks the benefit of every reasonable inference, they still had knowledge of facts that placed them on inquiry notice about Mrs. Speck's pregnancy. *See* Roe, 875 S.W.2d at 656–57 (statute of limitations in medical malpractice action "is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred"). This holding makes it unnecessary for us to address whether the trial court erred in declining to consider Mrs. Speck's Supplemental Affidavit.

Under these circumstances, we must conclude that the trial court did not abuse its discretion in denying the Specks' motion to alter or amend the order granting the Defendants' motion for summary judgment based on the statute of limitations.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of the Defendants based on the applicable statute of limitations, and we also affirm the trial court's denial of the Specks' motion to alter or amend the order granting summary judgment. This holding results in affirmance of the trial court's dismissal of the Specks' lawsuit in its entirety, and makes it unnecessary for us to address the Specks' argument that the trial court erred in granting the Defendants' motion for partial summary judgment based on *Smith v. Gore*. All other arguments raised but not specifically addressed herein are either rejected or are pretermitted by our decision.

The decision of the trial court is affirmed. Costs on appeal are to be taxed to the Plaintiff/Appellants Julie Speck and Kevin Speck and their surety, for which execution may issue, if necessary.

Tenn.Ct.App.,2013.
Speck v. Woman's Clinic, P.A.
Slip Copy, 2013 WL 5296886 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.2d, 1996 WL 200338 (Tenn.Ct.App.)
(Cite as: 1996 WL 200338 (Tenn.Ct.App.))

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Theresa STANBURY and spouse, John H. Stanbury, Plaintiffs/Appellees,
v.
Brian E. BACARDI and Hospital Corporation of America, d/b/a Centennial Medical Center, Defendants/Appellants.

No. 01-A-01-9509-CV00420.
April 26, 1996.
Permission to Appeal Granted Sept. 9, 1996.

APPEAL FROM THE FIRST CIRCUIT COURT OF DAVIDSON COUNTY AT NASHVILLE, TENNESSEE HONORABLE HAMILTON V. GAYDEN, JR., JUDGE

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OPINION

TODD, J.

*1 The defendant, Brian E. Bacardi, has appealed from a jury verdict and judgment awarding plaintiff, Theresa Stanbury, $211,000 and her husband, John H. Stanbury, $10,000, as damages for alleged malpractice in surgery and treatment of Mrs. Stanbury. The other captioned defendant, Hospital Corporation of America, was dismissed by nonsuit and is not involved in this appeal.

The sole issue on appeal is whether plaintiffs' suit is barred by the one year medical malpractice statute of limitations, T.C.A. § 29-26-116.

The patient first saw defendant on November 22, 1991. On December 11, 1991, defendant performed the following surgical procedures on both feet of the patient:

(a) transpositional osteotomy fifth metatarsal with internal fixation bilateral;

(b) arthroplasty proximal interphalangeal joint third, fourth and fifth bilateral;

© exostectomy remodeling distal medial fifth bilateral;

(d) middle phalangectomy fourth bilateral;

(e) flex ortenotomy third, fourth and fifth bilateral; and

(f) tenoplasty extensor digitorus longus bilateral.

On December 20, 1991, the surgical dressings were removed from the patient's feet and she was able to observe the outward evidence of the procedures performed on December 11, 1991. The patient was seen by defendant on January 10, 1992, January 17, 1992, February 14, 1992, and March 17, 1992. On April 3, 1992, defendant performed a further surgical procedure to correct a misalignment of the fifth toe on the right foot. On May 5, 1992, defendant removed the sutures from the site of the surgery and informed the

patient that there was nothing further he could do to relieve her problems.

This suit was filed on April 30, 1993. The complaint alleged deviation from the recognized standard of acceptable medical practice in the following particulars:

A. Negligently recommending surgery to the plaintiff which was not indicated, given her signs, symptoms and physical condition;

B. Failing to obtain the plaintiff's informed consent to the surgery performed on December 11, 1991;

C. Negligently performing the surgical procedures on December 11, 1991 and April 3, 1992;

D. Performing unnecessary surgery on December 11, 1991 and April 3, 1992;

E. Negligently providing post-surgical care including the failure to maintain antiseptic techniques;

F. Negligently causing an infection to Theresa Stanbury's feet by ignoring basic principles of antiseptic;

G. Ignoring the patient's complaints of pain and infection;

H. Intentionally and falsely preparing his office notes with the intent to conceal from the plaintiff and anyone else her true condition and result.

Defendants' answer included the affirmative defense of statute of limitations.

The Trial Court submitted to the jury several issues of fact, including the following:

3(a) Did the defendant, Brian Bacardi, deviate from the recognized standard of care for podiatrists in this community by negligently performing the surgical procedures on December 11, 1991, and/or April 3, 1992, on the plaintiff, Theresa Stanbury?

***2** As to this question the foreman of the jury asked the following question and the Trial Judge responded as follows:

MR. ROBINSON: I think the misunderstanding is are we to decide on that question, whether or not during the actual surgery itself, was a mistake made?

THE COURT: Okay. That's what I thought you meant. No, that's not part of the lawsuit. Okay. The lawsuit, "negligent" refers to other acts of alleged malpractice. But as far as the operation itself, that's not part of the lawsuit.

On February 14, 1995, the Trial Court entered a "Final Decree" reciting:

... After deliberating on February 1 and 2, 1995, the jury returned a verdict in favor of the plaintiff, Theresa Stanbury, on the issues of recommending and performing unnecessary surgery, lack of informed consent and negligently performing surgery, and awarded Theresa Stanbury compensatory damages of Two Hundred Eleven Thousand ($211,000.00) Dollars. The jury also returned a verdict for the plaintiff, John Stanbury, for his claim for loss of consortium in the amount of Ten Thousand ($10,000.00) Dollars....

Judgment was entered accordingly.

On February 24, 1995, the Trial Court entered an order containing the following:

... At the close of the plaintiff's case in chief, the

defendant moved for a directed verdict on the entire cause on the grounds that the plaintiff's cause of action was barred by the one year statute of limitations of the Tennessee Medical Malpractice Act.

Defendant's Motion for Directed Verdict was denied and the Court held that as a matter of law, plaintiff's claim was not barred by the Statute of Limitations of the Medical Malpractice Act.

Further, defendant moved for a directed verdict on the following issues:

1. Negligently providing post-surgical care, including the failure to maintain antiseptic techniques;

2. Negligently causing an infection to Theresa Stanbury's feet by ignoring basic principles of antiseptic;

3. Ignoring the patient's complaints of pain and infection;

4. Intentionally and falsely preparing his office notes with the intent to conceal from the plaintiff and anyone else her true condition and result. The Court was of the opinion that defendant's Motion for Directed Verdict on these issues was well taken.

Defendant also moved for a directed verdict on the issue of negligently performing the surgical procedures on December 11, 1991 and April 3, 1992. The Court was of the opinion that defendant's motion on this issue was not well taken and was overruled.

At the close of all of the proof, the defendant moved for directed verdict on the grounds that plaintiff failed to present competent expert testimony concerning the standard of care for podiatrists practicing in the Nashville, Davidson County community during the years 1991 and 1992.

The Court was of the opinion that this motion was not well taken and it was denied.

On appeal to this Court, defendant states the issue as follows:

*3 Whether the Trial Court erred in denying defendant's motion for directed verdict on the statute of limitations and holding as a matter of law that plaintiffs' cause of action was not time barred.

It is undisputed that this suit was filed more than a year after all services rendered by defendant except the final office visit on May 5, 1992. Nevertheless, plaintiffs insist that the statute of limitations had not expired on April 30, 1993, when this suit was filed, upon theories of continuing treatment and fraudulent concealment. In support of these theories, plaintiffs cite the following:

1. Defendant continued to treat Mrs. Stanbury to and including May 5, 1992, when he removed the sutures from her last surgery.

2. On May 5, 1992, defendant told the patient that healing would take about a year. In this respect, Mrs. Stanbury testified:

Q. Did Dr. Bacardi talk to you about how long it was going to take you to recover after he did surgery on your right toe?

A. Only at the last visit where he decided that I wasn't pleased with it so he didn't like my response and he just said, "You've got to give it at least a year and then worry about it."

....

Q. Now, at this last office visit, did you complain

to Dr. Bacardi about what was going on?

A. Oh, yes. Of course.

Q. And what did he tell you about what to expect from your feet?

A. He said that I was trying to resolve something that needed more time. Needed time. To give yourself a year and see what you feel after that.

....

Q. Well, was there any length of time mentioned or any indication given by him of how long you were going to be off work?

A. Not until after everything was done. When he said he couldn't do nothing for me he said, "Give it a year and see if you're happy then."

Defendant testified as follows:

Q. Dr. Bacardi, you're telling the jury from here to here is straight?

A. I also said that the digit is bandaged purposely in some over-correction at the time of surgery, and that's routine with the little toe, because they do tend to pull back in towards the fourth.

Sometimes we get that pulling in of the fifth toe towards the fourth toe down the road, a half year or a year later. That's not unusual. And what we do during the surgery is to bandage that toe in a little over-correction purposely. And as time goes on, you will see the toe remains straight.

No other evidence is cited or found which would defeat the defense of statute of limitations.

T.C.A. Section 29-26-116 provides in pertinent part as follows:

Statute of limitations.-Counterclaim for damages.-(a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

*4 "Discovery" means the discovery of the existence of a right of action, that is, facts which would support an action for tort against the tortfeasor. Such facts include not only the existence of an injury, but the tortious origin of the injury. *Hathaway v. Middle Tenn. Anaesthesiology,* Tenn.App.1986, 724 S.W.2d 355.

This rule was previously followed by Tennessee Courts, *Teeters v. Curry,* Tenn.1974, 518 S.W.2d 512, 93 A.L.R.3rd 207; but was codified by the quoted section of the Code. *Housh v. Morris,* Tenn.App.1991, 818 S.W.2d 39.

The gravamen of plaintiffs' action is that, on December 11, 1991, defendant performed surgery negligently, without actual or informed consent, and without advising the patient of the lengthy recovery period to follow the surgery. The evidence is uncontradicted that plaintiffs discovered or should have discovered facts supporting each of these complaints

more than a year prior to the institution of this suit on April 30, 1993.

As stated above, the complaint alleged the performance of unnecessary surgery. There is expert evidence that at least some of the surgery was unnecessary, but the claim for same is barred unless saved by the "discovery rule." No evidence is cited or found that plaintiff did not discover or should not reasonably discovered that the surgery was unnecessary at least one year before this suit was filed. The brief of appellee does not rely upon this aspect of the rule.

There is no evidence that any fact necessary to support plaintiffs' suit was fraudulently concealed from them at such a time and under such circumstances as would extend the statutory time for bringing suit until April 30, 1993.

Plaintiffs rely upon the "continuing treatment doctrine." In *Frazor v. Osborne,* 57 Tenn.App. 10; 414 S.W.2d 118 (1966), a surgeon left a surgical sponge imbedded in the patient and thereafter continued to treat the unhealed incision without probing the incision for a foreign object. The Trial Court directed a verdict for the surgeon on the ground of the statute of limitations. This Court reversed and remanded for a new trial stating:

> Bearing in mind that there is evidence in this case to indicate that the professional relationship between the decedent and the defendant, Dr. J.W. Osborne, did not cease until the discovery of the imbedded sponge in May, 1961, or sometime after that, it is our view that the evidence is such that the question of whether or not this professional relationship did continue until within one year of the filing of the suit is one that should have been submitted to the jury, and, if found by the jury that said relationship continued until within the statutory period of one year, the question of liability for negligence would have been for the jury to decide.

Frazor, 57 Tenn.App. at 20.

In *Frazor,* the negligence included failure to discover the cause of the unhealed wound. So long as Dr. Osborne continued as the treating physician, his duty to discover and his failure to discover continued. Thus, under the circumstances of *Frazor,* the continuance of the physician relationship resulted in the continuance of the negligent failure to discover the sponge.

***5** No such set of circumstances are shown in the present case. The professional relationship did continue, but there is no evidence that the negligence, if any, of defendant continued into the one year period preceding the filing of this suit. The only professional services rendered within one year preceding suit was the removal of sutures on May 5, 1993; and there is no showing of any negligence in the removal of the sutures, or, for that matter, in the performance of the last surgery on April 3, 1992, which included the insertion of the sutures which were removed on May 5, 1992.

The opinion in *Frazor* contains some language which may be interpreted as supporting a rule that no statute of limitations or malpractice begins to run until the termination of the doctor-patient relationship. This Court does not so interpret such language which referred only to breach of duties (such as duty to discover) which continued so long as the physician continued to treat the disorder which resulted from the continued failure to discover the cause.

Moreover, since the recognition of the continuing treatment doctrine in *Frazor,* its applicability has been eroded or entirely eliminated by the above cited statute and subsequent decisions.

In *Housh v. Morris, supra,* this Court affirmed a summary judgment dismissing a medical malpractice suit and said:

> Since the holding in *Frazor,* our courts have adopted and continuously applied the "discovery rule." This rule is codified and made applicable to malpractice actions by T.C.A. § 29-26-116. The present action is governed by T.C.A. § 29-26-116.

For the foregoing reasons, this Court finds that the Trial Court erred in failing to direct a verdict for the defendant on the ground of the bar of the statute of limitations.

The judgment of the Trial Court in favor of both plaintiffs is reversed and vacated, and plaintiffs' suit is dismissed at their cost. The cause is remanded to the Trial Court for entry in conformity with this opinion and such other proceedings as may be necessary.

CANTRELL, J., concurs.

OPINION
CONCURRING IN PART & DISSENTING IN PART

I concur with the majority's decision that Theresa Stanbury's lack of informed consent claim is time-barred. However, I have prepared this separate opinion for two reasons. First, the majority has erroneously dismissed Ms. Stanbury's claims regarding advising and performing unnecessary surgery which stand on a footing different from her lack of informed consent claim. Second, it is time to hold unequivocally that the continuing treatment doctrine has been completely subsumed into the discovery rule.

I.

Ms. Stanbury is an assembly line worker at Saturn Corporation in Columbia. In 1991 she developed a corn on the fifth toe of her right foot that caused her discomfort when she was required to stand for ten hours during her shift. A physician removed the corn and recommended that she consult a podiatrist. Accordingly, Ms. Stanbury met with Dr. Brian Bacardi on November 22, 1991. After a cursory examination, Dr. Bacardi recommended a minor surgical procedure to prevent her fifth toe on her right foot from laying on top of her fourth toe. Dr. Bacardi assured Ms. Stanbury that her recovery time would be short and that her work schedule would not be interrupted.

***6** Ms. Stanbury signed two consent forms prior to her December 11, 1991 surgery. One document on Dr. Bacardi's stationery entitled a "Surgery Informer" contained a brief discussion of the general risks and complications of surgery but did not identify the nature of the surgery Dr. Bacardi planned to perform. The second document was a Centennial Medical Center form entitled "Consent for Operation, Administration of Anesthesia, and Other Procedures." In the space provided for describing the operation to be performed, someone hand wrote: "Bilateral Osteotomy, Bilateral Repair Tailor Bunion, Bilateral Arthroplasty, Bilateral Realignment Digit 4 and 5, Bilateral Removal 5th Toenail." Ms. Stanbury insists that no one explained the nature of these procedures and that she did not know that she had consented to surgical procedures on both her feet or to anything other than the minor procedure Dr. Bacardi had described in his office several weeks earlier.

Dr. Bacardi performed extensive surgery on both feet while Ms. Stanbury was under a general anesthetic. During the mid-afternoon, Ms. Stanbury was released from the hospital in a wheelchair with both feet heavily bandaged. Ms. Stanbury described her feet as "[t]wo big white blobs." When Dr. Bacardi removed the surgical dressing during her first office visit on December 20, 1991, Ms. Stanbury stated that she was in "complete and utter shock" and that she "couldn't believe all that had been done. There were so many stitches and so many things, it was just unbelievable." She also noticed that the fifth toe on her right foot was not touching the floor but rather was sticking straight up in the air.

Ms. Stanbury had four more office visits with Dr. Bacardi between January 10 and March 17, 1992. On

April 3, 1992, Dr. Bacardi performed additional surgery to attempt to correct the misalignment of the fifth toe on Ms. Stanbury's right foot. During a post-operative office visit on May 5, 1992, Dr. Bacardi informed Ms. Stanbury that there was nothing more he could do for her and that it would take approximately one year for her feet to fully heal.

Ms. Stanbury and her husband filed a malpractice action against Dr. Bacardi and Hospital Corporation of America on April 30, 1993. They alleged that Dr. Bacardi had been negligent in advising her to have surgery, in performing the surgery itself, and in providing her with post-operative care. They also asserted that Dr. Bacardi had performed unnecessary surgery, that he had failed to obtain her consent to the surgery he performed on December 11, 1991, that he had ignored her complaints of pain and infection, and that he had falsified his office notes to conceal Ms. Stanbury's real condition. Dr. Bacardi responded by denying wrongdoing and by asserting that all the claims were barred by the statute of limitations.

The trial court directed a verdict for Dr. Bacardi at the close of the plaintiffs' proof on the theories of negligent post-operative care, ignoring Ms. Stanbury's complaints of pain and infection, and intentionally falsifying his office notes. It submitted the issues concerning lack of informed consent, advising and performing unnecessary surgery, and negligently performing the surgery to the jury. During the jury's deliberations, however, the trial court withdrew the claim for negligently performing the surgery from the jury. The jury returned a verdict awarding Ms. Stanbury $211,000 and Mr. Stanbury $10,000.

II.

*7 Until December 1974, negligence actions against health care providers, like all other actions for injuries to the person, were required to be filed within one year after the date of the wrongful act that caused the plaintiff's injury. *Albert v. Sherman*, 167 Tenn. 133, 135, 67 S.W.2d 140, 141 (1934); *Bodne v. Austin*, 156 Tenn. 353, 364-65, 2 S.W.2d 100, 103 (1928); Tenn.Code Ann. § 28-304. The two most common exceptions to this rule involved continuing torts and the fraudulent concealment of the injury. [FN1]

FN1. The facts of this case do not support Ms. Stanbury's claim that Dr. Bacardi fraudulently concealed her injury. It was evident to Ms. Stanbury as soon as she regained consciousness that Dr. Bacardi had performed surgery for which she had not consented. There was no way that Dr. Bacardi could have concealed from Ms. Stanbury that he had operated on her left foot in addition to her right foot.

The Eastern Section of this court adopted the continuing tort principle in 1938 in a case involving an employee who became disabled by breathing chemical particles in his employer's plant over an extended period of time. Noting that the employer had a duty to protect its employees from breathing these particles, the court held that the employer had committed "one continuous tort, beginning with the employment and ending only at the time of total disability of the employee and the termination of his employment." *Tennessee Eastman Corp. v. Newman*, 22 Tenn.App. 270, 279, 121 S.W.2d 130, 135 (1938). Accordingly, the Eastern Section held that the employee's action against the employer was timely since it was filed within one year of the onset of his disability and the termination of his employment. *Tennessee Eastman Corp. v. Newman*, 22 Tenn.App. at 279, 121 S.W.2d at 135.

Twenty-two years later, the Middle Section of this court extended the continuing tort principle to medical malpractice actions. In a case involving a surgical sponge that was negligently left in a patient's body for ten years, the court held that the statute of limitations would be tolled for the duration of the doctorpatient relationship when the plaintiff proved continuing negligent treatment by the physician. *Frazor v. Osborne*, 57 Tenn.App. 10, 19-20, 414

S.W.2d 118, 122-23 (1966). Accordingly, the continuing tort principle became known as the continuing treatment doctrine in the context of medical malpractice cases.

At about the same time, other victims of malpractice were urging the courts to adopt a discovery rule that would delay the accrual of the cause of action until a plaintiff discovered his or her injury. This court repeatedly declined to depart from the traditional rule that a medical malpractice plaintiff's cause of action accrues on the date that the wrongful act causing the injury occurs. *Clinard v. Pennington*, 59 Tenn.App. 128, 136, 438 S.W.2d 748, 752 (1968); *Hall v. De Saussure*, 41 Tenn.App. 572, 580, 297 S.W.2d 81, 85 (1956).

The Tennessee Supreme Court adopted the discovery rule on December 9, 1974, in a medical malpractice case where the continuing treatment doctrine was unavailable because the doctor-patient relationship had terminated approximately three years before suit was filed. The Court held that a cause of action for medical malpractice "accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury." *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn.1974). The Court did not address the relationship between the newly adopted discovery rule and the continuing treatment doctrine. However, Justice Harbison's separate concurrence implied that the statute of limitations continued to be tolled as long as the doctor-patient relationship continued even if the patient discovered the injury. *Teeters v. Currey*, 518 S.W.2d at 518.

***8** Approximately six months later the General Assembly included the *Teeters v. Currey* discovery rule in the Medical Malpractice Review Board and Claims Act of 1975.[FN2] Now codified at Tenn.Code Ann. § 29-26-116(a)(2) (1980), the legislative version of the discovery rule provides that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Thus, the statute of limitations for medical malpractice actions is tolled during the period that the plaintiff has not discovered that a wrong has occurred. *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn.1983). Discovery takes place when the plaintiff is aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of wrongful conduct. *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). These facts include the occasion, the manner, and the means by which the breach of duty that produced the injury occurred and the identity of the person who breached the duty. *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn.1982); *Hathaway v. Middle Tenn. Anesthesiology, P.C.*, 724 S.W.2d 355, 359 (Tenn.Ct.App.1986).

FN2. Act of May 21, 1975, ch. 299, § 15(a), 1975 Tenn. Pub. Acts 662, 671.

The courts did not address the relationship between the discovery rule and the continuing treatment doctrine until 1986 when the Eastern Section of this court heard an appeal involving the dismissal of a malpractice action for the over prescription of addictive drugs. Even though the patient filed suit within one year after the professional relationship with his physician ended, the Eastern Section held that the continuing treatment doctrine was inapplicable because another physician had informed him more than one year before the suit was filed that he was taking too many drugs. *French v. Fetzer*, C.A. No. 43, slip op. at 3 (Tenn.Ct.App. Feb. 20, 1986). The Tennessee Supreme Court granted the patient's application for permission to appeal and later issued a per curiam opinion affirming the Eastern Section's decision, stating: "we find there is no question but that plaintiff had actual knowledge of his malpractice claim no later than February, 1982 ... and that the subsequent treatment of plaintiff by defendant was in fact a continuation and did not involve new or different drugs."

French v. Fetzer, C.A. No. 43, slip op. at 2 (Tenn. June 22, 1987) (per curiam opinion not for publication).

Three years later, the Western Section of this court addressed the relationship between the discovery rule and the continuing tort principle in a case involving an employee who claimed to have been injured by prolonged use of a defective tractor. The Western Section stated

> We believe that the "continuous tort" doctrine must be applied in conjunction with the "discovery rule." Thus, in a case involving a continuing tort, the cause of action accrues at the time the professional relationship or course of treatment is terminated unless, under the "discovery rule," the cause of action is deemed to have accrued at a different point in time. A plaintiff is not entitled to a new limitations period to begin with the appearance of each new injury or complication.

*9 *Kenton v. United Technology,* Shelby Law No. 71, slip op. at 6 (Tenn.Ct.App. March 26, 1990) (no Tenn. R.App. P. 11 application filed). Accordingly, the court held that the employee's suit was barred because he had discovered his injury more than one year before filing suit.

One year later, the Middle Section of this court recognized similar reasoning in a medical malpractice case. The court held that the jury should decide whether "the plaintiff knew of the malpractice for a period prior to suit exceeding the statutory limitations period." *Higgins v. Estate of Crecraft,* App. No. 01-A-01-9008-CV-00311, slip op. at 13 (Tenn.Ct.App. Feb. 21, 1991) (no Tenn. R.App. P. 11 application filed). The Western Section reached a similar result three months later in a case involving lack of informed consent for hip replacement surgery. *Housh v. Morris,* 818 S.W.2d 39, 43-44 (Tenn.Ct.App.1991).

Two years later, the Middle Section invoked the continuing treatment rule to save a patient's cause of action against her psychiatrist from a summary judgment based on the one-year statute of limitations. *Roe v. Jefferson,* App. No. 01-A-01-9212-CV-00476, slip op. at 17 (Tenn. Ct.App. April 16, 1993). The Supreme Court, however, reversed the decision because it found that the patient had discovered the psychiatrist's wrongful conduct before their professional relationship ceased and more than one year before suit was filed. *Roe v. Jefferson,* 875 S.W.2d at 658. The Western Section applied the *Roe v. Jefferson* holding when it held that a patient's malpractice action against her psychotherapist accrued when she discovered that the defendant's conduct was wrong, not when her relationship with the defendant ended. *Clifton v. Bass,* 908 S.W.2d 205, 210 (Tenn.Ct.App.1995).

The cases decided since 1986 indicate that the continuation of a professional relationship no longer plays a role in determining when a cause of action for professional malpractice accrues. The Tennessee Supreme Court removed any doubt about this when it held that a cause of action for legal malpractice accrues when a client learns of his or her injury and that the injury was caused by the lawyer's negligence. *Carvell v. Bottoms,* 900 S.W.2d 23, 28 (Tenn.1995). Accordingly, the Court held that clients must sue their lawyers for malpractice within one year after discovering their injury, even if their lawyer is still representing them. *Carvell v. Bottoms,* 900 S.W.2d at 30.

The rule in both medical and legal malpractice actions is now the same. Notwithstanding the existence of an ongoing professional relationship, a cause of action for professional malpractice accrues and the statute of limitations begins to run when the patient or the client discovers, or reasonably should have discovered, that he or she has been injured by the negligent conduct of his or her lawyer or health care provider. The fact that the lawyer or health care provider continues representing or treating the client or patient

will not toll the running of the statute of limitations once the injury has been discovered.

III.

***10** Deciding that Ms. Stanbury's lack of informed consent claims were untimely cannot end our inquiry in this case. Ms. Stanbury also claimed that Dr. Bacardi performed the surgery on her feet in a negligent manner, that he negligently advised her to undergo unnecessary surgery, and that he performed unnecessary surgery on her feet. I will take these claims in turn.

A.

Negligent Performance of Surgery

Ms. Stanbury claimed that Dr. Bacardi performed the surgery on her feet in a negligent manner. The trial court declined to grant the doctor's motion for a directed verdict on the issue at the close of Ms. Stanbury's proof; however, it effectively withdrew the issue from the jury after deliberations began when the jury requested clarification of portions of the verdict form.[FN3] While I have serious misgivings about the manner in which the trial court disposed of this issue, the trial court's conduct was, at most, harmless error.

> FN3. During its deliberations, the jury sought clarification concerning question three on the verdict form that asked "Did the Defendant, Brian Bacardi, deviate from the recognized standard of care for podiatrists in this community by negligently performing surgical procedures on December 11, 1991, and/or April 3, 1992, on the Plaintiff, Theresa Stanbury?" The trial court agreed with the jury's characterization that this question concerned "the fact that surgery was performed, not how it was performed, not how successful it was." The trial court also instructed the jury that "as far as the operation itself, that's not part of the lawsuit."

Considering the record as a whole, I am unable to find any proof presented by Ms. Stanbury tending to show that Dr. Bacardi performed her surgery in a negligent manner. The only expert testimony remotely addressing this issue was that of Dr. James Rogers, a board certified podiatrist, who testified on Ms. Stanbury's behalf. Dr. Rogers stated that there was a misalignment of the bone where Dr. Bacardi performed the arthroplasty on Ms. Stanbury's right foot that did not exist before the surgery, but he did not opine that the misalignment was caused by Dr. Bacardi's negligent surgical technique.

Dr. Rogers's testimony does not establish that Dr. Bacardi performed the surgery negligently. Finders of fact cannot infer negligence from a bad result. *See, e.g., Johnson v. Lawrence,* 720 S.W.2d 50, 56 (Tenn.Ct.App.1986); *Redwood v. Raskind,* 49 Tenn.App. 69, 75-76, 350 S.W.2d 414, 417 (1961); *see also* Tenn.Code Ann. § 29-26-115(d)(1980) (the jury in a malpractice action shall be instructed that injury alone does not give rise to a presumption of the defendant's negligence). Thus, in medical malpractice cases, a plaintiff cannot establish a doctor's negligence merely by showing that an operation produced a bad result, *Butler v. Molinski,* 198 Tenn. 124, 133-34, 277 S.W.2d 448, 452 (1955), or even that aggravation followed the doctor's treatment. *Poor Sisters of St. Francis v. Long,* 190 Tenn. 434, 440, 230 S.W.2d 659, 662 (1950).

B.

The Unnecessary Surgery Claims

Ms. Stanbury also claimed that Dr. Bacardi negligently advised her to undergo surgery for the corn on her right fifth toe and that he also performed unnecessary surgery elsewhere on both of her feet. Dr. Bacardi asserted that these claims, like the informed consent claims, were time-barred because Ms. Stanbury filed suit more than one year after her surgery. Dr. Bacardi's argument is without merit because the running of the statute of limitations with regard to Ms. Stanbury's unnecessary surgery claims involves facts

and criteria that are quite different from those involved with the informed consent claims.

***11** The majority has decided to dismiss Ms. Stanbury's unnecessary surgery claims because she "does not rely upon this aspect of the rule" in her brief and because she cited no evidence that she "did not discover or should not reasonably [have] discovered that the surgery was unnecessary at least one year before this suit was filed." I find this reasoning both curious and entirely unpersuasive for three reasons. First, Dr. Bacardi, as the party seeking to dismiss Ms. Stanbury's claims based on the statute of limitations, had the burden of demonstrating that Ms. Stanbury's claims were time-barred. Second, Dr. Bacardi's statute of limitations argument with regard to Ms. Stanbury's unnecessary surgery claims is legally wrong. Third, Ms. Stanbury, as the appellee, is under no obligation to respond to arguments not made by the appellant.

We must deal with this issue head on because the jury's damage award is based on a general verdict that could have been based on its conclusion that Ms. Stanbury had not consented to all the surgery that Dr. Bacardi performed or that Dr. Bacardi had recommended and performed unnecessary surgery or both. Thus, even if Ms. Stanbury's informed consent claims are time-barred, she may still be entitled to recover on the unnecessary surgery claims unless they too are timebarred.

Disposing of the statute of limitations issue with regard to Ms. Stanbury's unnecessary surgery claims requires an understanding of the nature of the claims themselves. Ms. Stanbury claimed that Dr. Bacardi deviated from the standard of care for podiatrists by failing to follow a conservative treatment regime before recommending surgery on both her feet. Given that her chief complaint was pain associated solely with her right fifth toe, she presented expert testimony that Dr. Bacardi should have first attempted to alleviate her symptoms using conservative treatment measures such as shaving the corn, wearing wider shoes, or using shoe padding.

A doctor cannot be held responsible for choosing between two or more recognized courses of treatment. *McPeak v. Vanderbilt Univ. Hosp.*, 33 Tenn.App. 76, 79, 229 S.W.2d 150, 151 (1950). Presuming a careful diagnosis, a doctor's honest mistake in electing to perform surgery is a matter of judgment upon which a negligence action ordinarily cannot be predicated. *Burnett v. Layman*, 133 Tenn. 323, 328, 181 S.W. 157, 158 (1915). Both of Ms. Stanbury's experts testified, however, that performing surgery on Ms. Stanbury without first attempting more conservative treatments was not a recognized alternative treatment regime. Thus, electing to perform surgery without first attempting more conservative treatments was a deviation from the standard of care for podiatrists and was also prima facie evidence of Dr. Bacardi's malpractice.

The statute of limitations on Ms. Stanbury's unnecessary surgery claims could not have started to run until she discovered or reasonably should have discovered "the occasion, the manner, and the means by which a breach of duty occurred that produced [her] injuries." *Roe v. Jefferson*, 875 S.W.2d at 656. Thus, Ms. Stanbury would have had to discover that her surgery was unnecessary before her cause of action accrued. The fact that Ms. Stanbury was asymptomatic except for the corn on her right fifth toe is not, in and of itself, evidence that the surgery was unnecessary. Since Ms. Stanbury was a lay person, I would find that she did not discover that Dr. Bacardi had performed unnecessary surgery until another competent health care provider informed her that her surgery had been unnecessary.

***12** Thus, unlike the majority who are content to dismiss the entire case on statute of limitations grounds, I would hold that Ms. Stanbury's unnecessary surgery claims were timely. Prior to April 30, 1992-one year before the filing of the complaint-Ms. Stanbury knew that Dr. Bacardi had performed more surgery than she had consented to and that she had

experienced unanticipated complications. She had no reason to know that the surgery that Dr. Bacardi performed on her right fifth toe or elsewhere on either of her feet was unnecessary. Thus, even though the statute of limitations on her informed consent claim had started to run, the statute of limitations on her negligent surgery claims had not.

IV.

I would find that the trial court committed reversible error by submitting Ms. Stanbury's time-barred informed consent claims to the jury. Accordingly, I would vacate the judgment, but unlike the majority, I would not dismiss Ms. Stanbury's suit in its entirety. Since her unnecessary surgery claims are not timebarred, I would remand them for a new trial on these claims alone. She is not entitled to a second bite at the apple with regard to all the other theories of recovery that either were time-barred or were not proven during the first trial.

Tenn.App.,1996.
Stanbury v. Bacardi
Not Reported in S.W.2d, 1996 WL 200338 (Tenn.Ct.App.)

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69597

IN THE CIRCUIT COURT OF MADISON COUNTY TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK

Plaintiffs,

vs.

NO: C-11-87
JURY DEMANDED

WOMAN'S CLINIC, P.A. and
DR. RYAN ROY,

Defendants,

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants have filed a Motion for Summary Judgment contending that the Plaintiffs' claim is barred by the applicable statute of limitations. The Court conducted a hearing on the Defendants' Motion for Summary Judgment on April 12, 2012. After considering the Motion for Summary Judgment and the materials filed in support of the Motion, the response in opposition filed on behalf of the Plaintiffs, the arguments of counsel, and the entire record in this case, the Court, having considered the facts in the light most favorable to the Plaintiffs, has determined that the Defendants' Motion should be granted because the Plaintiffs' claim is barred by the applicable statute of limitations.

Because this is a medical malpractice case, the applicable statute of limitations is codified in Tenn. Code Ann. § 29-26-116(a)(1) and provides as follows: "The statute of limitations in malpractice actions shall be one (1) year as set forth in section 28-3-104." In addition, Tenn. Code Ann. § 29-26-116(a)(2) provides as follows: "If the alleged injury is not discovered within such one (1)

year period, the period of limitations shall be one (1) year from the date of such discovery." In discussing this statute, the Tennessee Supreme Court has stated that the statute of limitations "is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Roe v. Jefferson*, 875 S.W.2d 653, 656-57 (quoting *Hoffman v. Hospital Affiliates*, 652 S.W.2d 341, 344 (Tenn. 1983)). Moreover, the Tennessee Supreme Court has directed: "[i]t is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action'; the plaintiff is deemed to have discovered the right of action if he is aware of sufficient facts to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Roe*, 875 S.W.2d at 657. In *Sherrill v. Souder*, the Tennessee Supreme Court noted that "[n]either actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." 325 S.W.3d 584, 595 (Tenn. 2010)

Because the case at bar is a wrongful pregnancy case, the alleged injury is pregnancy. Therefore, the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant.

The record before the Court demonstrates the following undisputed facts:

1. On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant.

2. Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case.

3. Mrs. Speck had a history of regular and timely menstrual periods.

4. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009.

5. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant.

6. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results.

7. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time.

8. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate.

9. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs.

Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant.

10. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive.

Based upon Mrs. Speck's deposition testimony, she knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy.

Therefore, the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009.

Tenn. Code Ann. § 29-26-121(a)(1) requires any person to give written notice of a potential claim for medical malpractice at least sixty (60) days before the filing of a complaint based upon medical malpractice. Tenn. Code Ann. § 29-26-121(a)(3) states, "The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and the statutes of repose applicable to the provider, one of the following occurs, as established by the specific proof of service, which shall be filed with the complaint. . . ." The statute then proceeds to note that service of the written notice may be made by personal delivery or mailing of the notice. Therefore, the Court is required to determine

whether the Plaintiffs complied with Tenn. Code Ann. § 29-26-121 by giving written notice within the one year statute of limitations. Although the Court is aware of no case law that exists addressing the particular issue before the Court, the Court determines that the Plaintiffs did give timely pre-suit notice, because November 27, 2010 fell on a Saturday. Therefore, the Court concludes that the statute of limitations did not run until November 29, 2010, the following Monday. The Defendants contend that the statute does not provide additional time for serving the written pre-suit notice when the last day for doing so falls on a weekend or holiday. The Defendants note that the act required by the statute is not filing a complaint with the court; rather, the Defendants argue that the act is serving pre-suit notice one permissible method of which is by mail as the Plaintiffs did in this case. The Defendants argue that the Plaintiffs could have served written notice by mail, because the post office was open and operating on November 27, 2010. The Defendants argue that the notice was untimely, because the Plaintiffs failed to serve notice on November 27 by depositing notice in the mail. The Court rejects the Defendants' argument in this regard and determines that the Plaintiffs gave pre-suit notice within the statute of limitations.

The Court's analysis, however, does not end at this juncture, because Tenn. Code Ann. § 29-26-121(c) only extends the applicable statute of limitations for one hundred twenty (120) days from the date of the expiration of the statute of limitations assuming the plaintiff gives timely pre-suit notice. Therefore, the Court must determine whether the Plaintiffs' Complaint was filed within one hundred twenty days. As noted earlier, the statute of limitations ran, at the latest,

on November 29, 2010, and the Plaintiffs gave pre-suit notice on that day. One hundred twenty days from November 29, 2010 is March 29, 2011. Therefore, for the Plaintiffs to file their case within one hundred twenty days, the Complaint had to be filed, no later than March 29, 2011. The Plaintiffs' Complaint was filed on March 30, 2011. Thus, the Plaintiffs did not file their Complaint within one hundred twenty days. Thus, the claim was not timely as it was not filed within the statute of limitations or the period within which the statute of limitations was extended by operation of Tenn. Code Ann. § 29-26-121.

For the reasons noted above, the Court concludes that the Defendants' Motion for Summary Judgment should be granted, because the Plaintiffs' claim is barred by the one year statute of limitations.

It is hereby ordered that the Defendants' Motion for Summary Judgment is granted and that the Plaintiffs' case is dismissed with prejudice. The Court finds that there is no genuine issue as to any material fact and that the Defendants are entitled to a judgment as a matter of law. Finding no reason for delay, the Court expressly directs the entry of a final judgment in favor of the Defendants.

IT IS SO ORDERED.

JUDGE ROY MORGAN, JR.

April 27, 2012
Date

APPROVED FOR ENTRY:

MARTY R. PHILLIPS
MICHELLE GREENWAY SELLERS
Attorney for Defendants

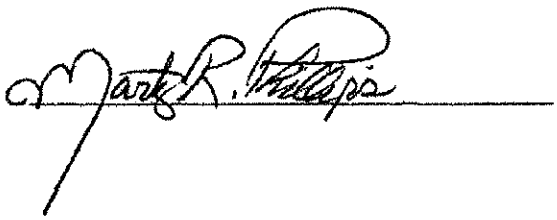
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Mr. Richard Glassman (#7815)
Glassman, Edwards, Wyatt, Tuttle & Cox, P.C.
26 N. Second Street
Memphis, TN 38103
(901) 527-4673 – phone
(901) 521-0940 – fax

Attorney for Plaintiffs

This the 24th day of April, 2012.



CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to

Mr. Richard Glassman
Attorney at Law
26 N. Second Street
Memphis, TN 38103

Mr. Marty R. Phillips
Attorney at Law
P.O. Box 1147
Jackson, TN 38302-1147

on this the 27 day of April, 2012.

Candice Wilson

Candice Wilson, Adm. Asst. to Judge Morgan

IN THE CIRCUIT COURT OF MADISON COUNTY TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK

Plaintiffs,

vs.

NO: C-11-87
JURY DEMANDED

WOMAN'S CLINIC, P.A. and
DR. RYAN ROY,

Defendants,

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On April 12, 2012, the Court heard arguments on the Defendants' Motion for Partial Summary Judgment, which seeks to dismiss the Plaintiffs' claims to the extent those claims seek damages not permitted by *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). Having considered the Defendants' Motion, the materials filed in support of the Motion, the arguments of counsel, and the entire record in this case, the Court determined that the Defendants' Motion should be granted and the damages of the plaintiffs should be limited in this case to those enumerated in Smith v Gore .

Therefore, the Court determines that there is no genuine issue as to any material fact and that the Defendants are entitled to a judgment as a matter of law to the extent the Plaintiffs' claims exceed those damages permitted by *Smith v. Gore*. The Court is not making a ruling that any damages are supported by the proof at this time, because the Court has heard no proof. The Court is merely

ruling that Tennessee law does not permit recovery of some of the damages the Plaintiffs seek in this case even if the proof supported those damages.

IT IS SO ORDERED.

JUDGE ROY MORGAN JR.

April 27, 2012
Date

APPROVED AS TO FORM:

RICHARD GLASSMAN
Attorney for Plaintiffs

MARTY R. PHILLIPS
MICHELLE GREENWAY SELLERS
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to

Mr. Richard Glassman
Attorney at Law
26 N. Second Street
Memphis, TN 38103

Mr. Marty R. Phillips
Attorney at Law
P.O. Box 1147
Jackson, TN 38302-1147

on this the 27 day of April, 2012.

Candice Wilson

Candice Wilson, Adm. Asst. to Judge Morgan

IN THE CIRCUIT COURT OF MADISON COUNTY TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

FILED
AUG 09 2012
KATHY BLOUNT, CIRCUIT COURT CLERK
DEPUTY CLERK 3:15 P.M.
A.M.

JULIE SPECK and KEVIN SPECK

Plaintiffs,

vs.

NO: C-11-87
JURY DEMANDED

WOMAN'S CLINIC, P.A. and
DR. RYAN ROY,

Defendants,

ORDER DENYING PLAINTIFFS' MOTION TO ALTER AND/OR AMEND JUDGMENT/RECONSIDER GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On July 13, 2012, the Court conducted a hearing on the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. After considering the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment, the Defendants' Reply in Opposition to Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the arguments of counsel, the deposition of Julie Speck, the deposition of Kevin Speck, the deposition of Ryan Roy, M.D., and the entire record in this case, the Court has determined that the Plaintiffs' Motion should be denied.

The Court considered Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment to be filed pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure. "The

purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). The Court considered the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure and finds that no errors as to law or facts have arisen as a result of the Court overlooking or failing to consider matters. The Court finds that a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003). The Court finds that Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment fails to meet any of the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment.

The Court finds that the Supplemental Affidavit of Julie Speck should not be considered. The Court finds that the Supplemental Affidavit of Julie Speck is not a clarification of Mrs. Speck's prior testimony. After comparing the Affidavit of Julie Speck which was filed in response to the Defendants' Motion for Summary Judgment with the Supplemental Affidavit of Julie Speck which was filed in support of the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the Court finds that the Supplemental Affidavit presents additional evidence that was clearly available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment. The

Supplemental Affidavit attempts to create an issue of material fact after an adverse ruling of this Court. The Court finds that the Supplemental Affidavit of Julie Speck is inconsistent with Mrs. Speck's prior testimony. The information contained in the Supplemental Affidavit of Julie Speck was not mentioned in Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs, the depositions of Mr. Speck, Mrs. Speck, or Ryan Roy, M.D., or the Affidavit of Julie Speck. Plaintiffs offer no plausible reason for failing to present the evidence contained in the Supplemental Affidavit of Julie Speck prior to the hearing on Defendants' Motion for Summary Judgment.

Notwithstanding the Court's findings that the Plaintiffs have failed to satisfy the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure, failed to meet the grounds of Rule 59.04 of the Tennessee Rules of Civil Procedure, and that the Supplemental Affidavit of Julie Speck should not be considered, the Court finds that even if the Supplemental Affidavit of Julie Speck was considered, Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment would be denied. Because the case at bar is a wrongful pregnancy case, the alleged injury is pregnancy. Therefore, the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant, not when she was certain that she was pregnant. The record before the Court demonstrates the following: On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant. Mrs. Speck had been pregnant four (4) times before the pregnancy at

issue in this case. Mrs. Speck had a history of regular and timely menstrual periods. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs. Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive. The Supplemental Affidavit of Julie Speck does

not dispute or change the ten (10) undisputed material facts set forth by the Court in the Order Granting Defendants' Motion for Summary Judgment.

The Court finds that Mrs. Speck knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy. Reasonable minds could not disagree that Plaintiffs were aware of sufficient facts to put them on inquiry notice that Mrs. Speck was pregnant no later than November 27, 2009. Therefore, the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009.

For the reasons noted above, the Court concludes that the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment should be denied.

IT IS SO ORDERED.

JUDGE ROY MORGAN, JR.

August 9, 2012
Date

APPROVED FOR ENTRY:

Michelle Sellers

MARTY R. PHILLIPS (#14990)
MICHELLE GREENWAY SELLERS (#20769)
Rainey, Kizer, Reviere & Bell, P.L.C.
105 S. Highland Avenue
Jackson, TN 38301

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Mr. Richard Glassman (#7815)
Glassman, Edwards, Wyatt, Tuttle & Cox, P.C.
26 N. Second Street
Memphis, TN 38103
(901) 527-4673 – phone
(901) 521-0940 – fax

Attorney for Plaintiffs

This the 30th day of July, 2012.

Michelle Sellers

IN THE CIRCUIT COURT OF MADISON COUNTY, TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK,

Plaintiffs,

vs. No. C-11-87

WOMAN'S CLINIC P.A. and
DR. RYAN ROY,

Defendants.

PLAINTIFFS' ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFFS

COMES NOW Plaintiffs, by and through undersigned counsel, and for their Answers to Defendants' First Set of Interrogatories to Plaintiffs in accordance with Rules 26 and 33 of the Tennessee Rules of Civil Procedure, state as follows:

INTERROGATORY NO.1: Please state the following:

(a) full name,
(b) any nicknames or aliases,
(c) social security number,
(d) date of birth,
(e) driver's license number,
(f) home address,
(g) home telephone number, and
(h) marital history, including current marital status and spouse's name.

ANSWER:

(a) Julie Ann Speck
(b) None
(c) To be provided under separate correspondence.
(d) 12-14-77
(e) 085383418
(f) 119 Robin Circle. Middleton, TN 38052
(g) 731-376-1569
(h) Divorced, remarried to Kevin Speck

(a) Kevin Marshall Speck
(b) None
(c) To be provided under separate correspondence.
(d) 075233531
(e) 8/31/1975
(f) 119 Robin Circle. Middleton, TN 38052
(g) 731-376-1569
(h) Divorced, remarried to Julie Speck

INTERROGATORY NO. 2: Furnish the names, addresses and occupations of persons who have or purport to have knowledge or information pertaining to the circumstances surrounding or arising out of the allegations and incidents described in the complaint; and, insofar as you know, state the nature of such knowledge or information, giving reference to each person as that person's knowledge pertains to the subject matter that you describe (E.g., Jane Doe; 1 Main Street, Jackson, Tennessee; R.N. ! Ms. Doe is aware of the fact that she heard the defendant Jones tell the plaintiff that she would give her a written guarantee that she would fully recover).

ANSWER:

Dr. Lolly Eldridge
Dr. William Pierce
Dr. Christopher Welsch
2863 Highway 45 Bypass, Jackson, Tn 38305.
Treated Julie Speck during pregnancy for routine visits.

Dr. Donald Wilson
2863 Highway 45 Bypass, Jackson, Tn 38305.
Treated me during my pregnancy and delivered the baby. He also performed a tubal ligation and removed what was left of the ESSURE after the birth.

Dr. Jason Sammons, 11 medical Park Ct., Jackson, TN 38305
Dentist that removed a wisdom tooth during my pregnancy.

William Thornton, 100 Chickadee Avenue, Middleton, TN 38052
Licensed Practical Nurse. Mr. Thornton treated me during my pregnancy for minor medical problems.

Dr. Richard Wagner, 620 Skyline Drive, Jackson, TN 38301.
I was sent to see him by the doctors at the Jackson Clinic because I was taking Paxil before I knew I was pregnant.

Dr. Glynn Wittber, 2863 Hway 45 Bypass, Jackson, TN 38305
Treated me during my pregnancy for my first visit to the Jackson Clinic.

Also, all employees, representatives, and/or agents of the above named physicians and/or their offices.

Kevin Speck, 119 robin Circle, Middleton, TN 38052. My husand.
Julie's parents, Beverly & Carlton Davis, 740 Pulse Road, Middleton, TN 38052

Julie's brother and sister in law. 680 Pulse Rd, Middleton, TN 38052

Julie's mother and father in law, Thelbert and Gwen Speck, 285 Powers Rd, Middleton, TN 38052

INTERROGATORY NO.3: Identify each person whom you expect to call as an expert witness at the trial of this case, and as to each such expert witness, state:

I. His/her name, address and occupation or profession (if a specialist, then name the specialty);

II. The subject matter on which he/she is expected to testify;

III. The substance of the facts and opinions to which he/she is expected to testify;

IV. A summary of the grounds for each opinion;

V. The expert's qualifications, including but not limited, a list of all publications authored in the previous 10 years;

VI. A list of all other cases in which, during the previous four years, the witness testified as an expert in a hearing, deposition, trial, or administrative or arbitration proceeding, including as part of the list the case name, docket number, and jurisdiction for court or administrative proceedings and, for arbitrations, information sufficient to identify the counsel to the parties in the arbitration; and

VII. A statement of the compensation to be paid to the expert for the study and testimony in the case.

ANSWER: Counsel for Plaintiffs have not yet decided which evidence and/or what expert(s) will be used at trial; however, Counsel for Plaintiff reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to which evidence and/or expert(s) will be used at trial.

Plaintiffs do hereby cross-designate any and all experts designated by any other Party to this case ("Parties") and specifically notifies all other Parties that

Plaintiffs may rely upon the opinions of other Parties' experts with regard to any matters related to this cause. Plaintiffs hereby incorporate the expert designations, reports, and resumes provided or to be provided by the other parties to this litigation as if fully set forth at length and hereby incorporates same by reference as if copied verbatim.

Plaintiffs specifically advise all other Parties that, should any Party designate any expert(s) and should the same not be a Party to this cause at the time of trial, or should same choose not to call any such expert(s) that it designated in this cause at the time of trial, or should the other Party(s) de-designate or withdraw any such expert designation, Plaintiffs may call these witnesses to testify at the time of trial. Plaintiffs do no not by this designation recognize the qualifications of any such witnesses/experts to render expert opinions in this cause, nor do these Plaintiffs accept, recognize, adopt or otherwise validate any of those opinions. Through this designation, Plaintiffs are simply reserving their right to elicit expert opinion testimony from any of these witnesses at the time of trial. By designating these experts, Plaintiffs do not waive their right to challenge the qualifications or opinions of any parties' through appropriate motions, nor do Plaintiffs waive their right to seek exclusion of any such experts.

Plaintiffs reserve the right to elicit by way of cross-examination, opinion testimony from experts designated and called by other parties to this lawsuit, if any, and reserves the right to call as referenced above, as witnesses associated with adverse parties, any of the experts identified by other parties to this lawsuit, if any.

Plaintiffs also reserve the right to call undesignated rebuttal expert witnesses who testimony cannot be reasonably foreseen until the presentation of evidence at trial.

Plaintiffs reserve the right to withdraw the designation of any expert and aver positively that any such previously designated expert will not be called as a witness at trial, and to re-designate the same as a consulting expert.

Plaintiffs reserves the right to elicit any expert or lay opinion testimony at the time of trial which would be truthful, of benefit to the court and/or the jury to determine material issues of fact, and upon which would not violate any existing court order, or the Tennessee Rules of Civil Procedure, or the Tennessee Rules of Evidence.

INTERROGATORY NO. 4: List, identify by name, title, location, and describe the subject matter of the contents of each document, record, photograph, statute, ordinance, protocol, standard or code of which you are aware which is or may be relevant to this action, and furnish the name and present address of each person known to have custody of each document, record,

photograph, statute, ordinance, protocol, standard or code.

ANSWER: **Counsel for Plaintiffs have not yet decided which evidence and/or what expert(s) will be used at trial; however, Counsel for Plaintiffs reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to which evidence and/or expert(s) will be used at trial.**

INTERROGATORY NO. 5: If your claimed elements of damages have been paid, or are payable wholly or partially, by another person, corporation, or insurance company, furnish the following with respect to each:

a. The date of payment or date payment will be due;

b. The name and address of the person, corporation, insurance company, or entity making or due to make such payment;

c. If any payments were made by an insurance company, state whether *or* not the Plaintiffs paid any portion of the premium for such insurance policy, and if any other person or entity made any payment of the premium, furnish the name and address of the person or entity making such payment, her or her relationship to the Plaintiff, and provide adequate reference to the insurance company and payment involved; and

d. Have any expenses been forgiven or written off? If so, please describe.

ANSWER:

a. **Please see medical records/billings; will supplement as information becomes available.**
b. **Blue Cross Blue Shield & Medicaid**
c. **Insurance Premiums are taken out of Kevin Speck's checks;**
d. **Dr. Wagner's office wrote off approximately $130 due to the incorrect filing of it with the insurance company. Other than insurance adjustments, not that I am aware of**

INTERROGATORY NO. 6: Describe the injuries, symptoms and disabilities Plaintiffs claim to have received or suffered as a result of the acts or omissions of these Defendants and state when such injuries, illnesses or disabilities first manifested themselves.

ANSWER: **Plaintiffs encountered an unwanted pregnancy that was confirmed by Dr. Roy on 12/1/2009. Baby was born July 21, 2010. Please also refer to the complaint filed herein.**

INTERROGATORY NO. 7: With respect to each such claimed injury, symptoms, or disability, state whether or not Julie Speck has now fully recovered therefrom. If so, state the approximate date upon which recovery was complete and, if not, state when it is contemplated that recovery will be complete or whether it will be claimed that such injury, illness or disability will be permanent.

ANSWER: I was no longer pregnant after the baby was delivered on July 21, 2010, but the effects of an unwanted pregnancy will last the rest of our lives. Please also refer to the complaint filed herein.

INTERROGATORY NO. 8: With regard to the allegations of negligence in the complaint, please state:

a. The facts which forms the basis of each allegation and/or supports such allegation;

b. The identity of the person or persons with knowledge of those facts forming or supporting each such allegation furnishing the name and address of such persons for each allegation (E.g., Ms. Sue Doe saw Dr. Jones read her fetal monitor strip and heard her say I should have done a section six hours ago-- this testimony supports allegation in paragraph 5(b) of the complaint); and

c. The identity of any tangible evidence supporting each allegation by describing each item of tangible evidence and giving the name and address of its present custodian.

ANSWER:

a. Please refer to complaint and medical/billing records

b. Dr. Roy reported that in retrospect, he could see there was a problem; also see #2.

c. Please refer to the medical records.

INTERROGATORY NO. 9: If you were present or if someone else has told you that they were present during the course of a conversation with Dr. Ryan Roy or any other physician or employee at the Woman's Clinic, P.A., which is relevant to this litigation, state the date and place of each such conversation, the name and address of each person present during or participating in each conversation, and the substance of each statement made by each such person, identifying the person who made each such statement.

ANSWER: **Dr. Roy's Nurse (name unknown); Husband, Kevin Speck**

INTERROGATORY NO. 10: Furnish the names and addresses of the health care providers, including without limitation, each medical doctor, psychologist, psychiatrist, chiropractor, osteopath, hospital or clinic visited by Julie Speck as a patient or in which she was confined for the purpose of examination and treatment for ten (10) years prior to the date of the alleged malpractice.

ANSWER:

Dr. Ryan Roy
Dr. Brad Adkins
Dr. J. Michael Epps
Dr. Molly Rheney
Dr. Paul Gray
Dr. Jadhav Boyapati
Dr. David Soll
FNP Betsy Swindle
WHNP LaCinda Butler
The Woman's Clinic
244 Coatsland Drive, Jackson TN

Jackson Madison County General Hospital
620 Skyline Drive, Jackson, TN

Bolivar General Hospital
650 Nuckolls Road, Bolivar, TN

Dr. Pravin Patel
407 W. Lafayette St.
Bolivar, TN 38008

Dr. Steven Spring, Psychiatrist
118 S. Main Street
Bolivar, TN 38008

Dr. Karl Warren, Dentist
137 Main Street North
Middleton, TN 38502

Charlotte Montgomery, LPN
727 S. Main Street
Middleton, TN 38052

INTERROGATORY NO. 11: Furnish the name and address of the medical practitioners, hospitals, clinics or other institutions visited by Julie Speck since December 15, 2008, for examination, evaluation or treatment with respect to any injury, illness or disability which she claims to have sustained as a result of the incident alleged in the complaint, stating the diagnosis and prognosis made by each such practitioner or health care provider, and dates of each such visit. (A complete copy of the chart or office record of each such health care provider may be attached to your answers as a response to this interrogatory.)

ANSWER: Please see answer to #2 above and medical records.

INTERROGATORY NO. 12: If you contend that a document relevant to this lawsuit, including, but not limited to, the medical record of Julie Speck at the Woman's Clinic, has been altered or falsified in any way, then answer the following:

a. Identify the document;

b. Specifically identify every part of the document that you contend has been altered or falsified;

c. State the manner in which you contend the document has been altered or falsified; and

d. Identify the person you contend is responsible for the alteration or falsification.

ANSWER:

a. Defendants' Answer to the Complaint
b. Paragraph #12
c. Defendants admit that Dr. Timothy Crossett performed the surgery at West Tennessee Surgery Center. Dr. Roy performed the procedure at Jackson Madison County General Hospital.
d. n/a

INTERROGATORY NO. 13: If Julie Speck will be claiming lost earnings or lost earning capacity as the result of acts or omissions of these Defendants, furnish the following:

a. State the period of time during which Julie Speck claims she was unable to work as a result of the acts or omissions of these Defendants, the amount of earnings she claims

were lost as a result of her inability to work, and the manner in which such amount is computed.

b. If loss of earning capacity or permanent impairment is claimed, state what jobs or occupations she contends were lost, what efforts she made to return to work, and the name and address of each physician who has told her that she has sustained any permanent impairment.

ANSWER: Not applicable.

INTERROGATORY NO. 14: Please list the specific dollar amounts claimed by you as special damages for (a) medical, dental or related services; (b) hospital expenses; (c) loss of earnings; (d) all other items of special damages, naming each category and listing the dollar amount claimed for each and (e) for each expense claimed indicate (i) whether the expense has been paid; (ii) who paid the expense; (iii) the amount actually paid; (iv) whether a lien or right of subrogation exists; (v) the name and address of the entity who holds the lien or right of subrogation; and (vi) the exact amount of the lien or subrogation interest.

ANSWER: This answer will be supplemented as information becomes available.

INTERROGATORY NO. 15: If you have ever been arrested or indicted for a criminal offense that could have resulted in a jail sentence, give the date and place of each such arrest or indictment, the charge placed against you, and the disposition of the case or charge.

ANSWER: None.

INTERROGATORY NO. 16: If you or anyone acting on your behalf has obtained statements in any form from any persons regarding this litigation, furnish the name and address of the person from whom such statements were taken, the names and addresses of the persons having custody of such statements, and whether such statements were written, preserved by recording device, by court reporter, by stenographer, or otherwise.

ANSWER: None, other than statements contained in the medical records.

INTERROGATORY NO. 17: If you have ever filed any other suit or asserted any other claim for damages arising out of personal injury, illness, disability, or property damage suffered by you or any of your children, furnish the date and place such suit or claim was instituted or asserted, the names of all parties involved, and the nature of the injury, illness, disability, or property damage for which the suit or claim was filed or asserted.

ANSWER: None.

INTERROGATORY NO. 18: If you ever filed a claim with or applied to the United States Veterans Administration, the Social Security Administration, or any federal, state, municipal or other governmental agency for disability benefits, dental or orthodontic treatment, medical or dental expenses, medical treatment, hospitalization or related benefits, state when, where and with what agency the claim or application was filed and the nature of the injury, illness or disability for which the claim or application was filed.

ANSWER: Social Security Administration. Filed for disability for anxiety, panic attacks and depression. Claim was denied.

INTERROGATORY NO. 19: If you, your attorney, or any expert witness on your behalf intends to rely upon any text book, scientific journal, or treatise to support your claim, furnish the exact title, publisher, author and date of publication of each such work.

ANSWER: Counsel for Plaintiffs has not yet decided which, if any, text books, scientific journals, or treatises or what expert(s), if any, will be used at trial; however, Counsel for Plaintiffs reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to the above.

INTERROGATORY NO. 20: Please furnish the names, addresses and approximate ages of each of your relatives (by blood and marriage) who presently reside in Madison County.

ANSWER: None.

INTERROGATORY NO. 21: Describe the charts, models, diagrams and similar devices which the Plaintiffs or their attorney or any expert identified in your answers to these interrogatories expects or intends to use in this litigation and in the trial, if any.

ANSWER: Counsel for Plaintiffs has not yet decided which, if any, charts, models, diagrams and similar devices or what expert(s), if any, will be used at trial; however, Counsel for Plaintiffs reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to the above.

INTERROGATORY NO. 22: List the names and addresses of the pharmacies Plaintiffs used in the last ten (10) years.

ANSWER:

Fred's Pharmacy, 110 Chickadee Avenue, Middleton, TN 38052
Wal-Mart, 1604 W. Market Street, Bolivar, Tn 38008
Medical Arts Pharmacy, 407 W. Lafayette Street, Bolivar, TN 38008
Wal-mart, 2717 S. Highland, Jackson, TN 38301
Walgreens, 1405 S. Highland Drive, Jackson, TN 38301
Walgreens, 601 Skyline Drive, Jackson, TN 38301
Walgreens, 1332 N. Highland Avenue, Jackson, TN 38301
Walgreens, 3144 N. Highland Avenue, Jackson, TN 38305
Walgreens, 384 Oil Well Road, Jackson, TN 38305

INTERROGATORY NO. 23: Describe the extent of Julie Speck's education, including all schools attended, the dates of attendance at each school identified, and any and all degrees received.

ANSWER: Middleton Elementary School 1983-1990. Middleton High School 1990-1996. Graduated 1996.

INTERROGATORY NO. 24: State whether any medical treatment you received for injuries alleged in the Complaint was or is being paid for by Medicare or has been submitted to Medicare for payment.

ANSWER: Received Medicaid throughout pregnancy.

INTERROGATORY NO. 25: If Plaintiffs have applied for or received Medicare benefits, state your Medicare Health Insurance Claim Number (HICN) along with your current address and any address you have had in the past ten (10) years.

ANSWER: Recipient ID# 35501026789

INTERROGATORY NO. 26: If you are currently represented by or become represented by an attorney, guardian/conservator, or other representative during the course of this litigation, please state the representative's full name, mailing address, phone number, and Tax ID.

ANSWER: The undersigned is our attorney of record. TAX ID #62-0953325

INTERROGATORY NO. 27: For purposes of Medicare, please state whether the Plaintiffs have end stage renal disease.

ANSWER: None.

69597-MRP

ANSWERED BY:

STATE OF TENNESSEE

COUNTY OF ~~MADISON~~ Hardeman

I, JULIE SPECK, having been first duly sworn, make oath that the foregoing answers to interrogatories are true and correct.

This the 11th day of August, 2011.

Julie Speck
JULIE SPECK

Sworn to and subscribed before me this the 11th day of August, 2011.

Jo Doss
Notary Public

My commission expires: 1-22-2014

JO DOSS
STATE OF TENNESSEE NOTARY PUBLIC
HARDEMAN COUNTY, TN

STATE OF TENNESSEE

COUNTY OF MADISON Hardeman

I, KEVIN SPECK, having been first duly sworn, make oath that the foregoing answers to interrogatories are true and correct.

This the 11th day of August, 2011.

Kevin Speck
KEVIN SPECK

Sworn to and subscribed before me this the 11th day of August, 2011.

Jo Doss
Notary Public

My commission expires: 1-22-2014

JO DOSS
STATE OF TENNESSEE NOTARY PUBLIC
HARDEMAN COUNTY, TN

Respectfully submitted:

GLASSMAN, EDWARDS, WYATT,
TUTTLE & COX, P.C.

BY: _____

Richard Glassman (#7815)
Attorney for Plaintiffs
26 N. Second Street
Memphis, TN 38103
(901) 527-4673 – phone
(901) 521-0940 – fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on this 26 day of August, 2011, by Email or U.S. Mail, postage prepaid to:

Mr. Marty R. Phillips
Michelle Greenway Sellers
Rainey, Kizer, Reviere & Bell, PLC
105 S. Highland Avenue
PO BOX 1147
Jackson, TN 38302-1147

_____
Richard Glassman

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
WESTERN DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK

Plaintiffs/Appellants,

vs.

NO: W2012-02111-COA-R3-CV
On Appeal from the Circuit Court of Madison County, Tennessee No. C-11-87

WOMAN'S CLINIC, P.A. and DR. RYAN ROY,

Defendants/Appellees.

DEFENDANTS/APPELLEES' BRIEF

MARTY R. PHILLIPS (#14990)
MICHELLE GREENWAY SELLERS (#20769)
Rainey, Kizer, Reviere & Bell, P.L.C.
105 S. Highland Avenue
Jackson, TN 38301

Attorneys for Defendants/Appellees

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court correctly granted summary judgment to Defendants on the basis that Plaintiffs' claim is barred by the applicable statute of limitations.

II. Whether the trial court correctly denied Plaintiffs' Motion to Alter and/or Amend.

III. Whether the trial court correctly granted Defendants' Motion for Partial Summary Judgment.

STATEMENT OF THE CASE

This is a medical malpractice case in which the Plaintiffs contend that Mrs. Speck wrongfully became pregnant following a sterilization procedure which Dr. Roy performed.[1] Plaintiffs filed a Complaint on March 30, 2011, alleging that Ryan Roy, M.D. and Woman's Clinic, P.A. (hereinafter "Dr. Roy" or "Defendants") committed medical malpractice and proximately caused injuries to Plaintiffs. (R. Vol. 1 at 1-9.) Defendants filed an Answer denying all allegations of medical negligence. Defendants also asserted the following defenses:

> SECOND DEFENSE
>
> Plaintiffs' cause of action is barred by the applicable statute of limitations codified at Tennessee Code Annotated § 29-26-116(a)(1).
>
> NINTH DEFENSE
>
> Plaintiffs have failed to state a claim for relief under *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). To the extent the complaint seeks damages beyond those permitted by *Smith v. Gore*, the claim for those damages should be dismissed.

(R. Vol. 1 at 14-15.)

On September 21, 2011, the depositions of Plaintiff Julie Speck, Plaintiff Kevin Speck, and Defendant Dr. Roy were taken. (R. Vols. 5, 6, 7.) On February 2, 2012, Defendants filed a Motion for Summary Judgment based on Plaintiffs' failure to timely file their Complaint within one year and one hundred twenty days of discovery of the injury (pregnancy) as required by Tennessee Code Annotated § 29-26-116 and § 29-26-121. (R. Vol. 1 at 47-48). Defendants' Motion for Summary Judgment was accompanied by a Memorandum in Support of Defendants' Motion for Summary Judgment (R. Vol. 1 at 53-77) and Rule

[1] References to the record on appeal shall be designated "R. Vol. __ at __."

56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment (R. Vol. 9).

On April 5, 2012, Plaintiffs filed the Affidavit of Julie Speck. (R. Vol. 1 at 89-92.) Plaintiffs responded to Defendants' Motion for Summary Judgment on April 9, 2012. (R. Vol. 1 at 82-84.) In the Response to the Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, Plaintiffs admitted that Julie Speck underwent an Essure sterilization procedure performed by Dr. Roy on August 25, 2008 and that Plaintiffs filed a Complaint on March 30, 2011 alleging that Dr. Roy provided negligent medical treatment to Plaintiff. (R. Vol. 1 at 85-88.) Plaintiffs did not specifically dispute the remaining statements and provide specific citations to the record. Instead, Plaintiffs referred the Court to the Affidavit of Julie Speck. (R. Vol. 1 at 85-88.) The Affidavit of Julie Speck does not demonstrate that the remaining facts are disputed.

On April 11, 2012, Defendants filed a Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment. (R. Vol. 1 at 101-129.) Defendants also filed the Affidavit of Ryan Roy, M.D. in response to Plaintiffs' reply. (R. Vol. 1 at 96-100.) The Affidavit of Ryan Roy, M.D. provides uncontroverted expert proof that ultrasound is not used to confirm whether or not a patient is pregnant. (R. Vol. 1 at 96.) Defendants' Motion for Summary Judgment was heard on April 12, 2012, at which time the trial court granted Defendants' Motion for Summary Judgment finding that Plaintiffs' alleged injury is pregnancy and the issue is when the Plaintiff was aware of sufficient facts to put

her on inquiry notice that she was pregnant. (R. Vol. 1 at 135-142.) By Order entered on April 27, 2012, the trial court dismissed the action against Defendants because Plaintiffs had failed to file their Complaint within the applicable statute of limitations. The trial court found that based upon Mrs. Speck's deposition testimony, she knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy. (R. Vol. 1 at 135-142.) The Court found that the Plaintiffs' Complaint was barred by the statute of limitations because the claim was not filed within the statute of limitations or the period in which the statute of limitations was extended by operation of Tennessee Code Annotated § 29-26-121.

On April 16, 2012, Plaintiffs filed a Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 93-95.) On April 24, 2012, Plaintiffs served a Supplemental Affidavit of Plaintiff Julie Speck. (R. Vol. 1 at 132.) On May 2, 2012, Plaintiffs refiled Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 156-158.) On July 6, 2012, Defendants filed a response in opposition to the Motion. (R. Vol. 2 at 165-231.) On July 13, 2012, the trial court heard argument on Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment and entered an Order denying the Motion on August 9, 2012

finding that the motion didn't meet the standard set for in Tenn. Rule Civ. Pro. 59.04. (R. Vol. 2 at 234-239; R. Vol. 4.))(copy attached in Appendix.)

The Defendants also filed a Motion for Partial Summary Judgment (R. Vol. 1 at 49-50), Memorandum in Support of Defendants' Motion for Partial Summary Judgment (R. Vol. 1 at 29-46), and Rule 56.03 Statement of Undisputed Material Facts (R. Vol. 1 at 51-52) on February 1, 2012 contending that Tennessee law does not allow Plaintiffs to recover for costs of raising, educating, nurturing, etc. of the child born subsequent to the procedure conducted by Dr. Roy. Plaintiffs failed to file a response to Defendants' Motion for Partial Summary Judgment or Defendants' Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Partial Summary Judgment. Defendants' Motion for Partial Summary Judgment was heard on April 12, 2012, at which time the trial court granted Defendants' Motion for Partial Summary Judgment to the extent the Plaintiffs' claims exceed those damages permitted by *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987).

On September 4, 2012, Plaintiffs filed a Notice of Appeal from the Order Denying Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment, Order Granting Defendants' Motion for Summary Judgment, and Order Granting Defendants' Motion for Partial Summary Judgment. (R. Vol. 2 at 240-241).

STATEMENT OF FACTS

On August 4, 2008, Julie Speck signed an Essure Hysteroscopic Tubal Occlusion Consent form. (R. Vol. 6 at 125.) Mrs. Speck read the Essure

Hysteroscopic Tubal Occlusion Consent form before she signed it. (R. Vol. 6 at 45.) She signed the Essure Hysteroscopic Tubal Occlusion Consent form after talking to Dr. Roy about the Essure procedure on August 4, 2008. (R. Vol. 6 at 45.) Mrs. Speck knew that there was still a chance she could get pregnant after having the Essure procedure. (R. Vol. 6 at 45.) The Essure Hysteroscopic Tubal Occlusion Consent form states: "Failure. Like all methods of birth control, the Essure procedure should not be considered one hundred percent effective." (R. Vol. 6 at 45.)

On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Julie Speck at the Woman's Clinic. (R. Vol. 1 at 2; R. Vol. 6 at 28, 46.) Prior to the procedure, Mrs. Speck had a urine pregnancy test at the Woman's Clinic to determine whether or not she was pregnant.[2] (R. Vol. 1 at 2-3.) The pregnancy test taken prior to the procedure was negative. (R. Vol. 1 at 2-3.) Mrs. Speck does not claim that she had any other type of testing to determine whether or not she was pregnant prior to the procedure. The purpose of the Essure sterilization procedure was to prevent Mrs. Speck from becoming pregnant even though—as Mrs. Speck acknowledged—no sterilization procedure is 100% effective (R. Vol. 6 at 50.) Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case. (R. Vol. 1 at 2.) She had a history of regular and timely menstrual periods. (R. Vol. 6 at 54, 67; R. Vol. 1 at 126.) According to her medical records, Mrs. Speck's menstrual cycles were regular, occurring approximately every 28 days. (R. Vol. 1 at 126; R. Vol. 6 at 67.)

[2] The Woman's Clinic, P.A. uses the same type of pregnancy test that is purchased over the counter. (Vol. 1 at 96.)

On November 27, 2009, Mrs. Speck believed she was pregnant because her menstrual period was several days late and that was unusual for her. (R. Vol. 6 at 67.) Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant. (R. Vol. 6 at 67.) The fact that Mrs. Speck's period was several days late led her to tell her husband that something was wrong because she was so late. (R. Vol. 6 at 68.) By November 27, 2009, Mrs. Speck had informed her husband that her menstrual period was late and the only thing she could think of was that she was pregnant. (R. Vol. 6 at 68.) When Mrs. Speck told Mr. Speck that she had missed a period and thought she was pregnant, he told her that she needed to go get a pregnancy test. (R. Vol. 7 at 33.) To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, she bought two home pregnancy tests, because she wanted to be "double sure" of the results. (R. Vol. 6 at 67-68.)

The pregnancy tests that Mrs. Speck purchased indicated that they were over 99% accurate for determining whether a woman was pregnant. (R. Vol. 1 at 97.) Mrs. Speck took at least one pregnancy test on November 27, 2009 which confirmed that she was pregnant. (R. Vol. 6 at 66-69.) The first pregnancy test taken on November 27, 2009 was positive. (R. Vol. 6 at 68.) The results of the first pregnancy test were not equivocal in any way. There was no question about the result. It was clear. (R. Vol. 6 at 68.) On either November 27, 2009 or November 28, 2009, Mrs. Speck took a second pregnancy test. (R. Vol. 6 at 69.)

The second pregnancy test was positive immediately. (R. Vol. 6 at 69.) Mrs. Speck called her husband and told him that she was pregnant, the test was positive, and she was upset. (R. Vol. 6 at 35; R. Vol. 7 at 35.) Mr. and Mrs. Speck both testified that they knew she was pregnant before she took the pregnancy tests. (R. Vol. 6 at 69; R. Vol. 7 at 36.) The pregnancy tests confirmed that she was pregnant. (R. Vol. 6 at 69.) The pregnancy test used at the Woman's Clinic is not any more accurate that the pregnancy test Mrs. Speck used at home. (R. Vol. 1 at 96.) Before she took the pregnancy test, Mr. Speck felt like Mrs. Speck was pregnant. (R. Vol. 7 at 35.) Mr. Speck thought Mrs. Speck was pregnant before she took the test based on their past history and his gut just told him she was pregnant. (R. Vol. 7 at 36.) There was never any question in his mind that she was pregnant. (R. Vol. 7 at 37.)

On November 30, 2012, Mrs. Speck presented to Dr. Soll at the Woman's Clinic. (R. Vol. 2 at 228 -231.) According to her medical records from November 30, 2012, she had taken two positive pregnancy tests over the weekend. (R. Vol. 2 at 228.) On November 30, 2009, Mrs. Speck's last period had occurred approximately 5.5 weeks prior. Prior to her period 5.5 weeks before, her cycles were regular, occurring approximately every 28 days. (R. Vol. 2 at 228.) On November 30, 2009, Mrs. Speck had a urine pregnancy test at the Woman's Clinic like the two that she had already taken at home. (R. Vol. 2 at 231; R. Vol. 1 at 97.) Mrs. Speck recalled taking another pregnancy test at the Woman's Clinic and them telling her that it was also positive. (R. Vol. 6 at 70.) On November 30, 2009, Dr. Soll informed Mrs. Speck that she would need to stop

Paxil if she was confirmed to have an "iup," (or intra uterine pregnancy). (R. Vol. 2 at 228.) Mrs. Speck's medical records from November 30, 2009, do not state that she should stop taking Paxil "if" she was positive for pregnancy. (R. Vol. 2 at 228-231.) Mrs. Speck's pregnancy had already been confirmed by the prior pregnancy tests she took over the weekend. Ultrasound is not used to determine is a patient is pregnant. (R. Vol. 1 at 96.)

On July 21, 2010, Mrs. Speck gave birth to a baby boy. (R. Vol. 6 at 7.) He is a perfectly healthy little boy. (R. Vol. 6 at 87.) He has brought joy and happiness to her life. (R. Vol. 6 at 87.) His birth was a happy day. (R. Vol. 7 at 40.) He has been a blessing in Mr. Speck's life. (R. Vol. 7 at 47.) He had no difficulty as a result of Mrs. Speck having had the Essure procedure. (R. Vol. 6 at 81.)

By letter dated November 29, 2010, more than one year after she confirmed her pregnancy by two positive pregnancy tests, Plaintiffs provided Notice of a Potential Claim to Defendants. (R. Vol. 1 at 2, 7, 8.) On March 30, 2011, over two years and seven months after the alleged malpractice, Plaintiffs filed a Complaint in the Circuit Court of Madison County, Tennessee, alleging that Dr. Roy provided negligent treatment to Mrs. Speck. (R. Vol. 1 at 1-9.) The Complaint was also filed over one year, four months, and four days after Mrs. Speck took her first positive pregnancy test and confirmed her pregnancy. (R. Vol. 1 at 1-9; *See also*, R. Vol. 6.) In filing this action, Plaintiffs failed to comply with Tennessee Code Annotated § 29-26-116.

Section 29-26-116 provides: "[t]he statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104." Tenn. Code Ann. § 29-26-116(a)(1)(2011). The statute further provides that if "the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn. Code Ann. § 29-26-116(a)(2)(2011). Plaintiffs discovered Mrs. Speck's pregnancy on November 27, 2009. As a result, the statute of limitations expired on March 29, 2011. Tenn. Code Ann. § 29-26-116(a)(2). Plaintiffs failed to file their Complaint by March 29, 2011.

Defendants filed a Motion for Summary Judgment supported by the deposition testimony of Plaintiffs confirming that Plaintiffs were at least on inquiry notice of Mrs. Speck's pregnancy by November 27, 2009. Plaintiffs made an unsuccessful attempt to demonstrate that she was not on inquiry notice that she was pregnant by November 27, 2009. The Defendants' argument asks the Court to consider and rely upon the Plaintiffs' undisputed testimony while the Plaintiffs' argument asks the Court to reject the Plaintiffs' undisputed testimony.

On April 12, 2012, the trial court heard argument on Defendants' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment. (R. Vol. 3; R. Vol. 1 at 135-142, 143-145.) On April 27, 2012, the trial court entered an Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 1 at 135-142.)(copy attached in Appendix.) Contrary to Plaintiffs' assertions, the trial court did not assess this matter with the benefit of hindsight. The trial court assessed this matter based on the evidence presented including Plaintiffs'

admitted knowledge of her pregnancy. The trial court found that the Plaintiffs' claim is barred by the applicable statute of limitations because Plaintiffs failed to file their Complaint within one year and one hundred twenty days of discovery. (R. Vol. 1 at 135-142.) The Order also provides that because the alleged injury in this case is pregnancy, the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant. Additionally, the Order sets forth the following ten undisputed material facts:

1. On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant;

2. Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case;

3. Mrs. Speck had a history of regular and timely menstrual periods;

4. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009;

5. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant;

6. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results;

7. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time;

8. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate;

9. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs. Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant; and

10. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive.

(R. Vol. 1 at 136-138.) The Order further provides as follows:

> Based upon Mrs. Speck's deposition testimony, she knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy.
>
> Therefore, the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009.

(R. Vol. 1 at 138.)

On April 16, 2012, Plaintiffs filed a Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 93-95.) On April 24, 2012, Plaintiffs served a Supplemental Affidavit of Plaintiff Julie Speck. (R. Vol. 1 at 132.) On May 2, 2012, Plaintiffs refiled Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 1 at 156-158.) On July 6, 2012, Defendants filed Defendants' Reply in Opposition to Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for

Summary Judgment. (R. Vol. 2 at 165-231.) On July 13, 2012, the trial court heard argument on Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 2 at 234-239; Vol. 4.) After considering the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment, the Defendants' Reply in Opposition to Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the arguments of counsel, the deposition of Julie Speck, the deposition of Kevin Speck, the deposition of Ryan Roy, M.D., and the entire record in this case, the trial court determined that the Plaintiffs' Motion should be denied. (R. Vol. 2 at 234-239.) On August 9, 2012, the Court entered an Order Denying Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. (R. Vol. 2 at 234-239)(copy attached in Appendix.) The trial court considered the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure and found "that no errors as to law or facts have arisen as a result of the Court overlooking or failing to consider matters." (R. Vol. 2 at 235.) The trial court further found that "a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003)." (R. Vol. 2 at 235.) Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment

failed to meet the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 2 at 235.) The trial court found that the Supplemental Affidavit of Julie Speck should not be considered. (R. Vol. 2 at 235.) The trial court found that "the Supplemental Affidavit of Julie Speck is not a clarification of Mrs. Speck's prior testimony" and after comparing the Supplemental Affidavit of Julie Speck to the Affidavit of Julie Speck, the court found "that the Supplemental Affidavit presents additional evidence that was clearly available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment." (R. Vol. 2 at 235.) The trial court found that the Supplemental Affidavit of Julie Speck is inconsistent with her prior testimony. (R. Vol. 2 at 236.) Additionally, the trial court found that

> [t]he information contained in the Supplemental Affidavit of Julie Speck was not mentioned in Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs, the depositions of Mr. Speck, Mrs. Speck, or Ryan Roy, M.D., or the Affidavit of Julie Speck. Plaintiffs offer no plausible reason for failing to present the evidence contained in the Supplemental Affidavit of Julie Speck prior to the hearing on Defendants' Motion for Summary Judgment.

(R. Vol. 2 at 236.) Furthermore, the trial court found that

> [n]otwithstanding the Court's findings that the Plaintiffs have failed to satisfy the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure, failed to meet the grounds of Rule 59.04 of the Tennessee Rules of Civil Procedure, and that the Supplemental Affidavit of Julie Speck should not be considered, the Court finds that even if the Supplemental Affidavit of Julie Speck was considered, Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment would be denied.

(R. Vol. 2 at 236.) The trial court found that the Supplemental Affidavit of Julie Speck did not change the undisputed material facts in this matter. (R. Vol. 2 at 237-238.)

On February 1, 2012, Defendants also filed a Motion for Partial Summary Judgment (R. Vol. 1 at 49-50), Memorandum of Law in Support of Motion for Partial Summary Judgment (R. Vol. 1 at 29-46), and Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Partial Summary Judgment (R. Vol. 1 at 51-52) contending that Tennessee law does not allow Plaintiffs to recover for costs of raising, educating, nurturing, etc. of the child born subsequent to the procedure conducted by Dr. Roy. Plaintiffs did not file a response to Defendants' Motion for Partial Summary Judgment or Defendants' Rule 56.03 Statement of Undisputed Material Facts in Support of Defendants' Motion for Partial Summary Judgment. On April 12, 2012, the trial court heard argument on Defendants' Motion for Partial Summary Judgment. (R. Vol. 3; R. Vol. 1 at 143-145.) Plaintiffs offered no argument in opposition to Defendants' Motion for Partial Summary Judgment. (R. Vol. 3 at 23-24.) The trial court granted Defendants' Motion for Partial Summary Judgment to the extent the Plaintiffs' claims exceed those damages permitted by *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987)(R. Vol. 1 at 143-145.) On April 27, 2012, the trial court entered an Order Granting Defendants' Motion for Partial Summary Judgment. (R. Vol. 1 at 143-145.)(copy attached in Appendix)

LAW AND ARGUMENT

I. The trial court properly granted Defendants' Motion for Summary Judgment as Plaintiffs' claims are barred by the statute of limitations applicable to medical malpractice actions.

A. The statutory period of limitations in medical malpractice actions is one year after the cause of action accrues.

Pursuant to Tennessee Code Annotated § 29-26-116(a)(1), "[t]he statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104." Tenn. Code Ann. § 29-26-116(a)(1)(2011). The statute specifically provides that if "the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn. Code Ann. § 29-26-116(a)(2)(2011).

B. The statute of limitations in this case began to run when the Plaintiffs became aware of facts sufficient to put a reasonable person on notice that she was pregnant.

The correct standard to be used in determining when Plaintiffs' cause of action began to accrue is when the Plaintiffs were aware of facts sufficient to put a reasonable person on notice that Mrs. Speck was pregnant as set forth by the Tennessee Supreme Court in *Roe v. Jefferson*, 875 S.W.2d 653, 656-57 (Tenn. 1994). In *Roe*, the Tennessee Supreme Court recognized that the statute of limitations in medical malpractice actions "is tolled only during the period when the plaintiff has *no knowledge at all that a wrong has occurred*, and, *as a reasonable person is not put on inquiry*." *Roe* 875 S.W.2d at 656-57(emphasis added)(quoting *Hoffman v. Hosp. Affiliates*, 652 S.W.2d 341, 344 (Tenn. 1983)). Further, *"[i]t is not required* that the plaintiff actually know that the inquiry

constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action'; the plaintiff is *deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.*" *Id.* at 657 (emphasis added).

The statute of limitations in a medical malpractice action is not tolled until an individual obtains actual knowledge of a breach of the standard of care nor until an individual obtains diagnosis by a medical professional. *See Sherrill v. Souder*, 325 S.W.3d 584, 595 (Tenn. 2010). In 2010, the Tennessee Supreme Court made clear that "[n]either actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." *Sherrill* at 595 (Tenn. 2010).

In the present action, Plaintiffs' injury is pregnancy. (R. Vol. 1 at 1-9; R. Vol. 1 at 135-142.) Plaintiffs' cause of action began accruing when Plaintiffs were aware of facts sufficient to put a reasonable person on notice that they had suffered an injury of pregnancy. (R. Vol. 1 at 135-142.) The statute of limitations is not tolled until Plaintiffs unequivocally knew that Mrs. Speck was pregnant; nor is it tolled until her pregnancy was confirmed by a healthcare provider. *See Roe* 875 S.W.2d at 656-57; *See also Sherrill* 325 S.W.3d at 595. Importantly, the actions and testimony of Mr. and Mrs. Speck show that Plaintiffs were put on at the least inquiry notice that she was pregnant by the time she took the first positive pregnancy test on November 27, 2009. Plaintiffs' deposition testimony

and actions taken to confirm Mrs. Speck's pregnancy are significant in the determination of whether Plaintiffs were aware of facts sufficient to put a reasonable person on notice that she had suffered an injury of pregnancy before November 29, 2009. First, Mrs. Speck had been pregnant on four occasions with four live births prior to August 25, 2008. (R. Vol. 1 at ¶ 2.) Second, Mrs. Speck had a sterilization procedure performed on August 25, 2008 by Dr. Ryan Roy at the Woman's Clinic. (R. Vol. 6 at 28, 46.) She knew there was a risk that the procedure wouldn't work. (R. Vol. 6 at 45.) Third, Mrs. Speck had regular periods after the Essure procedure. (R. Vol. 6. at 54.) According to her medical records, Mrs. Speck's menstrual cycles were regular, occurring approximately every 28 days. (R. Vol. 1 at 126; *See also* R. Vol. 6 at 67.) Fourth, Mrs. Speck was suspicious that she was pregnant the day after Thanksgiving in 2009 because her period was several days late and that was unusual. (R. Vol. 6 at 67.) Fifth, Mrs. Speck had been pregnant prior to November 27, 2009 and was aware that a late period likely meant she was pregnant. (R. Vol. 6 at 67.) Sixth, the fact that Mrs. Speck's period was several days late led her to tell her husband that something was wrong because her period was so late. (R. Vol. 6 at 68.) The only thing she could think of was that she was pregnant. (R. Vol. 6 at 68.) Mr. Speck testified that he told her she needed to go take a pregnancy test. (R. Vol. 7 at 33.) Seventh, to confirm her suspicion that she was pregnant, Mrs. Speck went and bought two home pregnancy tests. (R. Vol. 6 at 67.) Eighth, the pregnancy tests that that Mrs. Speck purchased indicated that they were over 99% accurate. (R. Vol. 1 at 97.) Ninth, Mrs. Speck took the first pregnancy test

on the day after Thanksgiving, November 27, 2009. (R. Vol. 6 at 68.) The first pregnancy test was positive. (R. Vol. 6 at 68.) The first pregnancy test was not equivocal in any way. There was no question about the result. It was clear. (R. Vol. 6 at 68.) Tenth, Mrs. Speck took a second pregnancy test on either Friday, November 27, 2009 or Saturday, November 28, 2009. (R. Vol. 6 at 69.) The second pregnancy test was positive immediately. (R. Vol. 6 at 69.) Eleventh, Mrs. Speck called her husband and told him that she was pregnant, the test was positive, and she was upset. (R. Vol. 6 at 69; R. Vol. 7 at 35.) Twelfth, Mr. and Mrs. Speck both testified that they knew she was pregnant before she took the pregnancy tests. (R. Vol. 6 at 69; R. Vol. 7 at 36.) Therefore, Plaintiffs were aware of facts sufficient to put a reasonable person on inquiry notice that they had suffered an injury of pregnancy prior to November 29, 2009. The actions of the Plaintiffs show that they were on inquiry notice prior to November 29, 2009. Whether or not the pregnancy was confirmed by a healthcare provider or the Plaintiffs were 100% sure about it is irrelevant in this case. Plaintiffs argue that Mrs. Speck believed she was pregnant, yet they argue that her belief had no factual basis. To the contrary, many facts (as noted above) existed to support Mrs. Speck's belief that she was pregnant.

On March 30, 2011, over two years and seven months after the alleged malpractice, Plaintiffs filed this lawsuit pursuant to Tennessee's medical malpractice statute. (R. Vol. 1 at 1-9.) The Complaint was also filed over one year, four months, and four days after Julie Speck took her first positive pregnancy test and confirmed her pregnancy. (*See* R. Vol. 1 at 1-9.; *See also*,

R. Vol. 6.) The trial court correctly held that Plaintiffs failed to file their Complaint timely.

C. Plaintiffs failed to file this medical malpractice action within one year of the date the cause of action accrued as required by Tennessee Code Annotated § 29-26-116(a)(2).

According to the sworn testimony of Mr. and Mrs. Speck, they knew or should have known of the alleged medical malpractice prior to November 29, 2011. The injury here is pregnancy. First, Mrs. Speck had regular periods after the Essure procedure. During her deposition she testified as follows:

Q: Did you have regular periods after the Essure procedure?

A: Yes, sir.

(R. Vol. 6 at 54.) Second, Mrs. Speck suspected she was pregnant before Friday, November 27, 2009 because her period was several days late which was unusual. Mrs. Speck testified as follows:

Q: When did you suspect that you were pregnant? And, of course, I'm talking about with Colton.

A: Gotcha. It was the day after Thanksgiving in 2009.

(R. Vol. 6 at 66-67.) She further testified as follows regarding her suspicion that she was pregnant the day after Thanksgiving in 2009:

Q: Why were you suspicious? Or why did you think you were pregnant?

A: My period was several days late.

Q: And that was unusual – –

A: Yes, sir.

Q: – – because you'd always had regular periods.

A: They were always a couple days late, but not that many.

(R. Vol. 6 at 67.) Third, Mrs. Speck had been pregnant four times prior to November 27, 2009. (R. Vol. 1 at 2.) She was aware that a late period likely meant she was pregnant. She testified as follows:

Q: And having been pregnant before, you knew what that likely – –

A: Yes, sir.

Q: – – signified, didn't you?

A: (The witness nodded.)

(R. Vol. 6 at 67.) Fourth, Mrs. Speck took two positive pregnancy tests to confirm her suspicion that she was pregnant by no later than Saturday, November 28, 2009. She testified as follows regarding the pregnancy tests:

Q: And what did you do to confirm your suspicion that you were pregnant?

A: I went and bought a home pregnancy test, two pregnancy tests.

Q: Do you remember the kind of test you bought?

A: The Dollar General brand. That's – – it's the DG brand, but I don't know what the brand was.

Q: Two of the same kind?

A: Yes, sir.

Q: Or did you get two different brands? Why did you get two?

A: To make double sure.

Q: And was this on the day after Thanksgiving 2009?

A: Yes, sir.

Q: Before you bought those pregnancy tests, did you tell Mr. Speck that you thought you were pregnant?

A: I told him something was wrong because I was so late.

Q: And the only thing you had in mind was you were pregnant?

A: It's the only thing I could think of.

Q: So what did the first pregnant test show?

A: Positive.

Q: And was it equivocal in any way? Any question about the result, or – –

A: No, sir.

Q: – – did it clearly show positive?

A: It was clear.

Q: How is a positive result recorded on that particular test?

A: How was it recorded?

Q: Yeah. How was it displayed?

A: A line, just a solid pink line.

Q: And what showed up if you were not pregnant?

A: Nothing.

Q: So the pink line was real obvious?

A: Yes.

Q: What time of the day did you take that test?

A: It was at nighttime.

Q: On the day after Thanksgiving.

A: Yes, sir.

(R. Vol. 6 at 67-69.) Mrs. Speck took a second pregnancy test on either Friday, November 27, 2009 or Saturday, November 28, 2009. She testified as follows regarding the second pregnancy test:

Q: When did you take the second pregnancy test?

A: I don't recall if I took it that night or the next day.

Q: What did the second test show?

A: Positive. Immediately.

Q: Did you tell Mr. Speck about the pregnancy tests?

A: Yes, sir.

(R. Vol. 6 at 69.) Mrs. Speck admitted that the positive pregnancy test confirmed that she was pregnant, but she thought she was pregnant prior to taking the pregnancy test. Her testimony was as follows:

Q: At that point you had confirmed that you were pregnant; right?

A: The test said I was pregnant.

Q: Well, that's what you thought before the test.

A: Yes, sir.

(R. Vol. 6 at 69.)

According to Mr. Speck, he and Mrs. Speck knew or should have known of the alleged malpractice prior to Sunday, November 29, 2009. Mr. Speck testified that he told Mrs. Speck to get a pregnancy test when she mentioned that she had missed a period and thought she was pregnant. He testified as follows:

Q: When did she mention to you that she had missed a period and thought she was pregnant?

A: Around the week of Thanksgiving, that 2009 or '8. I can't remember exactly the year.

Q: Was it before Thanksgiving Day or after Thanksgiving Day?

A: Well, it was the week of – – and I think – – I was at work, and I remember telling her, You need to go have a pregnancy – – you need to go get a pregnancy test.

We were talking on the phone. I told her, I said, "Look, you need to go have a pregnancy test done."

Q: Was that before she went to Dollar General and bought them?

A: I cannot remember.

Q: And did you know about those two home pregnancy tests that you did?

A: Yes, sir.

Q: She did?

A: Yes, sir. Yes, sir.

Q: Did you see them, or did she tell you about them?

A: She told me about them because I was at work. She called me on the phone and told me.

Q: Do you know what day it was?

A: No, sir. I cannot remember. I just know it was around Thanksgiving. That's all I know. I can't remember what exact day it was.

Q: She described the day after Thanksgiving. Does that sound consistent – –

A: Yes, sir.

Q: – – with what you remember?

A: Yes, sir. That's – – yes, sir.

Q: Do you think you worked on Friday after Thanksgiving in 2009?

A: Oh, I know I did.

Q: Did you work the Saturday after Thanksgiving 2009?

A: Yes, sir.

Q: Sunday?

A: No, sir. My days off then were Sunday, Monday, Tuesday.

Q: So it would had to have been Friday or Saturday just because –

A: Yes, sir.

Q: -- of your work schedule.

A: Yes, sir.

Q: Friday or Saturday after Thanksgiving.

A: Right. Yes, sir.

Q: And she told you she'd taken two pregnancy tests.

A: Yes, sir.

Q: And they were both positive.

A: Yes, sir.

(R. Vol. 7 at 33-35.) Mrs. Speck told him that she had taken two positive pregnancy tests. Before Mrs. Speck took the pregnancy tests, Mr. Speck thought she was pregnant. He testified as follows:

Q: What did she tell you when she called you after she'd taken the home pregnancy tests?

A: She just -- all I remember is **she told me she was pregnant**. And then it come up positive, and she was upset.

Q: Before she took the home pregnancy test, did she tell you she was pregnant?

A: She she was in denial. I felt like she was, and I think she did too. But she didn't actually come out and say, I'm pregnant.

Q: What did she come out and say?

A: I can' t remember.

Q: Why –

A: I just know that she didn't say that.

(R. Vol. 7 at 35.)(emphasis added.) Mr. Speck thought Mrs. Speck was pregnant before she took either pregnancy test based on their history. He testified as follows:

Q: Why did you think she was pregnant even before she took the pregnancy test at home?

A: Because I know my wife, and I know -- I know how easily we got pregnant with the first two children. And I just -- I just -- and my gut told me she was pregnant.

Q: So you thought those pregnancy tests were going to be positive when she took them at home, didn't you?

A: Yes, sir.

(R. Vol. 7 at 36.) Plaintiffs were aware that there was still a chance that Mrs. Speck could get pregnant after having the Essure procedure. (R. Vol. 6 at 45.)

Based on the testimony of Plaintiffs, they knew that Mrs. Speck was pregnant by Friday, November 27, 2009. Plaintiffs knew or should have known of the alleged medical malpractice prior to Sunday, November 29, 2009. Mrs. Speck had a sterilization procedure on August 25, 2008. She took at least one positive pregnancy test on Friday, November 27, 2009, that confirmed her pregnancy. She took a second positive pregnancy test no later than Saturday, November 28, 2009. Therefore, Plaintiffs' cause of action began accruing by

Friday, November 27, 2009. Plaintiffs were required by Tennessee Code Annotated § 29-26-116 to file the present action within one year. Plaintiffs failed to file the present action until over a year after the cause of action accrued. Even giving Plaintiffs additional time for providing Notice pursuant to Tennessee Code Annotated § 29-26-121, Plaintiffs' Complaint was still untimely. Therefore, Plaintiffs' action is time barred by the statute of limitations applicable to medical malpractice actions.

D. Whether or not Plaintiffs exercised reasonable care and diligence in discovering a compensable injury is an issue that was appropriately determined by the trial court.

Plaintiffs erroneously maintain that the trial court did not have authority to determine whether Plaintiffs exercised reasonable care and diligence in discovering her injury and was required to submit that issue to the jury. Whether Plaintiffs exercised reasonable care and diligence in discovering the injury is not an issue that the trial court is required to submit to the jury. In fact, the Tennessee Supreme Court and Tennessee Court of Appeals have upheld trial court orders granting motions for summary judgment in numerous cases where the medical malpractice discovery rule was at issue and the court was required to determine whether the plaintiffs filed a medical malpractice action within one year of discovery of the alleged injury. *See*, *Roe v. Jefferson*, 875 S.W.2d 653 (Tenn. 1994); *Roberts v. Bicknell*, 73 S.W.3d 106 (Tenn. Ct. App. 2001); *Holland v. Dinwiddie*, No. W2006-00523-COA-R3-CV, 2006 WL 3783534, (Tenn. Ct. App. Dec. 27, 2006) *perm. to appeal denied* May 21, 2007; *Murphy v. Lakeside Medical Center, Inc.*, No. E2006-01721-COA-R3-CV, 2007 WL 906760 (Tenn.

Ct. App. Mar. 26, 2007); *Brandt v. McCord*, 281 S.W.3d 394 (Tenn. Ct. App. 2008); *Holliman v. McGrew*, 343 S.W.3d 68 (Tenn. Ct. App. 2009); *McCulley v. Garber*, No. E2005-01606-COA-R3-CV, 2006 WL 1044142 (Tenn. Ct. App. Apr. 20, 2006); *Lewis v. Campbell*, No. M2000-03092-COA-R3-CV, 2002 WL 1800905 (Tenn. Ct. App. Aug. 7, 2002); *Farrow v. Barnett*, No. 03A01-9603-CV-00084, 1996 WL 560534 (Tenn. Ct. App. Oct. 3, 1996); *Parris v. Land*, No. 53505-6 T.D., 1996 WL 455864 (Tenn. Ct. App. Aug. 14, 1996); *Clifton v. Bass*, 908 S.W.2d 205 (Tenn. Ct. App. 1995); *Cantrell v. Buchanan*, No. 88-334-II, 1989 WL 25598 (Tenn. Ct. App. Mar. 22, 1989), *permission to appeal denied* June 5, 1989; and *Bennett v. Hardison*, 746 S.W.2d 713 (Tenn. Ct. App. 1987). Furthermore, in 2000 the Tennessee Court of Appeals reversed a trial court decision denying Defendants summary judgment where the Plaintiff failed to file the Complaint within one year of discovery of her injury. *See Huttchson v. Cole*, No. M1999-00204-COA-R10-CV, 2000 WL 354405 (Tenn. Ct. App. Apr. 7, 2000). In 1996, the Court of Appeals held that a Complaint was not filed within the applicable statute of limitations and the trial court erred in failing to direct a verdict for the defendant on the basis that the statute of limitations bars the action. *Stanbury v. Bacardi*, No. 01-A-01-9509-CV00420, 1996 WL 200338 (Tenn. Ct. App. Apr. 26, 1996). The Supreme Court of Tennessee upheld the decision and held that Plaintiffs failed to file an action within one year of discovery. *See Stanbury v. Bacardi*, 953 S.W.2d 671 (Tenn. 1997). Therefore, the trial court clearly had authority to determine whether Plaintiffs' Complaint was filed within one year of when they knew or should have known about the injury

and the trial court appropriately determined that Plaintiffs failed to file a Complaint within the applicable statute of limitations.

The trial court's decision is well supported by the facts and testimony present in this matter. Plaintiffs' now, for the first time on appeal, maintain that there were no facts to support Mrs. Speck's belief that she was pregnant. Contrary to the Plaintiffs' assertions, Plaintiffs were aware of many facts that supported their belief that Mrs. Speck was pregnant prior to November 29, 2009. First, Plaintiffs discovered that Mrs. Speck's period, which usually occurred approximately every 28 days, was several days late. (R. Vol. 6 at 67; R. Vol. 7 at 33.) Second, On November 27, 2009, Mrs. Speck purchased two pregnancy tests to confirm her suspicion that she was pregnant. (R. Vol. 6 at 67-68.) Third, Mrs. Speck took both tests and they were both positive confirming her pregnancy. (R. Vol. 6 at 66-69.) Mrs. Speck testified that both tests were clearly positive. (R. Vol. 6 at 66-69.) Fourth, Mrs. Speck took two tests to be "double sure" about the results. (R. Vol. 6 at 68.) Fifth, prior to her period being several days late and taking two positive pregnancy tests, Plaintiffs knew that Mrs. Speck underwent an Essure sterilization procedure on August 25, 2008 performed by Dr. Roy at the Woman's Clinic. (R. Vol. 6 at 28, 46; R. Vol. 7 at 23; *See also*, R. Vol. 1. at 2.) Moreover, this is not a case where the results of the pregnancy tests were in question. Sixth, ultrasound testing was not required to determine whether or not Mrs. Speck was pregnant. (R. Vol. 1 at 96-97.) Therefore, Plaintiffs had more than just a subjective belief of pregnancy on November 27, 2009. Plaintiffs were not required to know "for sure" about the pregnancy for the

cause of action to begin accruing. Based on the testimony of Plaintiffs and the evidence in the record, it is unreasonable for Plaintiffs to argue that on November 27, 2009 there were no reasonably known facts to support a wrongful pregnancy claim.

1. Plaintiffs erroneously argue that Mrs. Speck required additional testing and diagnosis of pregnancy by a physician before she could reasonably have known that she was pregnant.

The statute of limitations in a medical malpractice action is not tolled until an individual obtains actual knowledge of a breach of the standard of care nor until an individual obtains diagnosis by a medical professional. *See Sherrill v. Souder*, 325 S.W.3d 584, 595 (Tenn. 2010). However, Plaintiffs continue to allege that Mrs. Speck "could not reasonably have known that she was the victim of a 'failed pregnancy avoidance technique' until she received the results of an ultrasound to confirm that she was actually pregnant." (Appellants' Brief at 25.) The undisputed proof before the Court is that ultrasound is not used to "confirm whether or not a patient is pregnant," the Woman's Clinic uses the same type of pregnancy tests as the one Mrs. Speck purchased, and the pregnancy tests used by Mrs. Speck were over 99% accurate. (R. Vol. 1 at 96-97.) Additionally, Mrs. Speck has previously taken pregnancy tests to confirm whether or not she was pregnant. (R. Vol. 1 at 2-3.) Mrs. Speck did not require any additional testing or a diagnosis of pregnancy by a physician before she could be put on inquiry notice that she was pregnant.

Plaintiffs further maintain that the statute of limitations was not triggered based on the results of her pregnancy tests or Plaintiffs' beliefs that Mrs. Speck

was pregnant. Plaintiffs attempt to analogize this case with two cancer cases where additional testing was required before those Plaintiffs could have known that they had suffered an injury. *See Wyatt v. ACandS, Inc.*, 910 S.W.2d 851, 855 (Tenn. 1995); *Matz v. Question Diagnostics Clinical Labs, Inc.*, No. E2003-00167-COA-R3-CV, 2003 WL 22409452 (Tenn. Ct. App. Oct. 22, 2003). Contrary to Plaintiffs assertions, this case is not like the cancer diagnosis cases of *Wyatt* or *Matz*. In *Wyatt*, the Plaintiff had an x-ray and then received a letter stating that the "x-ray shows the possibility of an asbestos related disease." *Id.* at 853. Wyatt was then examined by a physician and advised that the abnormalities on his chest x-ray were caused by exposure to asbestos." *Id.* Importantly, in *Wyatt*, the uncontroverted medical testimony in the case was that "an x-ray in and of itself cannot constitute a diagnosis with regard to asbestos lung disease without an occupational history and physical examination....For purposes of asbestos lung disease an x-ray may distinguish those persons who need to be further evaluated to determine whether or not the individual has sustained an injury." *Id.* at 856. The Tennessee Supreme Court held "that the statute of limitations on a tort action commences when plaintiff knew or in the exercise of reasonable diligence, should have known, that an actionable injury has occurred." *Id.* at 856-857. The Court determined that in *Wyatt*, the plaintiffs "did not know the general cause and results of the tort until the asbestosis diagnosis were made." *Id.* at 857. The Court's decision was based in part on the uncontroverted medical testimony that an x-ray was not enough to diagnosis asbestos lung disease and Plaintiff required a physical examination. *Id.* at 856.

In *Matz*, a failure to diagnose cancer case, the Plaintiff had gone to the doctor with a bleeding lesion on his head, a biopsy was taken and sent to a lab, the biopsy was examined and Matz was informed no cancer was found. Matz had a follow up biopsy which was sent to a lab and not diagnosed as cancer. The cancer was diagnosed a year later. *Matz*, 2003 WL 22409452 at *1. Until he had a lesion that was found to be cancerous, Matz had "no factual knowledge of the 'occasion, manner, and means' by which defendants breached the duty that caused him harm." *Id.* at *3. Matz's physician even "testified that he did not suspect that cancer had been present earlier and had been missed until after this report came out" diagnosing cancer. *Id.* The Court of Appeals held that because the "facts and inferences in this case support more than one reasonable conclusion, summary judgment was improperly granted." *Id.* at *4. Matz had no knowledge that the cancer had been missed on the prior biopsy until he received the results of the cancer diagnosis.

Unlike *Wyatt* and *Matz*, Mrs. Speck was not required to have additional testing to determine whether or not she was pregnant after taking two positive pregnancy tests. Unlike asbestos lung disease and skin cancer, a woman can determine that she is pregnant without consulting a doctor. Pregnancy can be diagnosed by an over the counter test. In fact, the pregnancy test(s) taken by Mrs. Speck on November 27, 2009 were over 99% accurate. (R. Vol. 1 at 96.) The Woman's Clinic uses the same type of pregnancy test that is purchased over the counter. (R. Vol. 1 at 96.) A pregnancy test purchased over the counter, like the ones purchased by Mrs. Speck, has the same accuracy as those used at the

Woman's Clinic. (R. Vol. 1 at 96.) Unlike *Wyatt* and *Matz*, Plaintiffs did not require an examination by a healthcare provider or additional testing. Ultrasound is not required to diagnose pregnancy. (R. Vol. 1 at 96.) There is no evidence in the record to support Plaintiffs' claim that Mrs. Speck required examination or testing by a physician to confirm her pregnancy.

Therefore, *Wyatt* and *Matz* are not similar to Plaintiffs' case and offer no support for Plaintiffs' position that Mrs. Speck required further testing before Plaintiffs could be put on inquiry notice that she was pregnant.

II. THE TRIAL COURT APPROPRIATELY DENIED PLAINTIFFS' MOTION TO ALTER AND/OR AMEND JUDGMENT/RECONDER GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. The purpose of a Rule 59.04 motion to alter or amend a judgment is not to provide a second bite at the apple for Plaintiffs who do not take a motion for summary judgment seriously until the motion is granted.

"[T]he purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). The trial court found "that a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: '(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice.' *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003)." (R. Vol. 2 at 235.) Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment failed to meet the Rule 59 grounds for overturning

the Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 2 at 234-239.)

First, controlling law did not change. Because this is a medical malpractice case, the applicable statute of limitations is codified in Tenn. Code Ann. § 29-26-116(a)(1) and provides as follows: "The statute of limitations in malpractice actions shall be one (1) year as set forth in section 28-3-104." In addition, Tenn. Code Ann. § 29-26-116(a)(2) provides as follows: "If the alleged injury is not discovered within such one (1) year period, the period of limitations shall be one (1) year from the date of such discovery." In discussing this statute, the Tennessee Supreme Court has stated that the statute of limitations "is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Roe v. Jefferson*, 875 S.W.2d 653, 656-57 (Tenn. 1994)(*quoting Hoffman v. Hospital Affiliates*, 652 S.W.2d 341, 344 (Tenn. 1983)). Moreover, the Tennessee Supreme Court has directed: "[i]t is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action'; the plaintiff is deemed to have discovered the right of action if he is aware of sufficient facts to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Roe*, 875 S.W.2d at 657. In *Sherrill v. Souder*, the Tennessee Supreme Court noted that "[n]either actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." 325 S.W.3d 584, 595 (Tenn. 2010).

Second, no previously unavailable evidence became available. Instead, in support of the Motion to Alter and/or Amend Judgment Granting Defendants' Motion for Summary Judgment, Plaintiffs submitted a Supplemental Affidavit of Julie Speck. (R. Vol. 1 at 130-132.) The Supplemental Affidavit of Julie Speck was the fourth time Julie Speck offered sworn testimony in this matter. The Supplemental Affidavit of Julie Speck sets forth new evidence and theories that were clearly available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment. Plaintiffs offer no plausible argument that these new evidence and theories were not available to Plaintiffs or why they were not provided in response to Defendants' Motion for Summary Judgment, Defendants' Reply to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, or the Affidavit of Ryan Roy, M.D.

Third, no errors of law were presented in this case. In fact, Plaintiffs' did not assert that the Court should alter or amend the granting of Defendants' Motion for Summary Judgment to correct any errors.

Motions to Alter or Amend a Judgment pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure "should not be used to present new, previously untried or unasserted theories or legal arguments." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)(finding that the movant waived the issue of whether father was the legal parent for failure to timely raise the issue). The trial court appropriately found that Plaintiffs failed to meet the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment.

B. The trial court was not required to consider the "new evidence" presented in the Supplemental Affidavit of Julie Speck.

The Tennessee Court of Appeals has held that Tennessee courts are not required to consider supplemental or amended affidavits after summary judgment is entered. *See Chambliss v. Stohler*, 124 S.W.3d 116, *perm. to appeal denied*, (Tenn. Ct. App. 2003)(holding that the Trial Court did not abuse its discretion in refusing to consider an amended affidavit of an expert witness); See also, *Denton-Preletz v. Denton*, No. E2010-01756-COA-R3-CV, 2011 WL 5375141 (Tenn. Ct. App. Nov. 8, 2011) *perm. to appeal denied* Apr. 11, 2012 (copy attached in Appendix); *Robinson v. Currey*, 153 S.W.3d 32 (Tenn. Ct. App. 2004) *perm. to appeal denied* Dec. 6, 2004.

When new evidence is presented in a motion to alter or amend an Order Granting Summary Judgment, the Court should consider the following: "the moving party's effort to obtain the evidence in responding to the summary judgment; the importance of the new evidence to the moving party's case; the moving party's explanation for failing to offer the evidence in responding to the summary judgment; the unfair prejudice to the non-moving party; and any other relevant consideration." *Stovall v. Clark*, 113 S.W.3d 715, 721 (Tenn. 2003)(*citing Harris v. Chern*, 33 S.W.3d 741, 744 (Tenn. 2000)(setting forth the factors to be used in determining whether to consider new evidence in a motion pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure)).

Applying these factors to the present case, the trial court appropriately determined that the new evidence presented in the Supplemental Affidavit of Julie Speck should not be considered.

1. Plaintiffs' effort to obtain the evidence set forth in the Supplemental Affidavit of Julie Speck in responding to Defendants' Motion for Summary Judgment was nonexistent.

"[A] motion to alter or amend a court's order should not raise evidence that was available prior to the court's ruling, absent a satisfactory reason." *Denton-Preletz v. Denton*, No. E2010-01756-COA-R3-CV, 2011 WL 5375141 (Tenn. Ct. App. Nov. 8, 2011) *perm. to appeal denied* Apr. 11, 2012 (citing *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003))(copy attached in Appendix). The new evidence presented in the Supplemental Affidavit of Julie Speck was discoverable or known prior to the hearing on Defendants' Motion for Summary Judgment. First, the new evidence presented in the Supplemental Affidavit of Julie Speck was information held by the Plaintiff. (*See* Suppl. Aff. of Julie Speck.) The new evidence was clearly discoverable prior to the hearing on Defendants' Motion for Summary Judgment. In fact, the Supplemental Affidavit of Julie Speck sets forth new evidence from November of 2009, over two years prior to the hearing on Defendants' Motion for Summary Judgment. The Supplemental Affidavit of Julie Speck sets forth new evidence that was not disclosed in Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs, in her deposition, or in her first Affidavit. Plaintiffs Answered Defendants' First Set of Interrogatories on August 11, 2011. (copy attached in Appendix.) Interrogatory Number 9 requests information regarding conversations with Dr. Ryan Roy.

Plaintiffs did not provide any information regarding the new evidence set forth in the Supplemental Affidavit of Julie Speck. (*R. Vol. 2* at 208-209.) On September 21, 2011, Plaintiff Julie Speck was deposed by counsel for Defendants. (R. Vol. 6.) Plaintiff did not provide any information regarding the new evidence set forth in the Supplemental Affidavit. There is no showing whatsoever that the newly submitted evidence contained in the Supplemental Affidavit of Julie Speck was not available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment. Plaintiffs cannot legitimately argue that they put forth any effort to obtain the evidence set forth in the Supplemental Affidavit of Julie Speck.

a. Plaintiffs' new argument on appeal that the new evidence set forth in the Supplemental Affidavit of Julie Speck was contained in Plaintiffs' Complaint is incorrect and disingenuous.

Plaintiffs now argue for the first time on appeal that the new evidence set forth in the Supplemental Affidavit of Julie Speck was contained in Plaintiffs' Complaint and thus it is nothing new. (Appellant's Brief at 31-32.) Plaintiffs argue for the first time that "Mrs. Speck's Supplemental Affidavit does not present additional evidence to the Court after an adverse ruling because this fact allegation was already pending in front of the Court at the time it made its ruling." (Appellants' Brief at 31.) Plaintiffs go on to argue "[t]hat the trial court either overlooked or ignored this evidence does not mean Mrs. Speck failed to present this evidence." (Appellants' Brief at 31.) Allegations contained in Plaintiffs Complaint are not proof and Plaintiffs cannot rely on mere allegations. The Supplemental Affidavit of Julie Speck is the first time any proof was presented on this point although Plaintiffs clearly could have done so previously.

Plaintiffs' new argument that the testimony set forth in Mrs. Speck's Supplemental Affidavit was indeed alleged in the Plaintiffs' Complaint in that "Dr. Roy had a long discussion with the Plaintiff regarding the possibility of ectopic pregnancy" has nothing to do with the statements contained in the Supplemental Affidavit of Julie Speck. The Supplemental Affidavit of Julie Speck does not contain any statements regarding conversations with Dr. Roy about the possibility of an ectopic pregnancy. (R. Vol. 1 at 130-132.) The Supplemental Affidavit of Julie Speck does not reference an ectopic pregnancy. (R. Vol. 1 at 130-132.) An ectopic pregnancy does not equate to not being pregnant.

The statement in Plaintiffs' Complaint that Plaintiffs now refer to actually provides as follows: "On or about November 30, 2009, Plaintiff Julie Ann Speck had two positive pregnancy tests and the Defendant Dr. Roy had a long discussion with the Plaintiff regarding the possibility of ectopic pregnancy, which caused severe stress within the Plaintiff patient." (R. Vol. 1 at 3.) Plaintiffs now for the first time on appeal argue that this statement in the Complaint "alleges the fact that she had a discussion with Dr. Roy after taking the home pregnancy tests in which Dr. Roy advised Mrs. Speck that the results of the home pregnancy test were likely inaccurate." (Appellants' Brief at 33.) Plaintiffs now inappropriately argue that the "Supplemental Affidavit did not seek to present additional evidence that was clearly available to Plaintiffs, but rather brings to the Court's attention certain facts it overlooked or ignored in holding that the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009." (Appellants' Brief at 33.)

Importantly, Plaintiffs previously admitted during the hearing on Plaintiffs' Motion to Alter and/or Amend that the information contained in the Supplemental Affidavit of Julie Speck was additional information provided to counsel after the trial court's ruling granting Defendants' Motion for Summary Judgment. (R. Vol. 4 at 2.) The transcript provides as follows:

> First of all, I want to address the supplemental affidavit of the plaintiff, Julie Speck. After your Honor's rulings, I met with Mr. and Mrs. Speck and read to them information and notes from your ruling; and as a result of my conversations with them and Your Honor's ruling as to the day that Your Honor found Mrs. Speck was aware that she was pregnant, Mrs. Speck provided me with some additional information that contained in the supplemental affidavit.

(Vol. 4 at 2.) Plaintiffs' counsel went on to state "I wish Mrs. Speck had given me this information before we had the original hearing, surely, but she didn't. And I can't change that." (R. Vol. 4 at 6.) For Plaintiffs to now argue for the first time that the information contained in the Supplemental Affidavit of Julie Speck was evidence before the Court at the time of its ruling on Defendants' Motion for Summary Judgment is disingenuous.

The information contained in the Supplemental Affidavit of Julie Speck was not information previously before the Court. It was admittedly new information presented to the Court after the Order Granting Defendants' Motion for Summary Judgment. (R. Vol. 4 at 2-6; R. Vol. 1 at 130-132.)

b. The information contained in the Supplemental Affidavit of Julie Speck is unimportant to the issues in this case.

Plaintiffs failed to establish that the new information presented in the Supplemental Affidavit of Julie Speck was important to Plaintiffs' case. The new

information does not dispute any material issues of fact in this matter. The new information in the Supplemental Affidavit of Julie Speck does not dispute the following material facts: (1) On August 25, 2008, Julie Speck underwent an Essure sterilization procedure; (2) The Essure sterilization procedure was performed by Dr. Ryan Roy; (3) On November 27, 2009, Julie Speck took a pregnancy test; (4) The pregnancy test was positive; (5) The pregnancy test confirmed that she was pregnant; (6) Prior to November 29, 2009, Mrs. Speck took a second pregnancy test; (7) The second pregnancy test was also positive; (8) Mrs. Speck thought she was pregnant before she took the pregnancy tests; (9) Mrs. Speck called Mr. Speck on either November 27, 2009 or November 28, 2009 and told him that she had taken two positive pregnancy tests; (10) Before Mrs. Speck took the pregnancy tests, Mr. Speck felt like she was pregnant; and (11) On March 30, 2011, Plaintiffs filed a Complaint alleging that Dr. Roy provided negligent treatment to Mrs. Speck.

On November 27, 2009, Mrs. Speck thought she was pregnant because her period was several days late. (R. Vol. 6 at 67.) Mrs. Speck was suspicious that she was pregnant the day after Thanksgiving in 2009 because her period was several days late and that was unusual. (R. Vol. 6 at 67.) When Mrs. Speck told Mr. Speck that she had missed a period and thought she was pregnant he told her that she needed to go get a pregnancy test. (R. Vol. 7 at 33.) Before she took the pregnancy test, Mr. Speck felt like Mrs. Speck was pregnant. (R. Vol. 7 at 35.) He thought she was pregnant before she took the test based on their past history and his gut just told him she was pregnant. (R. Vol. 7 at 36.) There was

never any question in his mind that she was pregnant. (R. Vol. 7 at 37.) To confirm her suspicion that she was pregnant, Mrs. Speck went and bought two Dollar General brand home pregnancy tests. (R. Vol. 6 at 67-68.) She purchased two tests "to make double sure". (R. Vol. 6 at 68.) The package insert contained inside the Dollar General brand pregnancy test states that it is over 99% accurate when used from the first day of the expected period. (R. Vol. 1 at 96-100.)

On November 27, 2009, Ms. Speck took a pregnancy test which was positive. (R. Vol. 6 at 66-69.) The pregnancy test was not equivocal in any way. There was no question about the result. It was clear that it was positive. (R. Vol. 6 at 68.) On either November 27, 2009 or November 28, 2009, Mrs. Speck took a second pregnancy test. (R. Vol. 6 at 69.) The second pregnancy test was also positive and confirmed her pregnancy. (R. Vol. 6 at 69.) The second test was positive immediately. (R. Vol. 6 at 69.) Further, Mrs. Speck admittedly thought she was pregnant before she took the pregnancy tests. (R. Vol. 6 at 69.)

Mrs. Speck, as any other reasonable person in her situation, was on inquiry notice that she was pregnant no later than November 27, 2009 when she learned the results of her positive pregnancy test.

c. Plaintiffs/Appellants failed to provide a plausible explanation for failing to offer the new evidence contained in the Supplemental Affidavit of Julie Speck in responding to Defendants' Motion for Summary Judgment wherein the issue of Plaintiffs knowledge and the facts and circumstances surrounding the positive pregnancy tests was at issue.

Plaintiffs' explanation for failing to offer the evidence in responding to the summary judgment is without merit. "The non-moving party must fully oppose a motion for summary judgment before it is granted rather than rely on Rule 59.04 to overturn a summary judgment after only weakly opposing the motion." *Chambliss*, 124 S.W. 3d at 121; see also *Robinson v. Currey*, 153 S.W.3d 32, 39 (Tenn. Ct. App. 2004).

Plaintiffs offer no plausible reason as to why these new arguments were not submitted to the court once the motion for summary judgment had been filed other than to say that they thought the submissions were sufficient. Plaintiffs bore the burden of production to show that a genuine issue of material fact existed once Defendants filed a properly supported motion for summary judgment. Plaintiffs should have raised the allegations of statements by Defendant because these allegations were readily discoverable from the Plaintiffs themselves and they now feel they are important to their case.

Plaintiffs erroneously rely on *Howell v. Baptist Hospital*, No. M2001-02388-COA-R3-CV, 2003 WL 112762 (Tenn. Ct. App. Jan. 14, 2003) *perm. appl. denied* (copy attached in Appendix) for support of their failure to offer the evidence in responding to the motion for summary judgment. In *Howell*, the Plaintiffs submitted a Supplemental Affidavit of an expert witness clarifying statements in his original Affidavit such as the time frame when he was an associate professor at Vanderbilt University Hospital. *Id.* at *11. The Supplemental Affidavit in *Howell* clarified the expert's "assertion that he had been working in Nashville during the pertinent time period; it d[id] not introduce a new

locale of expertise." *Id.* Plaintiffs assert that the Supplemental Affidavit of Julie Speck "clarifies" disputed issues of fact, including those identified at oral argument. (R. Vol. 1 at 146-155.) Unlike the situation in *Howell*, a close review of the Affidavit of Julie Speck and the Supplemental Affidavit of Julie Speck reveals that the Supplemental Affidavit does not clarify any disputed issues of fact but attempts to assert new evidence and arguments that were previously available to Plaintiffs. A review of the Affidavit of Julie Speck and Supplemental Affidavit of Julie Speck reveals that they provide substantially different testimony. Plaintiffs' argument that the Supplemental Affidavit of Julie Speck clarifies disputed issues of fact is unsupported. For example, the Affidavit of Julie Speck states that she "went to my physician to find out if in fact I was pregnant via medical testing and/or ultrasound. The brochure/package insert for such home test specifically says that you should go see your doctor to confirm that you are or are not pregnant." (R. Vol. 1 at 89.) The Supplemental Affidavit of Julie Speck states that "Dr. Roy told me to call the clinic on Monday morning and that they would work me in so that I could be tested to see what was wrong, but that I could not be pregnant and that it would have to be something other than pregnancy that was going on physically." (R. Vol. 1 at 131.) Clearly the statements contained in the Supplemental Affidavit do not provide context for the prior reason asserted as to why she went to the doctor to confirm her pregnancy.

Furthermore, the testimony contained in the Affidavit of Julie Speck and Supplemental Affidavit of Julie Speck regarding the reason she went to the Woman's Clinic after taking two positive pregnancy tests is contradictory and the

testimony cancels each other out. The Affidavit of Julie Speck provides that "I went to see my physician to find out if in fact I was pregnant via medical testing and/or ultrasound. The brochure/package insert for such home pregnancy test specifically says that you should go see your doctor to confirm that you are or are not pregnant." (R. Vol. 1 at 89.) On the other hand, the Supplemental Affidavit of Julie Speck provides a contradictory reason for going to the doctor. The Supplemental Affidavit of Julie Speck provides: "Dr. Roy told me to call the clinic on Monday morning and that they would work me in so that I could be tested to see what was wrong." (R. Vol. 1 at 131.) The two affidavits provide contradictory statements regarding the reason why Julie Speck went to the doctor's office. Second, the Affidavits of Julie Speck provide contradictory statements regarding what she was going to the doctor to determine. The Affidavit of Julie Speck provides that she was going to the doctor "to confirm that you are or are not pregnant." (R. Vol. 1 at 89.) The Affidavit of Julie Speck also provides "[t]he reason I went to the doctor was to ascertain if in fact I was or was not pregnant regardless of my suspicions, feelings, thought processes, or home pregnancy test, I knew that I would not be confirmed as pregnant until the doctor ran the appropriate medical test. (R. Vol. 1 at 90.) While the Supplemental Affidavit of Julie Speck provides that she was going to the doctor to determine what was wrong with her other than pregnancy. (R. Vol. 1 at 131.)

The testimony of Julie Speck regarding false positives from the pregnancy tests is also contradictory. The Affidavit of Julie Speck provides that "At the time I did the home pregnancy test, I did feel like I was pregnant but I know that home

pregnancy tests have a certain percentage of false positives and I knew that until it had been confirmed by the doctor via appropriate medical testing and/or sonogram, that I would not know for sure." (R. Vol. 1 at 90.) The Supplemental Affidavit of Julie Speck provides that Dr. Roy told her "that there have been some false positives on pregnancy test and that apparently there was a batch of faulty or defective pregnancy tests in the Jackson area." (R. Vol. 1 at 131.) It should also be noted that Mrs. Speck does not live in the Jackson area. (*See* R. Vol. 1 at 1; R. Vol. 6 at 5.) Mrs. Speck does not drive any further than Middleton. (R. Vol. 6 at 60.)

Defendants' Motion for Summary Judgment was based on the testimony of Plaintiffs that their actions and statements show that they were on inquiry notice that Mrs. Speck was pregnant prior to November 29, 2009. Any evidence held by Plaintiffs to the contrary should have been presented by Plaintiffs in opposition to the Motion for Summary Judgment. "Parties have been 'admonished repeatedly that [those] facing a summary judgment motion cannot rest on the mere allegations or denials in their pleadings but rather must respond with appropriate evidentiary materials demonstrating that there is a genuine issue for trial.'" *Denton-Preletz v. Denton*, No. E2010-01756-COA-R3-CV, 2011 WL 5375141 (Tenn. Ct. App. Nov. 8, 2011), *perm. to appeal denied* Apr. 11, 2012(holding that trial court did not err in denying the motion to alter or amend because Plaintiff failed to submit a valid reason for not presenting allegations that were discoverable and available prior to the summary judgment hearing)(*quoting Bradley v. McLeod*, 984 S.W.2d 929, 932 (Tenn. Ct. App. 1998), *overruled on*

other grounds by Harris v. Chern, 33 S.W.3d 741, 744 (Tenn. 2000))(copy attached in Appendix).

The trial court appropriately found that:

> [T]he Supplemental Affidavit of Julie Speck is not a clarification of Mrs. Speck's prior testimony. After comparing the Affidavit of Julie Speck which was filed in response to the Defendants' Motion for Summary Judgment with the Supplemental Affidavit of Julie Speck which was filed in support of the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the Court finds that the Supplemental Affidavit presents additional evidence that was clearly available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment. The Supplemental Affidavit attempts to create an issue of material fact after an adverse ruling of this Court. The Court finds that the Supplemental Affidavit of Julie Speck is inconsistent with Mrs. Speck's prior testimony. The information contained in the Supplemental Affidavit of Julie Speck was not mentioned in Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs, the depositions of Mr. Speck, Mrs. Speck, or Ryan Roy, M.D., or the Affidavit of Julie Speck.

(R. Vol. 2 at 235-236.)

d. Defendants would be unfairly prejudiced if the Court considered Plaintiffs' new evidence set forth in the Supplemental Affidavit of Julie Speck.

Plaintiffs attempt to sway the Court that there is no unfair prejudice to any party in considering the Supplemental Affidavit of Julie Speck. Plaintiffs are certainly not prejudiced by the submission of the Supplemental Affidavit of Julie Speck. Plaintiffs did not set forth any effort to obtain the new evidence and present it to the Court prior to the hearing on Defendants' Motion for Summary Judgment. Plaintiffs have offered the Court no plausible explanation for the failure to present the new evidence prior to the hearing on the Motion for Summary Judgment. However, Defendants would suffer unfair prejudice as a

result of the Court's consideration of Plaintiffs' new evidence. On August 11, 2011, over eight months prior to the hearing on Defendants' Motion for Summary Judgment, Plaintiffs provided sworn answers to Defendants' First Set of Interrogatories. Plaintiffs did not disclose any conversations with Dr. Roy in Plaintiffs' Answers to Defendants' First Set of Interrogatories to Plaintiffs. On September 21, 2011, Mrs. Speck and Mr. Speck were deposed. Plaintiffs did not disclose any conversations with Dr. Roy as set forth in the Supplemental Affidavit of Julie Speck. On or about April 4, 2012, Julie Speck provided sworn testimony via an Affidavit. (R. Vol. 1 at 89-92.) On April 9, 2012, Plaintiffs filed a Memorandum in Opposition to Defendants' Motion for Summary Judgment. (R. Vol. 1 at 82-84.) On April 12, 2012, the Court heard argument on Defendants' Motion for Summary Judgment. Plaintiffs failed to set forth any information or argument regarding the new evidence at any time prior to filing the Supplemental Affidavit of Julie Speck. It was not until after the Court entered an Order Granting Defendants' Motion for Summary Judgment that Plaintiffs found new evidence. Plaintiffs provided sworn answers to interrogatories, sworn deposition testimony, and a sworn affidavit prior to the hearing on Defendants' Motion for Summary Judgment. Defendants deposed Plaintiffs, prepared a Motion for Summary Judgment, responded to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, and prepared for and attended the hearing on Defendants' Motion for Summary Judgment. Julie Speck is now attempting to alter her prior testimony which is unfairly prejudicial to Defendants. Additionally,

requiring Defendants to continue to spend time and money to defend against a claim that is barred by the statute of limitations is unfairly prejudicial.

Further, to consider the Supplemental Affidavit of Julie Speck where Plaintiffs have offered no showing whatsoever that the newly submitted evidence contained in the Supplemental Affidavit was not available to the Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment with no showing of due diligence and no explanation as to why the newly submitted evidence could not have been submitted earlier is inappropriate. To hold otherwise would permit Plaintiffs to oppose a motion for summary judgment by defending it "piecemeal by first offering some small portion of its available proof in an attempt to establish the existence of the essential elements of his claim and asking the trial court if that is enough to defeat the motion." Then, "[i]f the trial court answers, 'no, it's not', the non-moving party then could add a little more of its available proof and ask the same question of the trial court yet again. If 'no' still was the answer, the non-moving party could continue to add bits and pieces of its available proof in an attempt to establish the existence of the essential element of the claim." This process is inappropriate under Rule 56 of the Tennessee Rules of Civil Procedure and is not required or allowed by case law. *Chambliss*, 124 S.W.3d at 121.

Even if the Supplemental Affidavit of Julie Speck had been considered, Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment was appropriately denied.

III. THE TRIAL COURT APPROPIATELY GRANTED DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT

In 1987, the Tennessee Supreme Court evaluated and ascertained the scope of damages recoverable by a plaintiff in an action for wrongful pregnancy or wrongful conception. *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). In *Smith*, the Plaintiff underwent a sterilization procedure following the birth of twins. Approximately four months after the procedure, Smith was informed that she was pregnant with her fifth child. She gave birth to a healthy, normal baby boy. Smith filed a Complaint seeking damages for "emotional distress, loss of income, medical expenses, and the expenses of rearing the child to majority." *Id.* at 740. Defendants filed Motions to Dismiss Plaintiff's claims "for the recovery of the rearing expenses of a normal, healthy child." *Id.*

The Tennessee Supreme Court evaluated the various theories of recovery for wrongful pregnancy or wrongful conception, specific public policies and Tennessee law, and concluded that the extent of recovery was limited "to those damages immediately flowing from the failed pregnancy avoidance technique." *Id.* at 751. The Supreme Court held that the Defendants' were not liable for the support of a normal child

> because legislative enactment of such comprehensive statutory schemes controlling child custody and support demonstrates that the public policy of Tennessee is that the obligation for support of minor children is affirmatively placed on the parents of the children. The fact that a normal child is the result of a failed pregnancy avoidance technique will not shift this responsibility from the parents to the defendant in such a case. Application of general common law principles of tort recovery is not appropriate in this case because both the common law itself and statutory law have specifically established responsibility for the support of children.

Id. Furthermore, "[i]f this responsibility is to be shifted away from the parents, **such a determination is for the Legislature and not the Judiciary**. Significant and far-reaching questions of social policy are involved, 'and it is the prerogative of the General Assembly to declare the policy of the State touching the general welfare.'" *Id.* At 751 (quoting *Baptist Memorial Hosp. v. Couillens, supra*, 140 S.W.2d at 1093)(emphasis added).

The Court held, "[l]egal causation does not extend to the consequence of the necessity of support. The extent of recoverable damages is limited by this State's law and policy, which impose the obligation to support minor children on the parents. This does not, however, and cannot relieve the defendant in these cases of all liability for the injuries caused by his negligence; it only establishes a boundary on the extent of recoverable damages." *Id.* at 752. The Court went on to state, "[i]f liability is to be extended by shifting the obligation to support from the parents to defendants in wrongful pregnancy actions, **the Legislature is the proper forum in which the competing social policies should be considered in changing the law**." *Id.*(emphasis added.) Importantly, in over twenty-five years since the *Smith* decision, the Legislature has not acted to shift the responsibility for supporting a normal child away from the parents. Legislative silence on the subject can be interpreted as indicating legislative approval of the *Smith* decision.

The *Smith* court, like the majority of courts, has adopted a remedy of limited recovery which follows the view that the costs of raising a healthy child are not recoverable in a wrongful pregnancy action. *See*, *Boone v. Mullendore*,

416 So.2d 718 (Ala. 1982); *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975), *ovrld on other gr by Garrison v. Medical Center of Delaware, Inc.* (Del. 1990); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. App. 1984); *Fassoulas v. Ramey*, 450 So. 2d 822, *rehearing denied*, (Fla. 1984); *Fulton-DeKalb Hospital Authority v. Graves*, 314 S.E.2d 653 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385, cert. denied, (Ill. 1983); *Chaffee v. Seslar*, 786 N.E.2d 705 (Ind. 2003); *Johnson v. University Hospital of Cleveland*, 540 N.E.2d 1370 (Ohio 1989); *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987); *Jackson v. Bumgardner*, 347 S.E.2d 743 (N.C. 1986); *Garrison v. Foy*, 486 N.E.2d 5 (Ind.Ct.App.1985); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984); *Byrd v. Wesley Medical Center*, 699 P.2d 459 (Kan. 1985); *Schork v. Huber*, 648 S.W.2d 861 (Ky.1983); *Pitre v. Opelousas General Hospital*, 530 So.2d 1151 (La.1988); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988); *Macomber v. Dillman*, 505 A.2d 810 (Me.1986); *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); *Hitzemann v. Adam*, 518 N.W.2d 102 (Neb. 1994); P. v. Portadin, 432 A.2d 556 (N.J. 1981); *O'Toole v. Greenberg*, 477 N.E.2d 445 (N.Y. 1985); *Mason v. Western Pennsylvania Hospital*, 453 A.2d 974 (Pa.1982); *Crawford v. Kirk*, 929 S.W.2d 633 (Tex.App.1996); *Miller v. Johnson*, 343 S.E.2d 301 (Va. 1986); *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo.1982); and *Mississippi State Federation of Colored Women's Housing for the Elderly in Clinton, Inc. v. In the Interest of L.R.*, 62 So.3d 351 (MS 2010).

The *Smith* case and the instant case are very similar. First, both involve a failed pregnancy avoidance procedure that resulted in a normal, healthy baby. Second, both cases involve a family with multiple children. The Supreme Court in *Smith* did not overlook, but instead recognized "the economic realities that accompany the raising of children." *Id.* However, the Court found, "this is not a case involving a natural evolution of the common law due to changed social conditions." *Id.*

This Court should uphold the decision of the trial court and the decision of the Tennessee Supreme Court in *Smith*.

CONCLUSION

For the foregoing reasons, Defendants/Appellees are entitled to summary judgment and affirmation of the decisions rendered by the Madison County Circuit Court in case No. C1187.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on this 14th day of May, 2013, by mailing U.S. postage prepaid, via facsimile, or via email to:

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APPENDIX

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Cases

Orders

Other Pleadings

Not Reported in S.W.2d, 1989 WL 25598 (Tenn.Ct.App.)
(Cite as: 1989 WL 25598 (Tenn.Ct.App.))

H

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Middle Section at Nashville.
Linda CANTRELL and Jewell Cantrell, Plaintiffs-Appellants,
v.
Robert N. BUCHANAN, Jr., M.D., Defendant-Appellee.

March 22, 1989.
Permission to Appeal Denied by Supreme Court June 5, 1989.

No. 88-334-II, Davidson Law, Appealed from the Circuit Court of Davidson County at Nashville, Matthew J. Sweeney, III, Judge.
James V. Barr, III, Nashville, James A. Johnson, Johnson, Weis, Paulson & Priebe, S.C., Rhinelander, Wis., for plaintiffs-appellants.

C.J. Gideon, Jr., North & Gideon, Nashville, for defendant-appellee.

OPINION

CANTRELL, Judge.

*1 The trial court dismissed the plaintiffs' medical malpractice claim on the grounds that it is barred by the applicable statute of limitations, Tenn.Code Ann. § 29-26-116(a) (1980). The plaintiffs appeal.

The facts relevant to this appeal can be briefly stated. From April of 1967 until January of 1975, plaintiff-appellant Linda Cantrell received intermittent radiation treatments while under the care of defendant-appellee Dr. Robert Buchanan for acne. In late August or early September of 1986, Mrs. Cantrell learned that she had cancer. According to the plaintiffs, on either September 12 or September 19 of 1986, Mrs. Cantrell first discovered that her cancer was caused by the radiation therapy she received under Dr. Buchanan's care.

On September 11, 1987, the plaintiffs filed this malpractice action against Dr. Buchanan alleging negligence and intentional deceit. The defendant moved for summary judgment. The trial court granted the motion on the ground that Tenn.Code Ann. § 29-26-116(a)(3) bars the action.

Under Tenn.Code Ann. § 29-26-116(a)(1), the statute of limitations in medical malpractice actions is one year. Tenn.Code Ann. § 29-26-116(a)(2) codifies the discovery rule. However, Tenn.Code Ann. § 29-26-116(a)(3) establishes a 3-year statute of repose:

In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred....

Only in cases involving fraudulent concealment or negligent leaving of a foreign object in a patient's body is the three-year cap inapplicable. *See* Tenn.Code Ann. § 29-26-116(a)(3)-(4).

In the present case, the latest date on which any alleged negligence occurred is January of 1975. Suit was filed in September of 1987, more than three years after the negligent act. This case does not involve a foreign object. In their appeal, the plaintiffs do not assign error to the trial court's finding that there is no evidence to indicate fraudulent concealment. Therefore, Tenn.Code Ann. § 29-26-116(a)(3) bars the claim.

On appeal, the plaintiffs request that this court avoid the harsh consequences of Tenn.Code Ann. § 29-26-116(a)(3) by applying the discovery rule. The discovery rule would not bar this action filed on September 11, 1987 since Mrs. Cantrell did not discover the alleged source of her cancer until, at the earliest, September 12, 1986. *See Foster v. Harris*, 633 S.W.2d 304 (Tenn.1982).

The circumstances of this case are compelling: Tenn.Code Ann. § 29-26-116(a)(3) bars the plaintiffs' right to seek redress before they even knew about the injury. Despite the harshness of this result, this court cannot simply abrogate the legislature's enactment. The Supreme Court upheld the constitutionality of Tenn.Code Ann. § 29-26-116(a)(3) in *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn.1978). (The court took notice of the medical malpractice insurance crisis which prompted the legislature to enact the three-year cap.) The court noted that, in the absence of constitutional defects, such policy matters are for the legislature, not for the courts. *Id.*

***2** At oral argument, the plaintiffs raised a constitutional issue not addressed in *Harrison v. Schrader*. Relying on *Jones v. Morristown-Hamblen Hospital Assn., Inc.*, 595 S.W.2d 816 (Tenn.Ct.App.1979), the plaintiffs assert that applying Tenn.Code Ann. § 29-26-116(a)(3) to the present case constitutes a denial of due process. In the present case, as in *Jones*, the alleged malpractice occurred prior to July 1, 1975, the effective date of the Medical Malpractice Review Board and Claims Act of 1975, ch. 299, 1975 Tenn.Pub. Acts 662, of which Tenn.Code Ann. § 29-26-116 was a part. The plaintiffs urge that it is a denial of due process to apply Tenn.Code Ann. § 29-26-116(a)(3) retrospectively so as to cut off the plaintiffs' right to redress before they had discovered the injury.[FN1]

The constitutional issue raised by the plaintiffs was addressed and rejected in *Jones*. *Jones* held that, under due process principles, "[a] statute of limitation ... may not be given retrospective application so as to bar an accrued right of action, but may bar a cause of action which has not yet accrued or vested." *Jones*, 595 S.W.2d at 820. After *Teeters v. Currey*, 518 S.W.2d 512 (Tenn.1974), discovery became a condition precedent to the accrual of a right of action for medical malpractice. When the Medical Malpractice Review Board and Claims Act took effect on July 1, 1975, the plaintiff in *Jones* had not discovered her injury and, therefore, had no accrued right of action. Since retrospective application of what is now Tenn.Code Ann. § 29-26-116(a) would not impair a vested right, the court held such application constitutional.

In the present case, as in *Jones*, the plaintiffs had not discovered the injury as of July 1, 1975 when the Medical Malpractice Review Board and Claims Act took effect. Since there was no accrued right of action, retrospective application of Tenn.Code Ann. § 29-26-116(a)(3) does not constitute a denial of due process.

The *Jones* dissent does not help the plaintiffs' case. The dissenting judge based his opinion on factors not involved in the present case.

Courts have rejected similar due process challenges to Tennessee's statute of repose for products liability cases. *See Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir.1984), *cert. denied*, 469 U.S. 1159 (1985); *Mathis v. Eli Lilly and Co.*, 719 F.2d 134 (6th Cir.1983). Both *Wayne* and *Mathis* include discussions as to the rationality of the products liability statute of repose. In its equal protection analysis in *Harrison*, the Supreme Court concluded:

This Court cannot say that there is no reasonable basis for the separate classification of health care providers or that this classification bears no reasonable relation to the legislative objective of reducing and stabilizing insurance and health costs and protecting

the public as a whole. Indeed, at the time Sec. 23-3415(a) [now § 29-26-116(a)] was passed, "there was indubitably a valid reason for the distinction made" by the statute.

***3** *Harrison,* 569 S.W.2d at 827 (quoting *Dobbins v. Terrazzo Machine & Supply Co.*, 479 S.W.2d 806, 810 (Tenn.1972)). Moreover, rational basis analysis is unnecessary where there is no right deserving of due process protection. Thus, the court in *Mathis* stated:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer, as in the instant case, does not give rise to due process protection.

Mathis, 719 F.2d at 141. This reasoning was the basis of the majority opinion in *Jones.*

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for the collection of the costs in that court. Tax the costs on appeal to the appellant.

TODD, P.J., and KOCH, J., concur.

> FN1. Tenn.Code Ann. § 29-26-103 (repealed 1985) provided that the Medical Malpractice Review Board and Claims Act would "not affect any malpractice actions commenced or filed before July 1, 1975." From this provision, the *Jones* court concluded that the legislature intended the Act to have retrospective application "since any suit filed after July 1, 1975, would fall within the Act's provisions without regard to the date of the negligent act giving rise to the cause of action." *Jones,* 595 S.W.2d at 819. In 1985, the legislature repealed all sections of the Act concerning the medical malpractice review board, including Tenn.Code Ann. § 29-26-103. *See* Act of April 8, 1985, ch. 184, § 4, 1985 Tenn.Pub.Acts, 340, 341. However, the plaintiffs do not argue (and this court should find no reason to conclude) that this repeal indicated a legislative intent to preclude retrospective application of the remaining provisions of the Act. Rather, the legislature repealed the review board provisions because the board had gone out of existence pursuant to statute. *See* Act of April 8, 1985, ch. 184, § 4(a), 1985 Tenn.Pub.Acts 341.

Tenn.App.,1989.
Cantrell v. Buchanan
Not Reported in S.W.2d, 1989 WL 25598 (Tenn.Ct.App.)

END OF DOCUMENT

Slip Copy, 2011 WL 5375141 (Tenn.Ct.App.)
(Cite as: 2011 WL 5375141 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Carolyn L. DENTON–PRELETZ, et al.
v.
Susan L. DENTON.

No. E2010–01756–COA–R3–CV.
May 4, 2011 Session.
Nov. 8, 2011.
Application for Permission to Appeal Denied by Supreme Court April 11, 2012.

Appeal from the Chancery Court for Cumberland County, No.2008–CH–126; Ronald Thurman, Chancellor.

Robert L. Barr, Jr., Atlanta, Georgia, and D. Brent Gray, Jacksboro, Tennessee, for the appellants, Carolyn L. Denton–Preletz and Carolyn L. Denton–Preletz, as Trustee of the Carolyn L. Preletz, Living Trust.

Joe M. Looney, Crossville, Tennessee, for the appellee, Susan L. Denton.

JOHN W. McCLARTY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

OPINION

JOHN W. MCCLARTY, J.

***1** This appeal concerns a note executed by Robert Denton ("Husband") and Susan L. Denton ("Wife") and payable to Husband's sister, Carolyn L. Denton–Preletz ("Lender"). When Lender sought recovery of the note, Wife denied liability and filed a motion for summary judgment, asserting that the statute of limitations for recovery of the note had passed. The trial court granted the motion and dismissed the case as it related to Wife. Lender filed a motion to alter or amend the order and a motion to amend the complaint, which were denied. Lender appeals. We affirm the decision of the trial court.

I. BACKGROUND

Lender agreed to loan Husband and Wife (collectively the "Borrowers") $309,000. On October 24, 1986, Borrowers executed a note evidencing the loan. The note provided,

> For value received, the undersigned promise to pay to the order of [Lender] [t]he sum of [$309,000], with interest at the rate of [8 percent] per annum; said principal and interest shall be payable as follows: Payments will be made at the rate of $12,000 annually following the retirement of the FHA obligation.
>
> All installments of principal and interest are payable in lawful money of the United States at Crossville, Tennessee, or at such place as the holder of this note may designate.
>
> If default should be made in the payment of this note when due, or if any installment payment under this note should be in default for as much as 365 days, the entire principal sum and accrued interest shall be, at once, due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of default in the payment of this note, and if the note is collected by an attorney at law, the undersigned agree to pay all costs of collection, including a reasonable attorney's fee.

> The makers and endorsers severally waive presentment, protest, and demand, notice of protest, demand and dishonor and nonpayment of this note, and expressly agree that this note, or any payment thereunder, may be extended from time to time without in any way affecting [the] liability of the makers and endorsers hereof.
>
> This note is secured by a trust conveyance of even date herewith.

The "FHA obligation" referred to the Borrowers' execution of a deed of trust to the Farmers Home Administration on December 7, 1979. The deed was not attached to the note. The maturity date of the FHA obligation was December 7, 1999. The Borrowers satisfied the FHA obligation in 1991 but failed to inform Lender that the obligation had been fulfilled.

In February 2007, Lender asked Husband when the FHA obligation would be fulfilled. Husband told Lender that the obligation had been fulfilled, and Lender demanded payment. Husband eventually agreed that the note was due and payable, but Wife refused payment. Lender filed suit on May 28, 2008, claiming that the Borrowers had breached their contract by failing to remit payment when the FHA obligation was fulfilled, that she did not know the terms of the FHA obligation, that she believed the FHA obligation remained unpaid, and that she relied on the Borrowers' representations. Husband provided an affidavit for Lender, acknowledging that the "FHA obligation was satisfied early and did not go to term" and that he and Wife "forgot to inform" Lender. An agreed judgment was entered against Husband for $861,589.40, including the principal amount of the note, interest, and attorney fees.

***2** Following the filing of Lender's complaint, Wife again denied liability on the note. Wife alleged that the complaint failed to state a claim upon which relief could be granted, that the debt had been forgiven, and that Lender was barred from recovery on the note because the applicable statute of limitations had passed and because of the equitable doctrine of laches. Wife filed a motion for summary judgment, asserting that there were no genuine issues of material fact. She said the note did not "state a final maturity date" and would "never pay out because the annual accrual of interest exceed[ed] the annual payment called for." She opined that the note was a demand note, that the applicable statute of limitations was ten years, and that demand for payment should have been made in 1996. She stated that no payments had been made and that no demand for payment was made prior to 2007. She claimed recovery on the note was barred by the statute of limitations.

Lender conceded that the note was a demand note and that the applicable statute of limitations was ten years. She alleged that the earliest date she could have demanded payment was December 7, 1999, the maturity date of the FHA obligation, and that the statute of limitations did not begin to run until that date. She said that it would have been "disingenuous, if not fraudulent," for the Borrowers to prepare a note that precluded demand for payment until after the passing of the statute of limitations. She claimed that summary judgment was inappropriate because the facts of the case required application of the discovery rule, necessitating a factual determination regarding whether she made a timely demand for payment. She claimed that Wife could not assert a statute of limitations defense because by failing to inform her that the FHA obligation had been fulfilled, Wife did not meet the implied contractual obligation of good faith and fair dealing.

Following a hearing, the trial court granted Wife's motion for summary judgment and dismissed the case as it related to Wife. The court found that the note was a demand note and that the applicable statute of limitations was ten years pursuant to Tennessee Code Annotated section 47–3–118(b). The court further

found that the FHA obligation was satisfied in 1991. The court held that the discovery rule did not apply because evidence of the satisfaction of the FHA obligation was filed in Cumberland County, providing notice "to all of the world of their contents" pursuant to Tennessee Code Annotated section 66–26–102. The court dismissed the case, further holding that there was "no genuine issue of any material fact and that [Wife was] entitled to a judgment of dismissal as a matter of law."

Shortly thereafter, Lender filed a motion to alter or amend the order dismissing the case, alleging that the court improperly granted summary judgment following its erroneous reliance on Tennessee Code Annotated section 66–26–102. She claimed that she should not have been bound by a "duty to search land records on a continual basis for an event that might trigger a subsequent duty to act." She claimed that the discovery rule applied to her case, requiring a weighing of the evidence and precluding summary judgment. She asserted that the recording of the satisfaction of the FHA obligation was "a factor to be considered when determining the reasonableness of [her] conduct" under the discovery rule.

*3 After hiring new counsel, Lender filed a motion to amend her complaint. She asserted that Husband's reaffirmation of the debt and Wife's fraudulent misleading of Lender tolled the statute of limitations. Lender said she asked family members about the Borrowers' financial condition "repeatedly and directly" and was told "they were not doing well." Lender claimed the Borrowers accepted expensive gifts and travel, leading her to believe that "they were financially inept and unable to provide for themselves." She asserted that the Borrowers knew she relied on their trustworthiness because she lived across the country and would not be able to check whether the FHA obligation had been fulfilled.

Wife responded to the motion to alter or amend the order by asserting that Lender had attempted to "reargue" the same issues. She believed the statute of limitations could not be tolled because Lender had agreed at the hearing on the motion for summary judgment that there were no allegations of fraud or misrepresentation. She opined that the discovery rule did not apply because Lender failed to exercise reasonable care and diligence in determining when the obligation had been fulfilled and because application of the rule would be inconsistent with the statute of limitations applicable to demand notes. She claimed that application of Tennessee Code Annotated section 66–26–102 was merely one item the court took into account in granting the motion for summary judgment.

Wife responded to the motion to amend the complaint by asserting that the motion was untimely and raised issues that had not been suggested in prior pleadings but that were discoverable prior to the filing of the initial complaint. She claimed that the issues raised in the motion were also contradictory to the positions taken by Lender in prior pleadings and hearings and that the doctrine of judicial estoppel should prevent Lender from raising those issues. She said that the reaffirmation of the debt occurred 18 months prior to the filing of the motion. Wife asserted that Lender's attorney "conceded and stipulated" at the hearing on the motion for summary judgment "that there was no suggestion that [Wife] had at anytime engaged in any fraud or misrepresentation [ ] or that [Wife] had fraudulently concealed the running of the statute of limitations."

Lender's prior attorney subsequently filed an affidavit in which he stated,

> To the best of my knowledge, recollection, and belief no stipulation as to the issue of fraud was made. As there was no allegation raised in the pleadings that we filed that [Wife] had engaged in fraud or misrepresentation or that affirmative action to conceal the running of the statute of limitations was taken, I, as [Lender's] counsel, do not recall having specifically addressed the same.

Shortly thereafter, Lender's attorney filed another affidavit. He said Lender was not present at the hearing on the motion for summary judgment. He had "no specific recollection" of the discussion of fraud but said that if the court inquired on that issue, he "would have responded that [he] had not alleged fraud as a cause of action at that juncture." He asserted that he had engaged in "minimal discovery" prior to the hearing and that "all issues and theories are rarely known until all discovery is completed." Relative to whether he provided a stipulation, he said, "I state definitively that no such stipulation was ever made, nor was one contemplated. Any such stipulation would have been made in writing or, at a minimum, made on the record." He further stated, "At no time would I or anyone from my firm, to my knowledge, enter into such a stipulation that would effectively dismiss a possible issue at such an early stage of the proceedings in the absence of further discovery."

***4** Following arguments of counsel, the trial court denied the motion to alter or amend the order and the motion to amend the complaint. Relative to the complaint, the court found that "in answer to a specific inquiry by the [c]ourt," Lender's counsel had "represented that fraud and misrepresentation were not issues in the case[ ] and that [Lender] made no allegation of fraud and misrepresentation." The court held that Lender's attempts to "raise the issues of fraud and misrepresentation [were] foreclosed." This appeal followed.

II. ISSUES

We restate and consolidate Lender's issues on appeal as follows:

A. Whether the trial court erred in granting the motion for summary judgment after finding that Lender's suit was time-barred.

B. Whether the trial court erred in denying Lender's motion to alter or amend the court's order of summary judgment.

C. Whether the trial court erred in denying Lender's motion to amend the complaint after summary judgment had been granted.

III. STANDARD OF REVIEW

On appeal, the factual findings of the trial court are accorded a presumption of correctness and will not be overturned unless the evidence preponderates against them. *See* Tenn. R.App. P. 13(d). The trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn.2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). Mixed questions of law and fact are reviewed de novo with no presumption of correctness; however, appellate courts have "great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal." *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn.1995).

IV. DISCUSSION

A.

Lender contends that the court erred in granting summary judgment because there were genuine issues of material fact. Lender asserts that the trial court improperly relied on Tennessee Code Annotated section 66–26–102 and that pursuant to the discovery rule, the statute of limitations did not begin to run until she became aware that the FHA obligation had been fulfilled. Wife responds that the trial court did not err in granting the motion for summary judgment. She asserts that the court could not apply the discovery rule because Lender was not delayed or deterred from demanding payment when the satisfaction of the condition precedent was documented in public records and when she could have asked the Borrowers whether the condition had been fulfilled.

Summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion and (2) the moving party is entitled to judgment as a matter of law on the undisputed facts. Tenn. R. Civ. P. 56.04. A properly supported motion for summary judgment "must either (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn.2008). When the moving party has made a properly supported motion, the "burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id.* at 5; *see Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993). The nonmoving party may not simply rest upon the pleadings but must offer proof by affidavits or other discovery materials to show that there is a genuine issue for trial. Tenn. R. Civ. P. 56.06. If the nonmoving party "does not so respond, summary judgment, if appropriate, shall be entered." Tenn. R. Civ. P. 56.06.

***5** On appeal, this court reviews a trial court's grant of summary judgment de novo with no presumption of correctness. *See City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn.1997). In reviewing the trial court's decision, we must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn.1999); *Muhlheim v. Knox County Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn.1999). If the undisputed facts support only one conclusion, then the court's summary judgment will be upheld because the moving party was entitled to judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn.1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995).

The applicable statute of limitations for demand notes is ten years when no demand for payment is made and when "neither principal nor interest on the note has been paid for a continuous period of ten (10) years." Tenn.Code Ann. § 47–3–118(b). Additionally, actions on demand notes must be "commenced within ten (10) years after the cause of action accrued." Tenn.Code Ann. § 28–3–109(c).

The note was executed on October 24, 1986, and Lender did not demand payment until 2007. The complaint on the note was not filed until May 28, 2008. The terms of the note provided that payment should be remitted when the FHA obligation was fulfilled. We believe the cause of action accrued in 1991, when the condition precedent was fulfilled. Thus, Lender's claim was barred because she waited 16 years from that date to inquire about the obligation and demand payment and because no payments of principal or interest were made for a continuous period of 10 years.

Lender asserts that the discovery rule should be applied to her case to toll the statute of limitations. She believes that the statute of limitations should run from 2007, the time in which she learned that the obligation had been fulfilled. We, like the trial court, believe that application of the discovery rule to this case was unwarranted. The discovery rule applies "only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he [or she] has a right of action." *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn.1983). "Furthermore, the statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Id.* When applying the discovery rule, determining "[w]hether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a fact question for the jury to determine." *Wyatt v. A–Best, Co., Inc.*, 910 S.W.2d 851, 854 (Tenn.1995); *see McIntosh v. Blanton*, 164 S.W.3d 584, 586 (Tenn.Ct.App.2004). Nevertheless, if undisputed facts show "that no reasonable trier of fact could conclude that a plaintiff did not know, or in

the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of defendant's wrongful conduct, Tennessee case law has established that judgment on the pleadings or dismissal of the complaint is appropriate." *See* *Schmank v. Sonic Auto., Inc.*, No. E2007-01857-COA-R3-CV, 2008 WL 2078076, at *3 (Tenn.Ct.App. May 16, 2008) (citations omitted).

***6** Records indicating the FHA obligation had been fulfilled were filed in the county register's office, providing some form of notice to Lender that the obligation had been fulfilled. *See* Tenn.Code Ann. § 66-26-102; *see also* Tenn.Code Ann. § 66-24-101(a)(9). We acknowledge that Lender did not live in Tennessee and that it would be cumbersome for Lender to continually check the records of the register's office in Tennessee to ascertain when the FHA obligation had been fulfilled. *See generally* *Hutchison v. Estate of Nunn ex rel. Ozier*, No. W2004-00578-COA-R3-CV, 2004 WL 3048970, at *5 (Tenn.Ct.App. Dec.30, 2004). However, at the very least, Lender should have inquired about the FHA obligation at the time the note was executed.[FN1] Instead, Lender waited 21 years to inquire about the note and 22 years to bring a cause of action on the note. Given these facts, the discovery rule cannot be applied to Lender's case because she failed to exercise reasonable care and diligence in discovering her injury, namely the failure of the Borrowers to remit payment according to the terms of the note.

> FN1. We recognize that the terms of the FHA obligation provided a maturity date of December 7, 1999, several years after the obligation was actually fulfilled. If Lender had inquired about these terms, she would have been able to demand payment within ten years of the accrual of the cause of action, thereby complying with the applicable statute of limitations.

Lender asserts that she delayed demand on the note because of the Borrowers' representations. Absent allegations of fraud, her reliance on the Borrowers' representations was not enough to obviate her duty to exercise reasonable care and diligence in discovering her injury. Lender used the Borrowers' representations as the basis for her allegations of fraud that were included in the motion to amend the complaint but stopped short of alleging fraud in the initial complaint or in response to Wife's motion for summary judgment. At the hearing on the motion for summary judgment, the trial court inquired as to whether Lender was asserting fraud as a defense to the statute of limitations. While counsel's response on Lender's behalf at that hearing is a source of contention in this appeal, counsel admitted that they had not raised fraud as an issue at that point in the case.

Following Wife's properly supported motion for summary judgment, Lender bore the burden of production "to show that a genuine issue of material fact exist [ed]." *Hannan*, 270 S.W.3d at 5; *see* *Robinson*, 952 S.W.2d at 426; *Byrd*, 847 S.W.2d at 215. Lender simply failed to carry that burden. If Lender had raised allegations of fraud at the hearing on the motion for summary judgment, she would have raised a material question of fact, precluding summary judgment. *See* *Pero's Steak and Spaghetti House v. Lee*, 90 S.W.3d 614, 625 (Tenn.2002); *Benton v. Snyder*, 825 S.W.2d 409, 414 (Tenn.1992). Accordingly, we conclude that the trial court did not err in granting the motion for summary judgment because no genuine issues of material fact existed at that time.

B.

Lender contends that the court erred in failing to reverse the order dismissing the case because the court's application of Tennessee Code Annotated section 66-26-102 was erroneous and because the discovery rule tolled the statute of limitations. Lender asserts that when allegations of fraud were raised, the trial court should have allowed her to conduct discovery on the issue. Wife responds that the trial court did not err in applying the statute because the satis-

faction of the condition precedent was not inherently undiscoverable. Wife asserts that the doctrine of judicial estoppel precluded the court's consideration of fraud and that the alleged fraud occurred before the complaint was filed and was discoverable.

*7 A party may file a motion to alter or amend a judgment within 30 days after the entry of the judgment. Tenn. R. Civ. P. 59.04. This court reviews a trial court's decision to deny a motion to alter or amend a judgment under an abuse of discretion standard. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn.2003). "The purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn.Ct.App.2005). These motions should "be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice." *Id.* These motions "should not be used to present new, previously untried or unasserted theories or legal arguments." *Id.* If new evidence is raised in a motion to alter or amend a grant of summary judgment, the court should consider "the moving party's effort to obtain the evidence in responding to the summary judgment; the importance of the new evidence to the moving party's case; the moving party's explanation for failing to offer the evidence in responding to the summary judgment; the unfair prejudice to the non-moving party; and any other relevant consideration." *Stovall*, 113 S.W.3d at 721 (citing *Harris v. Chern*, 33 S.W.3d 741, 744 (Tenn.2000)).

The arguments regarding the application of Tennessee Code Annotated section 66–26–102 and the rejection of the discovery rule did not raise any new issues but were merely objections to the trial court's reasoning contained in the order granting summary judgment. While Lender may disagree with the court's application of the notice statute and the court's rejection of the discovery rule, the trial court did not apply an incorrect legal standard in reaching either decision. Additionally, we affirmed the court's grant of summary judgment. *See generally* *Stovall*, 113 S.W.3d at 723 (concluding that reversal of a court's grant of summary judgment necessarily required reversal of that court's denial of a motion to alter or amend the grant of summary judgment). Accordingly, we conclude that the trial court did not err in denying the motion to alter or amend on these grounds.

The allegations of fraud and Husband's revival of the debt were not raised in the motion to alter or amend the order dismissing the case but were raised in the motion to amend the complaint. Argument on both motions was considered simultaneously and rejected in the same order. Thus, we will consider these arguments as they relate to the motion to alter or amend the order. These arguments had not been raised in the complaint or at the hearing on the motion for summary judgment; thus, Lender presented new evidence for the court's consideration.

Relative to the allegations of fraud, Lender asserts that Wife had an implied duty to disclose that the condition precedent had been satisfied and that once this issue was raised, the court should have considered the evidence and determined that factual issues remained, precluding summary judgment. Lender's argument on this issue may have prevailed at the hearing on the motion for summary judgment but is without merit at this point in the case. Likewise, Lender's assertion that the court erroneously relied on counsel's alleged stipulation that fraud was not raised is equally without merit. Whether counsel stipulated that fraud was not an issue in response to the court's questioning is of no importance at this point in the case. At issue is whether the evidence regarding fraud and Husband's revival of the debt was discoverable prior to the hearing on the motion for summary judgment because a motion to alter or amend a court's order should not raise evidence that was available prior to the court's ruling, absent a satisfactory reason. *Id.* at 721. The evidence regarding fraud was available

but was not raised as an allegation of fraud. Additionally, Husband's alleged act of revival of the debt occurred prior to the court's hearing on the motion for summary judgment. In support of her argument regarding Husband's alleged revival of the debt, Lender points to Husband's affidavits that were filed prior to the hearing on the motion for summary judgment. Thus, this evidence was also available.

***8** Lender offers no reason as to why these arguments were not submitted to the court once the motion for summary judgment had been filed other than to say that only minimal discovery had been completed at that point in the case. As stated previously, Lender bore the burden of production to show that a genuine issue of material fact existed once Wife filed a properly supported motion for summary judgment. Lender should have raised the allegations of fraud and Husband's alleged revival of the debt at that point in the case because these allegations were readily discoverable and extremely important to her case. Parties have been "admonished repeatedly that [those] facing a summary judgment motion cannot rest on the mere allegations or denials in their pleadings but rather must respond with appropriate evidentiary materials demonstrating that there is a genuine issue for trial." *Bradley v. McLeod*, 984 S.W.2d 929, 932 (Tenn.Ct.App.1998), *overruled on other grounds by Harris*, 33 S.W.3d at 744. Accordingly, we conclude that the trial court did not err in denying the motion to alter or amend the order on these grounds because Lender failed to submit a valid reason as to why these allegations were not presented when they were discoverable and available prior to the hearing on the motion for summary judgment.

C.

Lender contends that the trial court erred in denying her motion to amend the complaint, which alleged that Wife's fraudulent concealment of the satisfaction of the FHA obligation should toll the running of the statute of limitations. Wife responds that denial of the motion to amend the complaint was appropriate because it was filed after the judgment of dismissal was entered. Wife asserts that the doctrine of judicial estoppel precluded amendment of the complaint.

The rule at issue here provides, in pertinent part, that "a party may amend [its] pleadings ... by leave of court; and leave shall be freely given when justice so requires." Tenn. R. Civ. Pro. 15.01. While requiring leave to be freely given lessens the discretion of the trial court in granting or denying such motions, the court's grant or denial of a motion to amend the pleadings is still generally subject to an abuse of discretion standard. *Merriman v. Cont'l Bankers Life Ins. Co.*, 599 S.W.2d 548, 559 (Tenn.Ct.App.1979); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

In determining whether to grant such a motion, the court must consider the following factors: "[u]ndue delay in filing; lack of notice to the opposing party; bad faith by the moving party; repeated failure to cure deficiencies by previous amendments[;] undue prejudice to the opposing party[;] and futility of amendment." *Merriman*, 599 S.W.2d at 559 (citing *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir.1973)). "Once a judgment dismissing a case has been entered, the plaintiff cannot seek to amend its complaint without first convincing the trial court to set aside its dismissal pursuant to" Rule 59 or 60 of the Tennessee Rules of Civil Procedure. *Lee v. State Volunteer Mut. Ins. Co., Inc.*, No. E2005–03127–COA–R3–CV, 2005 WL 123492, at *11 (Tenn.Ct.App. Jan.21, 2005) (citations omitted); *see also Morris Properties, Inc. v. Johnson*, No. M2007–00797–COA–R3–CV, 2008 WL 1891434, at *2 (Tenn.Ct.App.2008). Accordingly, we conclude that this issue is without merit because we have already concluded that the trial court did not err in denying the motion to alter or amend the order dismissing the case.

V. CONCLUSION

*9 The judgment of the trial court is affirmed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellants, Carolyn L. Denton–Preletz and Carolyn L. Denton–Preletz, as Trustee of the Carolyn L. Preletz, Living Trust.

Tenn.Ct.App.,2011.
Denton-Preletz v. Denton
Slip Copy, 2011 WL 5375141 (Tenn.Ct.App.)

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Jeannie FARROW, Plaintiff/Appellant,
v.
Charles F. BARNETT and Fort Sanders Parkwest Medical Center, Defendants/Appellees.

No. 03A01-9603-CV-00084.
Oct. 3, 1996.

Appeal from the Knox Circuit Court at Knoxville, Tennessee the Honorable Harold Wimberly, Judge.
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MEMORANDUM OPINION [FN1]

FN1. Court of Appeals Rule 10(b):

> The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

LEWIS, Judge.

***1** This is an appeal by plaintiff/appellant, Jeannie Farrow, from two orders of the trial court which granted the motion to dismiss filed by defendant/appellee, Charles F. Barnett, M.D. ("Dr.Barnett"), and the motion for summary judgment filed by defendant/appellee, Fort Sanders Parkwest Medical Center ("the Medical Center"). In its orders, the trial court concluded that plaintiff failed to file her action within the applicable statute of limitations. The facts out of which this controversy arose are as follows.

On 17 August 1995, plaintiff filed a complaint for medical malpractice and alleged the following. Plaintiff visited Dr. Barnett's office on 10 August 1994. He ordered plaintiff to have an MRI performed at the Medical Center. Dr. Barnett gave plaintiff a prescription for Xanax and told her to take the Xanax thirty minutes prior to having the MRI performed. Plaintiff went to the Medical Center on 18 August 1994 to have the MRI performed.[FN2] As ordered by Dr. Barnett, plaintiff ingested the prescribed dosage of Xanax and the Medical Center performed the MRI. Employees of the Medical Center placed plaintiff in a chair following the MRI procedure and left her unattended. Plaintiff passed out because of the effects of the Xanax and fell from the chair. She was injured when her shoulder and other parts of her body struck the floor.

FN2. Appellants later established the actual

date of the procedure was 13 August 1994.

On 18 September 1995, Dr. Barnett filed a motion to dismiss and an alternative motion for summary judgment. He claimed that plaintiff filed her claim outside the statute of limitations and that he was entitled to a judgment as a matter of law. He also alleged that he did not deviate from the recognized standard of acceptable professional practice. In support of his motion, he filed his own affidavit and a memorandum.

On 21 September 1995, the Medical Center filed a motion for summary judgment. The Medical Center provided affidavit testimony and numerous exhibits proving that it actually performed the MRI on 13 August 1994, not 18 August as alleged in plaintiff's complaint. Because plaintiff filed her complaint on 17 August 1995, the Medical Center contended she filed it outside the applicable statute of limitations.

On 3 January 1996, the trial court entered an order dismissing plaintiff's claims against the Medical Center. The trial court stated: "The Court considered the ... record as a whole, and found that the motion was well taken and should be sustained on the basis that the statute of limitations had expired prior to the filing of the plaintiff's lawsuit." On the same day, the court entered a second order that addressed Dr. Barnett's motion to dismiss. The court stated: "After hearing arguments of counsel, and considering the record as a whole, the Court found the Motion to be well taken and ruled that Plaintiff had failed to file her action within the applicable statute of limitations." Thereafter, the court dismissed plaintiff's claims against both defendants.

***2** Plaintiff filed her notice of appeal on 30 January 1996. Plaintiff notified the court that she was appealing both the court's orders entered on 3 January 1996. On appeal, plaintiff raised the following issue: "Whether the circuit judge erred in finding that the Plaintiff's complaint was barred on the statute of limitation grounds."

I. STANDARD OF REVIEW

Pursuant to the Tennessee Rules of Civil Procedure and Tennessee case law, we must review the court's orders as if both had granted defendants summary judgment. To explain, Rule 12 of the Tennessee Rules of Civil Procedure provides as follows:

> If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Tenn. R. Civ. P. 12.02 (West 1996). Moreover, the Tennessee Supreme Court has held that a trial court converts a Rule 12.02(6) motion into a Rule 56 motion when it considers matters outside the pleadings. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn.1976). A trial court, however, can "prevent a conversion from taking place by declining to consider extraneous matters." *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 952 (Tenn.App.1995). A matter outside the pleadings is " 'any written or oral evidence in support of or in opposition to a pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.' " *Kosloff v. State Auto. Mut. Ins. Co.*, Ch.App. No. 89-152-II, 1989 WL 144006, at *2 (Tenn.App. 1 Dec. 1989)(quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (1969)).

It is clear that the trial court considered matters outside the pleadings when ruling on both the motion for summary judgment and the motion to dismiss. Thus, the court converted the motion to dismiss into a motion for summary judgment. In both orders, the trial

court stated that it had considered the entire record. The record in this case contained numerous matters which did more than reiterate what was in the pleadings. For example, the Medical Center attached the affidavit of Lisa Little, the radiology technologist who performed the MRI, and three other exhibits to its motion for summary judgment. The affidavit and the exhibits provided information that was not in plaintiff's complaint and corrected information, the date of the MRI procedure, which was stated incorrectly in plaintiff's complaint. This evidence became part of the record. Because the trial court considered the entire record, we must review this case and address appellant's issue pursuant to summary judgment standards.

A trial court must grant a motion for summary judgment when there are no genuine issues of material fact and the law entitles the moving party to a judgment. *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn.1993). "In making its determination, the court is to view the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor." *Id.* at 215. These same principles apply to this court's review of a trial court's decision to grant summary judgment. *See Gonzales v. Alman Constr. Co.,* 857 S.W.2d 42, 44 (Tenn.App.1993).

II. STATUTE OF LIMITATIONS

***3** The applicable statute of limitations provides that medical malpractice cases "shall be commenced within one (1) year after the cause of action accrued...." Tenn.Code Ann. § 28-3-104(a)(1) (Supp.1996). In addition, the statutes also provide:

> (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
>
> (2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

Id. § 29-26-116(a)(1) & (2) (1980). The Tennessee Supreme Court has had numerous occasions to interpret and apply the language of this statute.

Prior to the codification of the discovery rule, the Tennessee Supreme Court recognized its importance in medical malpractice cases. *Teeters v. Currey,* 518 S.W.2d 512 (Tenn.1974). The *Teeters* court defined when the cause of action accrues as "when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury." *Id.* at 517.

Since the codification of the discovery rule, the Tennessee Supreme Court has defined when the statute of limitations begins to run in cases similar to the one currently before this court. As recognized by the Tennessee Supreme Court, Tennessee Code Annotated section 29-26-116(a) does not "specifically address what the appropriate period of limitations would be if the alleged negligent act is discovered within the one year period but after the date of injury." *Hoffman v. Hospital Affiliates, Inc.,* 652 S.W.2d 341, 344 (Tenn.1983). In *Hoffman,* the Court used the common law to "fill in the crack left by the legislature's silence." [FN3] The *Hoffman* court relied on *Teeters* and concluded that the interpretation of when a cause of action accrues found in *Teeters* "fits squarely with both the wording of the statute and prior case law." *Id.* The court then held that the discovery rule applies only when the "plaintiff does not discover and reasonably could not be expected to discover that he has a right of action." *Id.* In addition, the court held that the statute is tolled only when "the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Id.*

> FN3. *Id.* At the intermediate level, the Middle Section of the Court of Appeals held that Tennessee Code Annotated section 29-26-116(a)(2), the "savings statute," did

> not apply because the plaintiff discovered the injury within one year of the negligent act. Thus, the court concluded that the plaintiff had one year from the negligent act in which to file his or her complaint. *Hoffman v. Hospital Affiliates, Inc.*, slip op. at 3-4 (Tenn.App. 1 Feb. 1982), *rev'd*, 652 S.W.2d 341 (Tenn.1982). The facts of *Hoffman* are similar to the present case. In this case, plaintiff claimed that she discovered her injuries twelve to thirteen days after the negligent act.

In another case, the Tennessee Supreme Court defined the date of discovery. *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn 1982); *see Hoffman*, 652 S.W.2d at 343. Specifically, discovery occurs when the plaintiff discovers or reasonably should have discovered: "(1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty." *Foster*, 633 S.W.2d at 305. In a more recent opinion, the Tennessee Supreme Court held that a plaintiff does not have to have actual knowledge "that the injury constitutes a breach of the appropriate legal standard." *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). Instead, the Court held that the plaintiff only needs to be "aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Id.*

***4** To summarize, Tennessee's discovery rule prevents the statute of limitations in medical malpractice case from beginning to run until the plaintiff discovers or in the exercise of reasonable care and diligence should have discovered: 1) facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct and 2) the existence or identity of a wrongdoer. *Id.*; *Hoffman*, 652 S.W.2d at 343; *Foster*, 633 S.W.2d at 305. Moreover, this rule applies even if the plaintiff discovers the injury within one year of the negligent act. *Hoffman*, 652 S.W.2d at 344. Finally, the rule will not apply if the plaintiff could have reasonably been expected to discover that he or she had a cause of action. *Id.*

The dates relevant to a determination of the issue in this case are as follows. The first date, 10 August 1994, is the date that Dr. Barnett prescribed what plaintiff claims was an excessive dosage of Xanax. Next, plaintiff claims the Medical Center was negligent on 13 August 1994, the date it performed the MRI. Plaintiff contended that her shoulder and back were sore and that she called the hospital on 25 August 1994. The hospital called plaintiff back on 26 August 1994 and requested she come in for x-rays. [FN4] Plaintiff filed her complaint on 17 August 1995.

> FN4. There is no evidence in the record as to what the x-rays revealed.

It is the opinion of this court that the trial court correctly determined that the statute of limitations bars plaintiff's claims. As previously stated, the discovery rule tolls the statute until a person discovers or in the exercise of reasonable care should have discovered certain facts. Assuming that plaintiff had no knowledge of the fall, it is reasonable to expect that plaintiff would discover the injury, at least the soreness, within a few days after the fall. Had plaintiff exercised reasonable care and diligence for her own health and welfare, she would have discovered facts sufficient to place her on notice prior to 17 August 1994. Note, the record does not contain any evidence that plaintiff was unconscious other than when she passed out on 13 August 1994. Plaintiff was admitted as an out-patient, and as such, she did not remain in the hospital overnight. The record also reveals that plaintiff claims to remember nothing about the MRI or the period she claims Medical Center employee's left her unattended, yet she never inquired into the reasons for her blackout. There is no evidence that plaintiff expected the Xanax to have such an affect. Thus, the simple fact that plaintiff did not remember the MRI or the period thereafter should have, at the very least, put

her on notice that something was wrong and caused her to inquire further. *See* *Housh v. Morris*, 818 S.W.2d 39, 42-43 (Tenn.App.1991).

For these reasons, the trial court correctly determined that plaintiff's claims were barred by the statute of limitations. The judgment of the trial court is affirmed and remanded for any further necessary proceedings. The costs on appeal are taxed to plaintiff/appellant, Jeannie Farrow.

CRAWFORD and FARMER, JJ., concur.

Tenn.App.,1996.
Farrow v. Barnett
Not Reported in S.W.2d, 1996 WL 560534 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2006 WL 3783534 (Tenn.Ct.App.)
(Cite as: 2006 WL 3783534 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Bobby L. HOLLAND and wife, Rita Holland
v.
Amelia Jo DINWIDDIE, DDS d/b/a Jo Dinwiddie, DDS.

No. W2006-00523-COA-R3-CV.
Sept. 19, 2006 Session.
Dec. 27, 2006.
Application for Permission to Appeal Denied by Supreme Court May 21, 2007.

Direct Appeal from the Circuit Court for Benton County, No. 05CCV-998; Julian P. Guinn, Judge.
Dixie W. Cooper and Catherine Corless, of Nashville, Tennessee, for the Appellants.

W. Scott Sims, of Nashville, Tennessee, for the Appellee.

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

OPINION

ALAN E. HIGHERS, J.

***1** The plaintiff patient visited the defendant dentist periodically between 1998 and 2003. Between 2001 and 2003, the defendant performed dental work on the plaintiff including root canals, fillings, and crown work. Over this period, the plaintiff's dental condition became significantly worse. The plaintiff developed abscesses and infection in his mouth and suffered from substantial dental pain. The plaintiff's last visit to the defendant was in October of 2003. Over the 2003 holidays, the plaintiff unsuccessfully attempted to contact the defendant for relief from his increasingly painful condition. The plaintiff ultimately received treatment from another dentist throughout 2004. After receiving the plaintiff's dental records from the defendant in October of 2004, the treating dentist informed the plaintiff that the defendant's treatment had been negligent. The plaintiff filed a dental malpractice action against the defendant on January 12, 2005. The trial court granted the defendant's motion for summary judgment based on the one-year statute of limitations for medical malpractice claims, finding that the plaintiff should have discovered the injury by the time of the plaintiff's last visit to the defendant in October of 2003. The plaintiff filed a timely notice of appeal. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This is an appeal from a dental malpractice case that the trial court dismissed on the defendant's motion for summary judgment. The plaintiff Bobby Holland ("Holland" or "Appellant") received dental care periodically from the defendant Amelia Jo Dinwiddie ("Dr. Dinwiddie" or "Appellee") in Camden, Tennessee, between the years of 1998 and 2003. Holland's first series of visits to Dr. Dinwiddie occurred between September of 1998 and February of 1999. Holland's second series of visits to Appellee took place between August of 2001 and October of 2003. During the first series of visits, Dr. Dinwiddie cleaned Holland's teeth and replaced a pre-existing crown on a tooth. In June of 1999, Holland began visiting a different dentist in Columbia, Tennessee, where his daughter and new grandchild lived.

Holland returned to Dr. Dinwiddie on August 8, 2001. At this time, Holland had all of his natural teeth except for his wisdom teeth, which had been extracted years earlier. Upon recognizing gaps between Hol-

land's gums and pre-existing crowns on two of his teeth, Dr. Dinwiddie referred Holland to a specialist for crown lengthening surgery. Holland ultimately decided against having the crown lengthening surgery, and he sought an alternative remedy from Dr. Dinwiddie. Dr. Dinwiddie removed the existing crowns and took their impressions in order to make modified replacements, but the replacement crowns did not fit. Dr. Dinwiddie gave Holland two temporaries for these teeth, but the temporaries did not fit properly and often "popped off." Holland claimed that he was charged for the replacement crowns, and that despite his repeated inquiries with the dentist's office, the crowns were not replaced.

***2** In March of 2002, after Dr. Dinwiddie performed a root canal, Holland developed painful abscesses and infections in his mouth which caused severe swelling. This lasted several months, with multiple visits to Dr. Dinwiddie, until one tooth broke off at the root in August or September. Dr. Holland removed the remainder of this tooth in September of 2002. Holland was given a partial replacement for the tooth, with which Holland experienced dissatisfaction. Holland experienced significant deterioration and decay of several other teeth in the following months, and he experienced more pain, abscesses, and infection. Dr. Dinwiddie continued to perform treatment on Appellant, including root canals, placement and replacement of fillings, and extraction of at least two more of Holland's teeth. Holland claims that because of the swelling, pain and difficulty speaking, he "was not able to work on a regular enough basis to be much of an influence." He claims that this led to the loss of several valuable insurance accounts. Holland's last office visit to Dr. Dinwiddie was on October 30, 2003, and the record indicates that Dr. Dinwiddie filled a prescription for Holland in early January of 2004.

In late 2003, the pain in Holland's mouth worsened. During the Christmas holidays, he attempted to reach Dr. Dinwiddie, but he was unsuccessful. Upon the recommendation of his son-in-law, Holland made an appointment to see Dr. Victor C. Beck, Jr. ("Dr.Beck"), who was a dentist in Columbia, Tennessee. On January 12, 2004, Holland filled out a patient registration form from Dr. Beck's office and when asked, "[have] your past experiences in a dental office always been positive?", he responded, "no." On this form, Holland identified Dr. Dinwiddie as his previous dentist. On January 13, Holland visited Dr. Beck's office for a brief consultation with one of Dr. Beck's associates ("Dr. Follis" or "DF") who documented the visit as follows:

> DF talked to [patient] and went over health [history]. DF took initial look at [patient] and noticed that [patient] had many dental issues that needed prompt attention. DF discussed need for NP exam to do comprehensive [treatment] plan for him, rather than just looking at his front teeth. [Patient] agreed and stated that he knew he needed a lot of work and was ready to get started. *He confided in us that his past dentist was very nice, but has not been able to help his condition and he feels his teeth have gotten much worse over the last two years under her care.* [Patient]'s daughter lives in Columbia and is a [patient] here.... I informed [patient] that he will more than likely need a full mouth reconstruction (implants, crown and bridge, etc.) due to the extensive breakdown of his teeth. [Patient] is ready to get started and stated that he "trusted us and would do whatever we said."

(emphasis added). Holland returned on January 20 for a complete examination by Dr. Beck, and Holland reported having "been in significant pain for the last couple of years, dental pain." Dr. Beck noted in his records that Holland related "some unpleasant experiences with his previous dentistry."

***3** Holland thereafter visited Dr. Beck many times throughout 2004. At some point during these visits, Holland said that Dr. Beck informed him that his mouth was "a wreck" and "beyond professional belief." Dr. Beck identified multiple abscesses that

had developed on many of Holland's teeth. Dr. Beck performed significant work on all but a few of the teeth in Holland's mouth, including root canals, crown work, and the extraction of at least nine teeth. The total cost of this treatment by Dr. Beck was in excess of $27,000. In October of 2004, Dr. Beck examined Holland's previous dental records and x-rays and expressed his opinion that Dr. Dinwiddie had committed dental malpractice in her treatment of Holland.

Holland and his wife filed a complaint against Dr. Dinwiddie on January 12, 2005, in the Circuit Court for Benton County, Tennessee. Holland alleged that Dr. Dinwiddie had been negligent in the treatment she provided since 2001, through her failure to:

> (a) properly fill and crown teeth that she determined needed these dental services to avoid more permanent damage to his teeth; (b) timely evaluate and treat conditions indicating the need for dental interventions including: replacing fillings, filling areas of his teeth that indicated the presence of decay resulting in permanent damage to gums and bones, placement of permanent crowns on teeth that she was paid for but never performed, and performance of a root canal, which was started but never finished; (c) timely treat Bobby Holland's dental conditions which resulted in the development of multiple abscesses and overwhelming infection, requiring extensive additional work, removal of many permanent teeth and pain and discomfort; (d) timely and accurately advise Bobby Holland of the nature, extent and severity of his condition in time to allow him to seek alternative dental care to correct the problem before permanent damage occurred;

Included in the malpractice claim were allegations that Dr. Dinwiddie had:

> falsely blam[ed] a[W]ater [P]ik for the damage to Bobby Holland's teeth and gums caused by her failure to adequately and timely treat the infection and other problems created by her negligence; ... charg[ed] and g[otten] paid for services that were never completed, including seeding of permanent crowns; ... [and] fail[ed] to adhere to the accepted standard of practice for dentist [sic] treating patients under the same or similar circumstances that she treated Bobby Holland.

Holland sought damages for dental expenses, physical and mental pain and suffering, lost wages, income and earnings due to his ability to conduct his business, and damages for loss of consortium with his wife.

Dr. Dinwiddie filed a motion for summary judgment on November 28, 2005, in which Appellee asserted that Holland's claims were barred by the statute of limitations and statute of repose of the Medical Malpractice Act, located at Tenn.Code Ann. §§ 29-26-116. In an order entered on January 19, 2006, the trial court granted Appellee's motion for summary judgment. The court found that Holland was "aware of facts sufficient to put a reasonable person on notice that he had suffered an injury as a result of wrongful conduct more than one year prior to filing this lawsuit on January 12, 2005." The trial court held that the claims were time-barred pursuant to the statute of limitations provision under Tenn.Code Ann. § 29-26-116(a). On February 3, 2006, Holland filed a motion to alter or amend the judgment pursuant to Tennessee Rules of Civil Procedure Rule 59.04, which the trial court denied in an order entered on February 21, 2006. Holland filed a timely notice of appeal to this Court.

II. ISSUE PRESENTED

*4 On appeal, Holland presents the following issue for review:

Whether there exists a material factual dispute as to when Appellant discovered or reasonably should have discovered his injury.

For the following reasons, we affirm.

Not Reported in S.W.3d, 2006 WL 3783534 (Tenn.Ct.App.)
(Cite as: 2006 WL 3783534 (Tenn.Ct.App.))

III. STANDARD OF REVIEW

Summary judgment is appropriate when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. ***McIntosh v. Blanton,*** 164 S.W.3d 583, 585 (Tenn.Ct.App.2004) (citing TENN. R. CIV. P. 56.04; ***Byrd v. Hall,*** 847 S.W.2d 208, 214 (Tenn.1993)). When a motion for summary judgment is used defensively, the plaintiff must present evidence sufficient to establish the essential elements of the claim on which he or she will bear the burden of proof at trial. ***Blair v. Allied Maint. Corp.,*** 756 S.W.2d 267, 269-70 (Tenn.Ct.App.1988). We review an award of summary judgment *de novo,* with no presumption of correctness afforded to the trial court. ***Guy v. Mut. of Omaha Ins. Co.,*** 79 S.W.3d 528, 534 (Tenn.2002).

IV. ANALYSIS

On appeal, Appellant argues that the trial court erred when it granted Appellee's motion for summary judgment on his dental malpractice action, because a genuine issue of material fact existed as to when Appellant could have discovered his injury. Holland argues that when the trial court applied the discovery rule exception to the one year statute of limitations for his claims, it erroneously concluded that Holland was "aware of facts sufficient to put a reasonable person on notice that he had suffered an injury as a result of wrongful conduct more than one year prior to filing this lawsuit on January 12, 2005." Appellant relies on his deposition testimony and affidavits, and those of his expert witness, Dr. Beck, in attempting to establish that he did not, and could not, discover his injury until January 20, 2004, "at the earliest." Appellant maintains that the trial court incorrectly granted Dr. Dinwiddie's motion for summary judgment because the date of discovery was a material fact to be determined by a jury. As counsel for Appellant admitted at oral argument upon questioning by this Court, Holland does not allege that Dr. Dinwiddie caused his underlying injuries, but that she was negligent in treating Holland's dental problems. Holland proposes that the exacerbation of decay and infection in his teeth and mouth was a direct result of Appellee's improper interpretation of x-rays showing decay, inadequate filling of root canals, inadequate placement of fillings, and ignoring x-ray findings. Holland states that he had no reason to suspect that Dr. Dinwiddie's treatment led to these problems, because Appellee had opined that they stemmed from aggressive brushing and/or the use of a "Water-Pik."

Conversely, Dr. Dinwiddie contends that summary judgment should be affirmed because of the extent of Holland's dental problems occurring between 2001 and late 2003, Holland's decision to visit another dentist in early 2004, and his statements to Dr. Beck and his employees regarding his dissatisfaction with Dr. Dinwiddie's treatment. Dr. Dinwiddie argues that by October of 2003, when she last treated Appellant, Holland was undeniably aware that his dental condition had significantly worsened under her care.[FN1] Appellee directs us to Holland's own deposition testimony that he had suffered unrelenting pain and infection in his mouth during the final two years of Dr. Dinwiddie's treatment in support of the contention that these facts were more than sufficient to put a reasonable person on notice of the wrongs alleged in Appellant's complaint. [FN2]

> FN1. Appellee also notes that while Holland attributes his dental condition to her medical negligence, "[t]he cause of the deterioration process is the subject of intense debate among the parties[,]" and that her experts "assert that the deterioration process was directly caused by Mr. Holland's clandestine abuse of substantial quantities of prescription narcotics, which dramatically escalated in late 2000 and 2001 and continued, unbeknownst to Dr. Dinwiddie, throughout the time that Mr. Holland was under her care." This argument is beyond the scope of our review on appeal, and we express no opinion

as to its merit.

FN2. Appellee alternatively urges us to affirm the trial court's judgment on the basis of the three-year statute of repose for medical malpractice actions. This defense was not addressed by the trial court's final order and similarly will not be considered on appeal.

***5** The applicable statute of limitations in this case provides:

Statute of limitations-Counterclaim for damages.

(a) (1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) *In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.*

TENN.CODE ANN. § 29-26-116(a)(1)-(2) (2000) (emphasis added). This "discovery rule" for medical malpractice cases involving negligence was first adopted by our Supreme Court in ***Teeters v. Currey***, 518 S.W.2d 512 (Tenn.1974), and codified in 1975. ***Shadrick v. Coker***, 963 S.W.2d 726, 733 (Tenn.1998); TENN.CODE ANN. § 29-26-116(a)(2) (2000). Within the meaning of the statute, "discovery" refers to the "discovery of the existence of a right of action, that is, facts which would support an action for tort against the tortfeasor," or "when in the exercise of reasonable care and diligence, it should have been discovered." ***McDaniel v. Clare***, No. 02A01-9510-CV-00237, 1996 Tenn.App. LEXIS 786, at *6 (Tenn.Ct.App. Dec. 12, 1996) (citing ***Hathaway v. Middle Tenn. Anesthesiology, P.C.***, 724 S.W.2d 355, 359 (Tenn.Ct.App.1986); ***Bennett v. Hardison***, 746 S.W.2d 713, 714 (Tenn.Ct.App.1987)). A cause of action in tort does not accrue until a judicial remedy is available to the plaintiff. ***Wyatt v. ACandS, Inc.***, 910 S.W.2d 851, 855 (Tenn.1995). A judicial remedy is available when a breach of a legally recognized duty owed to the plaintiff by the defendant causes the plaintiff legally cognizable damage. ***Id.*** (citing ***Potts v. Celotex Corp.***, 796 S.W.2d 678, 681 (Tenn.1990)).

A plaintiff may not, however, delay filing suit until all injurious effects or consequences of the actionable wrong are actually known. ***Id.*** (citing ***Chambers v. Dillow***, 713 S.W.2d 896, 898 (Tenn.1986); ***Security Bank and Trust Co. v. Fabricating, Inc.***, 673 S.W.2d 860, 864-65 (Tenn.1983); ***Taylor v. Clayton Mobile Homes, Inc.***, 516 S.W.2d 72, 74-75 (Tenn.1974); ***Bennett v. Hardison***, 746 S.W.2d 713, 714 (Tenn.Ct.App.1987); ***National Mortg. Co. v. Washington***, 744 S.W.2d 574, 579 (Tenn.Ct.App.1987)). Furthermore, the statute of limitations is not tolled until the plaintiff actually knows the "specific type of legal claim he or she has," or that "the injury constituted a breach of the appropriate legal standard." ***Roberts v. Bicknell***, 73 S.W.3d 106, 110 (Tenn.Ct.App.2001) (citing ***Stanbury v. Bacardi***, 953 S.W.2d 671, 677 (Tenn.1997); ***Roe v. Jefferson***, 875 S.W.2d 653, 657 (Tenn.1994)). "[T]he statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant." ***Shadrick***, 963 S.W.2d at 733; *see also* ***Hoffman v. Hosp. Affiliates, Inc.***, 652 S.W.2d 341, 344 (Tenn.1983) ("[T]he statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry.").

***6** As it appears to be undisputed that the occurrence of injury in this case took place more than one year before Appellant filed suit on January 12, 2005, the only issue we will consider is whether Appellant had sufficient information to have discovered his injury as of January 12, 2004, one year before filing suit. Based upon our review of the record, including

Appellant's own deposition testimony regarding his dental condition while under Dr. Dinwiddie's care, Dr. Beck's deposition testimony, and the allegations set forth in Holland's complaint, we conclude that Appellant discovered, or reasonably should have discovered, his injury and sufficient facts to support his allegations in tort well before January 12, 2004. We believe that Appellant's somewhat inconsistent positions as to the date of discovery, as well as his contentions that he could not have reasonably discovered his injury until he received an expert opinion from Dr. Beck, fail to establish any material dispute of fact as to when Appellant should have discovered his injury.

From his visits to Appellee in August of 2001 to October of 2003, Holland's dental health regressed significantly. Holland admitted that when he began his second round of treatment with Appellee in August of 2001, he had all of his teeth except for his wisdom teeth. Dr. Dinwiddie performed fillings and crown extractions on Holland over several months. In March of 2002, after a root canal by Appellee, Holland claimed that he developed painful abscesses in his mouth:

> I immediately started to swell, and I had-my face-actually, it was distorted. I couldn't close my mouth. Within about ten days, I couldn't shut my mouth, it was so swollen. Had a knot that came up underneath at the-it would have been at the root, at the base of the root ... She opened-took the top off the seal, I guess it is. It's a hard-hard seal. And hoped-and she said that we'd see if it would drain ... It drained on-it was quite-it was very sickening. I kept a-an abscess that erupted with a knot here (indicating), and it-when it went down, it ended up splitting open where it oozed infections constantly. And so I did that for-I don't know how long. You know, at least a couple months.

Holland claimed that as many as eight teeth were eventually affected by abscesses. By September of 2002, Holland testified that one of his teeth had snapped off at the gum line, and that he was experiencing significant swelling, decay, and infection affecting several other teeth. Holland continued to experience throbbing pain around the teeth whose crowns had been removed and never replaced. In addition, other teeth had become affected with decay and infection, which he also described in his deposition testimony:

> I mean, I know I had infection because I could taste it, you know, constantly. And I know that some of the teeth were repaired repeatedly. I don't know. I can't recall which ones. The numbers seven and eight-I know this one here was repaired. Number 20 was repaired a lot. And also the bottom lower in the front here (gesturing), they were-they became-I call it angry at the gum line then. All my teeth were getting to look angry at the ... gum line. And of course I was kind of obsessed with it, I guess. In my business, if you can't talk, it's very difficult to do business. And of course, the pain was bad. But I don't-I don't know how many times they were all repaired. They were repaired quite often.

*7 Another tooth had deteriorated beyond repair, which Dr. Dinwiddie extracted in September of 2002, and yet another in March of 2003. Holland claimed that in late 2003, the pain became worse, and that he only contacted Dr. Beck in early 2004 after he had been unable to reach Dr. Dinwiddie for relief.

In Holland's complaint, filed on January 12, 2004, he alleged that he "did not discover the Defendant's negligence or have reason to suspect the Defendant had negligently treated [him], or the extent of the Defendant's negligence, until January 20, 2004, when [he] was evaluated by another dentist in Columbia, TN who described his condition as a 'train wreck.' " In his brief on appeal, Holland claims that the only way that he could know or discover that his injuries were the result of Dr. Dinwiddie's negligent treatment was by having a dentist "review the records and x-rays and advise [Holland] that Dr. Dinwiddie had either neg-

ligently interpreted the x-rays or simply ignored the findings." Dr. Beck did not review Holland's records from Dr. Dinwiddie until October of 2004.

We find Appellant's position, that it was necessary to obtain Dr. Beck's expert opinion of Dr. Dinwiddie's treatment before Holland could file suit, to be incorrect as a matter of law. "Advice from another health care professional that a claim exists is not a prerequisite to accrual of a medical malpractice cause of action." ***Stanbury v. Bacardi,*** 953 S.W.2d 671, 678 (Tenn.1997); *see also* ***Wansley v. Refined Metals Corp.,*** No. 02A01-9503-CV-00065, 1996 Tenn.App. LEXIS 552, at *9-10, 1996 WL 502497 (Tenn.Ct.App. Sept. 9, 1996) ("[T]here is no requirement of a formal medical diagnosis in order for a claim to accrue ... The fact that plaintiff may not have had the proof necessary to sustain his cause of action until within a year prior to filing suit is immaterial in determining when his cause of action accrued."). For the purposes of TENN.CODE ANN. § 29-26-116(a)(2), a plaintiff discovers an injury after he or she has "discovered the existence of facts which would support an action in tort against the tortfeasor" including "not only the existence of an injury, but the tortious origin of the injury." ***Wyatt,*** 910 S.W.2d at 855 (citing ***Hathaway v. Middle Tenn. Anesthesiology, P.C.,*** 724 S.W.2d 355, 359 (Tenn.Ct.App.1986)). A plaintiff need not actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a right of action. ***Stanbury,*** 953 S.W.2d at 678 (citing ***Roe v. Jefferson,*** 875 S.W.2d 653, 657 (Tenn.1994)).

At oral argument, Appellant's counsel conceded that the very earliest his injury could have been discovered was in January of 2004, when he first visited Dr. Beck. However, Holland's statements in January of 2004 to Dr. Beck and his staff regarding his dissatisfaction with Dr. Dinwiddie's treatment over the previous two years, which he does not dispute, further lead us to conclude that the trial court correctly found as a matter of law that Appellant had, or should have, discovered his injuries and their tortious origins more than a year prior to January 12, 2005. "When the facts material to the application of a rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury in favor of one party or the other." ***Timmons v. HCA Regional Hosp. of Jackson,*** No. 02A01-9301-CV-00023, 1993 Tenn.App. LEXIS 800, at *7, 1993 WL 541077 (Tenn.Ct.App. Dec. 30, 1993) (citing *Byrd v. Hall,* 847 S.W.2d 208, 214). Holland admitted to Dr. Follis, Dr. Beck's associate, that he felt his teeth had "gotten much worse over the last two years under [Dr. Dinwiddie's] care" and reported to Dr. Beck that he had been in significant dental pain for the previous two years. Holland did not see any other dental professional between his last visit to Dr. Dinwiddie on October 30, 2003, and his first visit to Dr. Beck's office on January 12, 2004. His knowledge, therefore, that his dental condition had gotten worse during his treatment by Appellee appears to have been based upon his own reasonable conclusions from his experiences over this two year period. We believe that the trial court was correct in holding as a matter of law that a reasonable person should have discovered the injury by the time of the last visit to Dr. Dinwiddie in October of 2003. This was the latest date at which Holland's cause of action could reasonably have accrued. Therefore, the one-year statute of limitations set forth at TENN.CODE ANN. § 29-26-116(a)(1) barred Appellant's claims of malpractice against Dr. Dinwiddie.

***8** We hold that the trial court correctly granted Appellee's motion for summary judgment. We find that the only reasonable conclusion that could be reached in light of the record before us is that Holland had discovered, or should have discovered through reasonable diligence, his injury and cause of action against Dr. Dinwiddie by October 30, 2003, which was the date of his last office visit to Dr. Dinwiddie and fourteen months before he filed his complaint on January 12, 2004.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs are assessed against Appellants, Bobby and Rita Holland, and their surety, for which execution may issue if necessary.

Tenn.Ct.App.,2006.
Holland v. Dinwiddie
Not Reported in S.W.3d, 2006 WL 3783534 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2003 WL 112762 (Tenn.Ct.App.)
(Cite as: 2003 WL 112762 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Mildred HOWELL and Dillon Howell,
v.
BAPTIST HOSPITAL, Neil Price, M.D., and Josephine Vicente, R.N.

No. M2001-02388-COA-R3-CV.
Jan. 14, 2003.
Application for Permission to Appeal Denied by Supreme Court May 27, 2003.

An Appeal from the Circuit Court for Davidson County, No. 99C-3472; Walter Kurtz, Judge.
Larry D. Ashworth and Peter D. Heil, Nashville, Tennessee, for the appellants, Mildred Howell and Dillon Howell.

E. Reynolds Davies, Jr., and John T. Reese, Nashville, Tennessee, for the appellee, Neil Price, M.D.

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

OPINION

HOLLY KIRBY LILLARD, J.

***1** This is a medical malpractice case. In January 1999, the plaintiff underwent an endoscopic medical procedure performed by the defendant physician. During the procedure, the plaintiff developed multiple air emboli in her brain, which resulted in permanent neurological difficulties. The plaintiff and her husband sued the physician, claiming that the plaintiff's injuries were due to the physician's negligence. The physician moved for summary judgment and submitted his own affidavit in support. In response, the plaintiffs submitted affidavits of two medical experts, asserting that the defendant physician had breached the applicable standard of care. The trial court granted the physician's motion for summary judgment, concluding that the plaintiffs' experts' affidavits did not comply with Tennessee Code Annotated § 29-26-115. The plaintiffs moved to alter or amend the judgment, submitting an amended affidavit and curriculum vitae of one of the two experts. The trial court refused to consider the additional evidence and denied the motion. The plaintiffs now appeal. We affirm in part and reverse in part, concluding that, while the trial court did not err in finding that the initial expert affidavits submitted by the plaintiffs were insufficient, the trial court abused its discretion in failing to consider the amended affidavit and curriculum vitae submitted by the plaintiffs.

On January 19, 1999, Plaintiff/Appellant Mildred Howell ("Mrs.Howell"), a 53-year-old female with a history of cirrhosis of the liver, was admitted as an outpatient at Baptist Hospital for an elective procedure called an esophagogastroduodenoscopy [FN1] ("EGD") for banding of esophageal varices. Defendant/Appellee Neil Price, M.D. ("Dr.Price"), performed the EGD. During the procedure, Mrs. Howell was sedated by defendant Josephine Vicente, R.N. ("Vicente"), with a titration of Sublimaze and Versed. Vicente was neither an anesthesiologist nor a certified registered nurse anesthetist. At 3:52 p.m., Mrs. Howell's blood pressure was 102/55. Three minutes later, at 3:55 p.m., her blood pressure dropped to 72/36. After the EGD was completed at 4:01 p.m., Mrs. Howell could not be aroused. Dr. Price gave her Romazicon, Narcan, and then more Versed in an attempt to arouse her, but she remained unresponsive. Subsequent CT scans of the brain showed multiple air emboli. After the emboli were discovered, Mrs.

Howell was transferred to the neurological intensive care unit at the hospital under the care of her treating internist, Sally Killian, M.D., where she was placed on life support. Subsequently, Mrs. Howell was transferred emergently to Vanderbilt Medical Center. Mrs. Howell underwent extensive rehabilitation and presently retains a neurological deficit due to brain damage she suffered because of the air emboli.

> FN1. An esophagogastroduodenoscopy is "the examination of the esophagus, stomach and duodenum to look for ulcers, tumors, inflamation, and areas of bleeding. Biopsy, cytology, specimen collection and dilation of strictures may be necessary."

On December 14, 1999, Mrs. Howell and her husband, Dillon Howell (collectively "the Howells"), filed this complaint for medical malpractice against Baptist Hospital, Dr. Price, nurse Vicente, Anita Murphy, R.N., and Dianne I. Heme, R.N. The complaint alleged that the defendants breached the applicable standard of care in treating Mrs. Howell in the following ways: (1) by failing to conduct adequate tests that would have allowed Dr. Price to make a correct diagnosis of her air emboli, (2) by failing to ensure that an anesthesiologist or a nurse anesthetist was present during the EGD, (3) by failing to obtain Mrs. Howell's informed consent to undergo the procedure without the aid of an anesthesiologist or a nurse anesthetist, (4) by failing to inform Mrs. Howell of the risks involved with the administration of the procedure, and (5) by failing to recognize her physical distress during the EGD. The Howells alleged that the facts and circumstances warranted the inference of negligence under the doctrine of *res ipsa loquiter.* By agreement of the parties, defendant nurses Murphy and Heme were dismissed from the lawsuit.

*2 On February 2, 2001, Dr. Price filed a motion for summary judgment, arguing that no genuine issue of material fact existed with regard to whether he complied with the standard of care (1) in his treatment of Mrs. Howell, nor (2) in obtaining her informed consent prior to the surgery. Dr. Price also argued that no genuine issue of material fact existed as to whether any alleged deviations from the standard of care actually caused any of Mrs. Howell's injuries. He maintained that the doctrine of *res ipsa loquitur* did not apply.

In support of his motion for summary judgment, Dr. Price submitted his own affidavit. In that affidavit, Dr. Price stated that he had been licensed to practice medicine in Tennessee continuously since 1987, and that he was familiar with the recognized standard of care as those standards existed in Nashville in January 1999, in performing EGDs and variceal banding procedures, and in obtaining a patient's informed consent for those procedures. He asserted that he had discussed with Mrs. Howell the risks, benefits, and potential complications associated with EGD procedures. Dr. Price conceded that he did not discuss with Mrs. Howell the potential risk of cerebral air emboli, but claimed that this was because air emboli occur so infrequently that disclosure of the risk was not required. Dr. Price attested that he complied with the recognized standard of care during and after performance of the EGD and variceal banding procedures, and that Mrs. Howell's injuries can and do occur in the absence of negligence.[FN2] He asserted that his conduct did not cause Mrs. Howell to suffer injuries that would not have otherwise occurred. Dr. Price attached to his affidavit a copy of Mrs. Howell's information and consent form that she had signed prior to the procedure.[FN3]

> FN2. Dr. Price's affidavit does not address his failure to have an anesthesiologist or a nurse anesthetist present during the procedure, nor his apparent failure to inform Mrs. Howell that no anesthesiologist or nurse anesthetist would be present, and the risks resulting therefrom. Consequently, it is unclear why partial summary judgment was granted as to these claims in the Howells'

complaint.

FN3. Dr. Price also attached information and consent forms signed by Mrs. Howell for EGD and other procedures that he had performed on her previously.

On March 19, 2001, the Howells filed a motion to amend their complaint to add a claim of medical battery based on the allegation that Dr. Price performed the banding procedures when, in fact, there had been no variceal bleeding. On March 23, 2001, the Howells filed a memorandum in opposition to Dr. Price's motion for summary judgment, which was supported by the affidavits of Ronald J. Gordon, M.D. ("Dr.Gordon"), and Michael A. Todd, M.D. ("Dr.Todd").

In his supporting affidavit, Dr. Gordon stated that he had been licensed to practice medicine in Tennessee for one year preceding the date of the allegedly negligent acts, and that he had been continuously licensed to practice in Tennessee since that time. Dr. Gordon said that he is a board certified anesthesiologist practicing in middle Tennessee, and that he has been "Chief of the Anesthesiology Department at Southern Tennessee Medical Center from June of 1989 to present and an Associate Professor of Anesthesiology at Vanderbilt University Hospital." With respect to the applicable standard of care, Dr. Gordon asserted in paragraph eleven:

> 11. I am familiar with the recognized level of acceptable professional practice regarding the treatment of patients undergoing endoscopic medical procedures in Middle Tennessee, as it existed in January of 1999 and all times relative to this suit.

***3** Dr. Gordon opined that, within a reasonable degree of medical certainty, Dr. Price had violated the applicable standard of care in not having a qualified anesthesiologist or nurse anesthetist administer the anesthesia to Mrs. Howell before her EGD. He also stated that Dr. Price breached the standard of care in failing to take appropriate action when Mrs. Howell's blood pressure dropped precipitously toward the end of the procedure. In addition, Dr. Gordon asserted that Dr. Price's failure to conduct a sufficient post-operative medical exam or order reasonable post-operative tests adversely affected his ability to diagnose her air embolism in a timely manner. Finally, Dr. Gordon stated that Dr. Price improperly administered Versed following the dose of Romazicon, because that treatment further delayed Mrs. Howell's diagnosis and treatment. Dr. Gordon asserted that the injuries suffered by Mrs. Howell would not have occurred but for the negligence of Dr. Price.

The affidavit of Dr. Todd was submitted to the trial court on June 8, 2001. Dr. Todd stated that he had been licensed to practice medicine in Tennessee for one year preceding the date of the incident in question, and that he had continued to be licensed since that date. He stated that he had specialized in clinical pathology since 1980, and that he was "familiar with the recognized standard of acceptable professional practice for the treatment of patients with gastrointestinal disorders and esophageal varices." Dr. Todd asserted that "[i]t is well known to the medical profession ... that patients can suffer a permanent brain injury if air is infused or allowed to enter the blood stream." He further opined that "the cerebral air embolus Mildred Howell suffered does not occur in the absence of negligence," supporting the Howells' claim that the doctrine of *res ipsa loquitur* should apply in this case. Dr. Todd also stated that Dr. Price had violated the applicable standard of care by failing to warn Mrs. Howell of the potential risk of a cerebral air embolus.

On July 13, 2001, the trial court entered an order and memorandum opinion on the Howells' motion to amend the complaint to allege medical battery, as well as Dr. Price's motion for summary judgment on the Howells' claims for medical malpractice and lack of informed consent. The trial court first granted the

Howells' motion, permitting them to add a claim for medical battery. However, the trial court then granted Dr. Price's motion, dismissing the Howells' claims for medical malpractice and lack of informed consent. The trial court held that the affidavit of Dr. Gordon was insufficient in that Dr. Gordon did not indicate that he had knowledge of the standard of care in Nashville or a similar community in January 1999, nor did he state that he had knowledge of the standard of care specifically for gastroenterologists. The trial court determined that Dr. Gordon's statement regarding his position at Vanderbilt University was ambiguous, because it did not clarify when Dr. Gordon served in that position. Thus, the trial court concluded that "[t]he affidavit of Dr. Gordon does *not* indicate knowledge of the standard of care for gastroenterologists nor does it indicate that he had a knowledge of the standard of care in Nashville or a similar community in January, 1999." As to the supporting affidavit filed by Dr. Todd, the trial court determined that Dr. Todd's affidavit was insufficient, because "it [did] not state that [Dr. Todd] was familiar with standard of care in Nashville and similar communities in January, 1999 nor [did] it state that he was familiar with the standard of care for the specialty of gastroenterology." Finally, the trial court observed that the doctrine of *res ipsa loquitur* is not a separate cause of action, but rather a method of proving professional negligence, and that application of the doctrine would have to be supported by expert testimony. Because the affidavits submitted by the Howells were struck, the trial court rejected application of the doctrine of *res ipsa loquitur* to prove their claims. Accordingly, the trial court granted Dr. Price's motion for partial summary judgment.[FN4]

> FN4. The claim against Dr. Price based on medical battery was not dismissed and remained pending.

*4 On August 3, 2001, the Howells filed a motion pursuant to Rule 59 .04 of the Tennessee Rules of Civil Procedure to alter or amend the trial court's order, asking the trial court to permit them to supplement the record to include Dr. Gordon's curriculum vitae and amended affidavit. In the amended affidavit, Dr. Gordon clarified that he had been an associate professor at Vanderbilt University "from 1988 to the present." In addition, Dr. Gordon revised paragraph eleven by replacing it with the following:

> 11. I am familiar with the recognized standard of acceptable professional care and practice for gastroenterologist[s] in the treatment of patients undergoing endoscopic medical procedures in Nashville, Tennessee and similar communities, as it existed in January of 1999 and all times relative to this suit.

The remainder of the amended affidavit was the same as the original. Dr. Gordon's curriculum vitae indicated that Dr. Gordon was a visiting associate professor and consultant at Vanderbilt University Medical Center in Nashville, Tennessee and that he had held that position continuously since 1988.

On August 31, 2001, the trial court entered an order denying the Howells' motion to alter or amend. The trial court stated that, "[f]ollowing review of the entire record in this cause, arguments of counsel for the plaintiffs and the defendant Neil Price, M.D., as well as an analysis of the Motion pursuant to ***Harris v. Chern*** [33 S.W.3d 741 (Tenn.2000)], the Court is of the opinion that the plaintiffs' Motion is not well taken and should be **DENIED** ." The trial court also entered an order making its July 13, 2001 order entered final and appealable. From that order, the Howells now appeal.

On appeal, the Howells argue that the trial court erred in granting Dr. Price's motion for partial summary judgment. They assert that the trial court failed to draw the reasonable inference from Dr. Gordon's original affidavit that he was familiar with the applicable standard of care in Nashville as it existed in

January 1999. The Howells also contend that the trial court applied the wrong standard in assessing Dr. Gordon's affidavit, because it found the affidavit insufficient in that Dr. Gordon did not have "knowledge of the standard of care for gastroenterologists." Finally, the Howells argue that the trial court erroneously applied the standard in ***Harris v. Chern*** in denying their motion to alter or amend to include the additional information in Dr. Gordon's revised affidavit and curriculum vitae.

We first consider the trial court's grant of partial summary judgment. A grant of summary judgment is reviewed de novo with no presumption of correctness. ***Warren v. Estate of Kirk,*** 954 S.W.2d 722, 723 (Tenn.1997). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We must view the evidence in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. ***Warren,*** 954 S.W.2d at 723 (quoting ***Bain v. Wells,*** 936 S.W.2d 618, 622 (Tenn.1997)). Once the moving party demonstrates that no genuine issues of material fact exist, the nonmoving party must demonstrate, by affidavits or otherwise, that a disputed issue of material fact exists for trial. ***Byrd v. Hall,*** 847 S.W.2d 208, 211 (Tenn.1993). When a trial court makes determinations regarding the "admissibility, qualifications, relevancy and competency" of expert testimony, we will uphold those determinations absent an abuse of discretion.[FN5] ***See McDaniel v. CSX Transp., Inc.,*** 955 S.W.2d 257, 263 (Tenn.1997); ***see also Tilley v. Bindra,*** No. W2001-01157-COA-R3-CV, 2002 Tenn.App. LEXIS 349, at *10 (Tenn.Ct.App. May 13, 2002).

FN5. The Howells argue that we should afford no deference to the trial court's conclusions relating to the sufficiency of the testimony of Dr. Gordon, because the issue on appeal involves the interpretation of an affidavit, rather than an assessment of Dr. Gordon's credibility as a "live" witness. ***See Wells v. Tennessee Board of Regents,*** 9 S.W.3d 779, 783-84 (Tenn.1999). The Howells' argument, however, is misplaced. The rule allowing an appellate court to review de novo a trial court's credibility determinations that are based on a "cold" record is not applicable here, where we are called upon to review the trial court's determination regarding the qualifications of an expert witness. Such determinations are within the broad discretion of the trial court. ***See McDaniel v. CSX Transp., Inc.,*** 955 S.W.2d 257, 263 (Tenn.1997), ***cited in Robinson v. LeCorps,*** No. M1999-01581-SC-R11-CV, 2002 Tenn. LEXIS 380, at *16 (Tenn. Sept. 5, 2002).

*5 The plaintiff's burden in a medical malpractice action is set out in Tennessee Code Annotated § 29-26-115, which states:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices ***in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred*** ....
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or

> specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred....

Tenn.Code Ann. § 29-26-115(a)-(b) (Supp.2002) (emphasis added); ***see Church v. Perales,*** 39 S.W.3d 149, 166 (Tenn.2000). The statute requires that a plaintiff submit proof of the applicable standard of care in the same or similar community in which the defendant practices, as that standard existed at the time the wrongful conduct occurred. This requirement is commonly referred to as the "locality rule." ***See Mabon v. Jackson-Madison County Gen. Hosp.,*** 968 S.W.2d 826, 831 (Tenn.Ct.App.1997); ***see also Tilley,*** 2002 Tenn.App. LEXIS 349, at *12. "Without this requisite threshold evidence of the standard of care in the locality, a plaintiff cannot demonstrate a breach of duty." ***Mabon,*** 968 S.W.2d at 831.

In this case, the trial court's rejection of Dr. Gordon's affidavit was based, in part, on its conclusion that the affidavit did not indicate that Dr. Gordon had knowledge of the standard of care in Nashville or a similar community in January 1999. The Howells argue that, in reaching this conclusion, the trial court erroneously drew all inferences in favor of Dr. Price, rather than in favor of the Howells, the nonmovants. They assert that, in paragraph eleven of Dr. Gordon's affidavit, the reference to the standard of care in "Middle Tennessee" necessarily included Nashville. The Howells contend that Nashville must have been implied in that reference, because paragraph six of the affidavit stated that Dr. Gordon had been "Chief of the Anesthesiology Department at Southern Tennessee Medical Center from June of 1989 to present and an Associate Professor of Anesthesiology at Vanderbilt University Hospital." [FN6] They maintain that the trial court should have interpreted that statement to mean that Dr. Gordon had held the positions at both Southern Tennessee Medical Center and Vanderbilt University Hospital continuously since 1989, and that because Dr. Gordon maintained his position as an associate professor at Vanderbilt University Hospital in Nashville at the pertinent time, he must be familiar with the applicable standard of care in the Nashville community, as is required under the statute. In sum, the Howells argue that, if paragraph eleven is read in conjunction with paragraph six, it is reasonable to infer that the reference to "Middle Tennessee" in paragraph eleven means Nashville.

> FN6. Southern Tennessee Medical Center is located in Winchester, Tennessee, and Vanderbilt University Hospital is located in Nashville, Tennessee; however, the affidavit does not state the location of the two medical facilities.

*6 Thus, in this appeal, we must determine whether it can be reasonably inferred that knowledge of the standard of care in "Middle Tennessee," when considered in the context of Dr. Gordon's affidavit as a whole, means knowledge of the standard of care in Nashville. While the Howells make a cogent argument and the question is close, in light of pertinent case law and the high standard of review, we must conclude that the trial court did not err in finding that such an inference cannot reasonably be made from the affidavit alone.

The Tennessee Supreme Court has recently upheld a strict application of the locality rule in ***Robinson v. LeCorps,*** No. M1999-01581-SC-R11-CV, 2002 Tenn. LEXIS 380 (Tenn. Sept. 5, 2002). In ***Robinson,*** the Court declined to adopt a national standard of professional care for malpractice actions, but instead adhered to the statutory requirement that the plaintiff's expert "must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of the standard of professional care in a community *that is shown to be similar* to the defendant's community." ***Robinson,*** 2002 Tenn. LEXIS 380, at *14. In support of its reasoning, the Court cited with approval this court's de-

cision in ***Mabon v. Jackson-Madison County Gen. Hosp.***, 968 S.W.2d 826, 831 (Tenn.Ct.App.1997). In ***Mabon,*** the defendant physician practiced in Jackson, Tennessee. To establish the requisite standard of care under the statute, the plaintiff's expert stated in his affidavit that he was "familiar with the recognized standard of acceptable medical practice ... in an area such as Jackson, Tennessee," and that "the standard of care in Jackson ... would be comparable to the cities and facilities at which he had practiced medicine." ***Mabon,*** 968 S.W.2d at 828. From the expert's deposition testimony, however, it became apparent that he had no knowledge about Jackson's medical community, nor did he have any evidence on which to base his opinion that the standard of care in Jackson was the same nationwide. ***Id.*** at 830-31. We emphasized that the plaintiff has the burden of establishing the requisite standard of care in a medical malpractice action:

> It is the plaintiff who is charged with the burden of proof as to the standard of care in the community in which the defendant practices or in a similar community.... A plaintiff who chooses to prove the standard of care in a similar community necessarily must prove that community is similar to the one in which the defendant practices. To shift this burden to the defendant directly contradicts the plain language of the statute and would render the statute a nullity. Under the principles of summary judgment, once [the defendant] moved for summary judgment and submitted an affidavit stating that he complied with the standard of care in Jackson, the burden then shifted to [the plaintiff] to set forth specific facts that [the defendant] failed to meet the standard of care in Jackson or a similar community.

*7 ***Id.*** at 831. Because the plaintiff's expert did not set forth specific facts showing that he was familiar with the standard of care in Jackson, or that the standard with which he was familiar pertained to a community similar to Jackson, we upheld the grant of summary judgment in favor of the defendant. ***Id.*** at 831.

Another recent case, ***Tilley v. Bindra,*** No. W2001-01157-COA-R3-CV, 2002 Tenn.App. LEXIS 349 (Tenn.Ct.App. May 13, 2002), supports a strict application of the locality rule. In ***Tilley,*** the plaintiff alleged that the defendant otolaryngologist committed malpractice in Dyersburg, Tennessee. The defendant moved for summary judgment, submitting his own affidavit in support. The defendant physician's affidavit stated that he fully complied with the standard of care required of an otolaryngologist in Dyersburg. ***Tilley,*** 2002 Tenn.App. LEXIS 349, at *3. In response, the plaintiff filed an affidavit of a medical expert who asserted that the defendant had violated the applicable standard of care for an otolaryngologist in the State of Tennessee, without specifying Dyersburg or another community. In his deposition, the plaintiff's expert admitted that he had only practiced in Knoxville, Tennessee, and that he had never been to Dyersburg.[FN7] The expert testified that he assumed that the standard of care for an otolaryngologist would be the same statewide. The defendant then filed a renewed motion for summary judgment, apparently arguing that the plaintiffs' expert lacked knowledge of the applicable standard of care in the Dyersburg community. Subsequently, in a supplemental affidavit, the plaintiffs' expert cited statistics about the hospital and the medical community in Dyersburg, and asserted that he was familiar with the standard of care in Dyersburg or in a similar community. ***Id.*** at *6. The trial court granted the defendant's motion for summary judgment, finding, among other things, that the plaintiff's expert was not competent to testify as an expert witness as to the standard of care in Dyersburg. ***Id.*** at *7. This Court upheld the trial court's conclusion that the expert was not competent to testify on that subject, and determined that his supplemental affidavit was insufficient to establish the requisite familiarity with the applicable standard of care because it did not provide "trustworthy facts or data sufficient to provide a basis for his opinion." ***Id.*** at *19; ***see Roberts v. Bicknell,*** No. W2000-02514-COA-R3-CV, 2001 Tenn.App. LEXIS 605, at *7 (Tenn.Ct.App. Aug.16,

2001) (stating that an expert's opinion must be based on "trustworthy facts or data sufficient to provide some basis for the opinion"); ***Spangler v. East Tennessee Baptist Hosp.,*** No. E1999-01501-COA-R3-CV, 2000 Tenn.App. LEXIS 121, at *1-*2 (Tenn.Ct.App. Feb.28, 2000) (concluding that supplemental affidavit, which recited that plaintiff's expert was familiar with standard of care in the same or similar community, was insufficient because it simply tracked the statutory language and was submitted after the expert had testified that the standard of care did not vary from community to community).

FN7. The defendant elected not to argue his motion for summary judgment until after the deposition of the plaintiff's expert had been taken. ***Tilley,*** 2002 Tenn.App. LEXIS 349, at *4.

***8** In the instant case, in reviewing the trial court's grant of partial summary judgment, we consider only Dr. Gordon's affidavit. No evidence was adduced to identify the "Middle Tennessee" communities with which Dr. Gordon was familiar, and in particular whether the reference to Middle Tennessee was intended to include Nashville. Assuming it can be inferred from the affidavit that Dr. Gordon was familiar with the applicable standard of care in Winchester, Tennessee, where Southern Tennessee Medical Center is located, the affidavit does not indicate that the standard of care in Winchester is similar to that in Nashville. Dr. Gordon's statement in paragraph six that he was an associate professor at Vanderbilt University Hospital does not illuminate the reference to "Middle Tennessee" in paragraph eleven, because paragraph six is too vague as to time and duration to reasonably infer that Dr. Gordon was familiar with the applicable standard of care in Nashville in January of 1999. While the question is close, under pertinent caselaw, and considering the abuse of discretion standard on appeal for reviewing a trial court's determination regarding the admissibility and competency of expert testimony, we cannot say that the trial court erred in determining that the reference to "Middle Tennessee" in paragraph eleven is too broad to satisfy the requirements of the locality rule. Consequently, we must affirm the trial court's conclusion that the information provided in Dr. Gordon's affidavit is insufficient to establish that he was familiar with the applicable standard of care in Nashville during the pertinent time period.[FN8]

FN8. The Howells do not argue on appeal that the trial court erred in concluding that Dr. Todd's affidavit was insufficient. Dr. Todd's affidavit supported the Howells' theories of recovery based on the failure to warn and the doctrine of *res ipsa loquitur,* and also served as evidence of causation. Because the Howells have not raised the issue on appeal, we uphold the trial court's decision to strike Dr. Todd's affidavit.

We note, however, that Dr. Todd's affidavit fails to meet the requirements of the locality rule. Nowhere in his affidavit does Dr. Todd state that he is aware of the standard of care in Nashville or a similar community. In fact, Dr. Todd states only that he was licensed to practice medicine in Tennessee, that he specializes in pathology, and that he is "familiar with the recognized standard of acceptable practice for the treatment of patients with gastrointestinal disorders and esophageal varices." He does not mention locality anywhere in his affidavit. As we have stated, "[w]ithout this requisite threshold evidence of the standard of care in the locality, a plaintiff cannot demonstrate a breach of duty." ***Mabon,*** 968 S.W.2d at 831. Consequently, even if the Howells had sought to rely on the affidavit of Dr. Todd, it would have been deemed insufficient based on its failure to satisfy the locality rule.

The Howells also argue on appeal that, even if the trial court correctly found Dr. Gordon's original affidavit insufficient, it should have granted their motion to revise the summary judgment, based on the newly submitted affidavit of Dr. Gordon and the addition of Dr. Gordon's curriculum vitae.[FN9] As noted above, both the amended affidavit and the curriculum vitae indicated that Dr. Gordon had been a visiting professor at Vanderbilt University Medical Center in Nashville during the pertinent time period. The amended affidavit also included wording that more closely tracked the language in Tennessee Code Annotated § 29-26-115(a)(1), stating that Dr. Gordon was "familiar with the recognized standard of acceptable professional care and practice for gastroenterologist[s] in the treatment of patients undergoing endoscopic medical procedures in Nashville, Tennessee and similar communities, as it existed in January of 1999." The Howells argue that the trial court erred in finding that the ***Harris*** factors weighed in favor of declining to consider their motion. ***See Harris v. Chern,*** 33 S.W.3d 741, 744 (Tenn.2000). We review the trial court's decision for an abuse of discretion. ***Id.*** at 746 (citing ***Donnelly v. Walter,*** 959 S.W.2d 166, 168 (Tenn.Ct.App.1997)).

> FN9. Though the Howells styled their motion as a "Motion to Alter or Amend Court's Order" pursuant to Tennessee Rule of Civil Procedure 59.04, the trial court properly considered it a motion to revise a non-final judgment under Rule 54.02, because the July 13, 2001 order granting partial summary judgment had not been made final when the Howells filed their motion to amend. Indeed, "Rule 54.02 applies to cases, such as this one, in which judgment was not entered as to all of the defendants or claims." ***Harris v. Chern,*** 33 S.W.3d 741, 743 (Tenn.2000). Nevertheless, Tennessee courts have expressly adopted the analysis in ***Harris,*** applicable to Rule 54.02 motions to revise, in considering Rule 59.04 motions to amend. ***See Stovall v. Clarke,*** No. M2001-00810-COA-R3-CV, 2002 Tenn.App. LEXIS 437, at *20-*21 (Tenn.Ct.App. June 20, 2002); ***Smith v. Haley,*** No. E2000-001203-COA-R3-CV, 2001 Tenn.App. LEXIS 136, *15-16 (Tenn.Ct.App. March 2, 2001).

In ***Harris,*** the Tennessee Supreme Court rejected a strict application of the "newly discovered evidence standard" or "new evidence rule" for motions to revise orders granting summary judgment. ***Id.*** at 745-46. Instead, the Court delineated five factors that courts should balance and "make adequate findings of fact and conclusions of law on the record to support those findings." ***Id.*** at 745. Those factors are as follows:

*9 1) the movant's efforts to obtain evidence to respond to the motion for summary judgment;

2) the importance of the newly discovered evidence to the movant's case;

3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment;

4) the likelihood that the nonmoving party will suffer unfair prejudice; and

5) any other relevant factor.

Id. The Court reasoned that giving courts the discretion to consider other circumstances strikes the appropriate balance between the need to bring litigation to an end and the need to render a just decision based on all of the pertinent facts.[FN10] ***Id.***

> FN10. The Court identified the opposing

> viewpoints through its discussion of ***Schaefer v. Larsen***, 688 S.W.2d 430 (Tenn.Ct.App.1984), applying the more lenient standard, and ***Bradley v. McLeod***, 984 S.W.2d 929 (Tenn.Ct.App.1998), which rejected the more lenient standard in favor of the strict "new evidence" standard. ***Compare Schaefer***, 688 S.W.2d at 433 (reasoning that a litigant seeking to revise an order granting summary judgment "is only seeking that which he is basically entitled to-a first trial"), ***with Bradley***, 984 S.W.2d at 933 (stating that a Rule 59.04 motion should not be used to introduce new evidence or arguments "that could have been adduced and presented while the summary judgment motion was pending").

The trial court below applied the ***Harris*** factors to the instant case and concluded that the circumstances did not warrant consideration of the curriculum vitae and the revised affidavit. In applying the ***Harris*** factors, the trial court noted that factor two weighed in favor of revising the judgment, because the newly submitted evidence was "of some importance surely because if [the court] considered the Affidavit, it might save the malpractice claim." In considering factors one and three, however, the trial court found deficient the Howells' efforts to obtain the new evidence and their explanation for failing to offer the new evidence at an earlier time. The court reasoned:

> I don't read this [*Harris v. Chern*] case as saying to the bar or the trial judges, well, look, if you argue a summary judgment and you are the [ ]movant and you lose because the judge says there is a factor missing, that you are now allowed under [*Harris v. Chern*] to come back and say, Judge, you ruled against me and said that while I showed X and Y, I didn't show Z. Well, you know, now here is Z; here are a couple of affidavits on Z, so now since I have filled this hole you found earlier, just reverse yourself, deny the summary judgment and the case goes forward.
>
> I just don't think that's what they are saying. I think there really has to be a cogent explanation for the failure to present it the first time around.

With respect to factor four, unfair prejudice to the nonmovant, the trial court determined that Dr. Price would suffer some prejudice if the Howells were allowed to resurrect their malpractice claim based on the tardy revised affidavit. The trial court concluded that, in light of all of those factors, "and considering that there should be some definiteness to rulings on summary judgment and that they not be litigated in some bifurcated manner and that counsel [should] not be allowed to come back and fill a hole when the judge finds that he hadn't prevailed at the argument[,] that this motion will be respectfully overruled."

On appeal, the Howells argue that the trial court abused its discretion in its application of the five ***Harris*** factors. With respect to factor one, while the Howells admittedly did not submit the curriculum vitae and the revised affidavit in response to the motion for summary judgment, they assert that their reason for not doing so was defensible. Prior to the trial court's initial ruling, they believed that the affidavits of Dr. Gordon and Dr. Todd were sufficient under the statute, particularly when those affidavits were viewed in a light most favorable to them, the nonmovants. They argue that the trial court applied "hypertechnical semantics" and applied "too strict a standard in assessing Dr. Gordon's original affidavit," and that the supplemental affidavit was offered post-judgment "to address any clerical-type objections" in the original one. With respect to factor two, the importance of the new evidence, it is not in dispute, as the trial court noted, that the information in the revised affidavit of Dr. Gordon was critically important to their case, because without it the medical malpractice and informed consent claims against Dr. Price would fail. In addition, with respect to factor four, the Howells contend that any prejudice to Dr.

Price would not be unfair because if Dr. Price believes that Dr. Gordon is truly unqualified to testify, he would have the opportunity to depose Dr. Gordon and renew his summary judgment motion.

10** This is a close case. Regarding the first ***Harris factor, the new evidence sought to be introduced by the Howells was admittedly available prior to the trial court's ruling on Dr. Price's motion for summary judgment. The Howells were aware of Dr. Price's objections to the affidavits, yet chose not to submit additional evidence to cure the claimed defects.

As noted above, however, the ***Harris*** court explicitly rejected the "new evidence" rule, and the other enumerated factors must be taken into consideration. ***Harris***, 33 S.W.3d at 745-46. The second ***Harris*** factor weighs heavily in favor of considering the new evidence. Dr. Gordon's affidavit was crucial to the Howells' malpractice claims; without it, the necessary standard of care cannot be proven with respect to any of the claims.

As for the third ***Harris*** factor, the Howells' reason for not submitting the additional evidence is tenable. Again, the Howells argue that they failed to submit the additional evidence because they believed that the affidavits were sufficient to defeat Dr. Price's motion. Indeed, the trial court's finding that Dr. Gordon's affidavit was insufficient is upheld on appeal primarily in light of the high standard of review, abuse of discretion, for such determinations. This is not a case in which the plaintiffs' expert attempts to claim familiarity with the standard of care in a community in which he has never practiced. Summary judgment is often granted in favor of defendant physicians in cases in which the plaintiff's expert claims to have sufficient knowledge of the standard of care in the locality of the defendant's practice, but the claim is found to have been based on untrustworthy data. ***See Tilley,*** 2002 Tenn.App. LEXIS 349, at *19 (discrediting expert's claim that he was familiar of standard of care in the pertinent community because his deposition testimony revealed that his claim was not based on trustworthy facts); ***Stovall v. Clarke,*** No. M2001-00810-COA-R3-CV, 2002 Tenn.App. LEXIS 437, at *20-*21 (Tenn. Ct.App. June 20, 2002) (holding that merely claiming knowledge of standard is conclusory and insufficient to establish plaintiff's case when supplemental testimony was merely a reaction to the experts' lack of geographic information and medical statistics); ***Smith v. Haley,*** E2000-002103-COA-R3-CV, 2001 Tenn.App. LEXIS 136, at *18 (Tenn.Ct.App. March 2, 2001) (refusing to set aside summary judgment that was based on fact that plaintiff's expert's affidavit was untrustworthy and case had been pending over five and one-half years); ***Church v. Perales,*** 39 S.W.3d 149, 167 (Tenn.Ct.App.2000) (stating that "[e]xpert opinions having no basis can properly be disregarded because they cannot materially assist the trier of fact"); ***Mabon,*** 968 S.W.2d at 831 (rejecting expert's allegation that he is familiar with the applicable standard of care when deposition testimony reveals that he is not familiar with standard in that locality).

***11** In this case, it is undisputed that Dr. Gordon's original affidavit indicates that he was licensed to practice in Tennessee at all pertinent times, and that he had been "an Associate Professor of Anesthesiology at Vanderbilt University Hospital," which is in Nashville, for some period of time. It also states that he was familiar with the standard of care in "Middle Tennessee," which geographically includes Nashville. In the amended affidavit, the Howells more specifically set out that Dr. Gordon was an associate professor at Vanderbilt University Hospital "from 1988 to the present," and that he was familiar with the standard of care "in Nashville" at the pertinent time. The revised affidavit clarifies Dr. Gordon's assertion that he had been working in Nashville during the pertinent time period; it does not introduce a new locale of expertise.[FN11]

FN11. In point of fact, had the trial court

> denied Dr. Price's motion for summary judgment and concluded that, considering Dr. Gordon's affidavit in the light most favorable to the Howells, Dr. Gordon's affidavit was sufficient, this decision likely would also have been upheld on appeal, considering the abuse of discretion standard of review.

With respect to factor four, we find that Dr. Price would not be unfairly prejudiced by allowing the Howells to submit the additional evidence. To be sure, he would be prejudiced, because allowing the trial court to reconsider its previous ruling in light of the additional information could possibly revive a claim against him that had been dismissed. However, since Dr. Price has the opportunity through discovery to obtain support for his assertion that Dr. Gordon is not competent to testify, any prejudice to Dr. Price is not unfair prejudice.

Considering all of the facts and circumstances of this case, we must conclude that the trial court abused its discretion in failing to consider the additional evidence submitted by the Howells for purposes of determining whether to revise its order granting summary judgment to Dr. Price. Therefore, we reverse the trial court's decision not to consider the amended affidavit and curriculum vitae and remand for reconsideration of the grant of partial summary judgment in light of the new evidence.

Dr. Price argues that the trial court was correct in determining that Dr. Gordon's original affidavit was insufficient to show that he was familiar with the applicable recognized standard of acceptable professional practice for a gastroenterologist in performing an EGD procedure. The original affidavit stated that Dr. Gordon was "familiar with the recognized level of acceptable professional practice regarding the treatment of patients undergoing endoscopic medical procedures." Dr. Gordon's amended affidavit included language stating that he was "familiar with the recognized standard of acceptable professional ***care and*** practice ***for gastroenterologist[s] in*** the treatment of patients undergoing endoscopic medical procedures." Under Tennessee Code Annotated § 29-26-115, the plaintiffs' expert witness need not practice in the same specialty of the medical profession as the defendant. ***See Ledford v. Moskowitz,*** 742 S.W.2d 645, 647 (Tenn.Ct.App.1987). Rather, the expert must "demonstrate that he or she practices in a profession or specialty that makes the affiant's opinion relevant to the issues in the case." ***Church,*** 39 S.W.3d at 166. Dr. Gordon is an anesthesiologist, whose testimony would be relevant to some, but not necessarily all, issues in this case. On remand, the trial court may determine the issues to which Dr. Gordon's testimony is relevant, in light of the assertions in the amended affidavit and curriculum vitae.

***12** Accordingly, we affirm in part and reverse in part the decision of the trial court, and remand for further proceedings not inconsistent with this Opinion. Costs are to be taxed equally to the appellants, Mildred and Dillon Howell, and their surety, and the appellee, Neil Price, M.D., for which execution may issue, if necessary.

Tenn.Ct.App.,2003.
Howell v. Baptist Hosp.
Not Reported in S.W.3d, 2003 WL 112762 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2000 WL 354405 (Tenn.Ct.App.)
(Cite as: 2000 WL 354405 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Doris HUTTCHSON,
v.
Donald COLE, M.D., et al.

No. M1999-00204-COA-R10-CV.
April 7, 2000.

Appeal from the Circuit Court for Wilson County No. 10357; Clara Byrd, Judge.
Thomas W. Lawrence, Jr., and Richard F. Russell, Nashville, TN, for appellant Donald Cole, M.D.

William C. Moody, Jr., Nashville, TN, for appellant National Medical Hospital of Wilson County, Inc.

F. Michie Gibson, Jr., and T.J. Cross, Nashville, TN, for appellee, Doris Huttchson.

FARMER, J., delivered the opinion of the court, in which HIGHERS and LILLARD, JJ., joined.

OPINION

***1** Defendants Donald Cole, M.D., and National Medical Hospital of Wilson County, Inc., appeal the trial court's nonfinal order denying their motions for summary judgment in this medical malpractice action brought against them by Plaintiff/Appellee Doris Huttchson. We granted the Defendants' application for an extraordinary appeal [FN1] to determine the sole issue of whether Huttchson's cause of action is barred by the one-year statute of limitations applicable to medical malpractice actions.[FN2] Based upon the undisputed record evidence, we conclude that Huttchson's action against Dr. Cole and the Hospital is time-barred, and we reverse the trial court's order denying their motions for summary judgment.

FN1. *See* Tenn.R.App.P.10.

FN2. *See* Tenn.Code Ann. §§ 28-3-104(a)(1), 29-26-116(a) (1980 & Supp.1996).

For purposes of these summary judgment proceedings, the following facts were undisputed. On January 27, 1997, Huttchson underwent an endoscopic examination of her gastrointestinal tract. Defendant Donald Cole, M.D., performed the procedure at the Defendant Hospital's surgical facilities, and Defendant Maurice Gilbert served as the anesthesiologist for the procedure.[FN3] Prior to performing the endoscopic procedure, Dr. Cole agreed that Huttchson would "be put to sleep" during the procedure. Huttchson specifically requested general anesthesia because of difficulties she had experienced during a prior endoscopic procedure.

FN3. Defendant Maurice Gilbert is not a party to this appeal.

The endoscopic procedure required Dr. Cole to "run a tube down" Huttchson's throat. Prior to the procedure, a nurse visited Huttchson in the Hospital's preoperative area and told Huttchson that "she needed to see [her] throat." When Huttchson opened her mouth, the nurse, without warning, sprayed a local anesthetic in her throat. The spray startled Huttchson, and she choked and turned her head to one side. As a result, the nurse accidentally sprayed Huttchson's face. The spray caused Huttchson's skin to tingle and her eyes to burn. Huttchson complained to the nurse that she had sprayed the anesthetic in Huttchson's face, but the nurse "never offered [her] something to get it off with."

When Huttchson regained consciousness after the procedure, she discovered that her "eyes were burning and they were red." Later in the day, when Huttchson returned home, she noticed that her eyes were watering and "itching real bad." By this time, her skin also felt like it was burning, so Huttchson placed a cold, wet cloth on her face. Later that night, Huttchson observed that her face was beginning to swell, especially in the area around her left eye. When Huttchson awoke the next morning, her eyes were swollen shut. In the days following the procedure, Huttchson developed a blister under one eye, and a green discharge began to ooze from her eyes. Huttchson subsequently sought treatment for these conditions from an optometrist and a dermatologist. On February 11, 1997, Huttchson's optometrist confirmed that Huttchson had an eye infection and that her eye injury was caused by the anesthetic spray.

In the months following the accident, Huttchson continued to experience symptoms that she attributed to being sprayed in the face with the anesthetic. In September 1998, when she gave her deposition, Huttchson still suffered from headaches, recurring eye infections, blurred vision, alternately watery and dry eyes, swelling around the left eye, increased sensitivity to sunlight, burning, and other discomfort.

*2 Although Huttchson's injury occurred on January 27, 1997, Huttchson did not file her complaint against the Defendants until January 28, 1998, more than one year later. Apparently, Huttchson mistakenly believed that her injury occurred on January 28, 1997, because a statement she received from Dr. Cole erroneously identified that as the date of the procedure. Huttchson's amended complaint correctly identified the date of the procedure as January 27, 1997. [FN4]

FN4. Huttchson also conceded on appeal that January 27, 1997, was the correct date. In any event, we note that Huttchson's mistaken belief as to the date of her injury did not toll the limitations period. *See* *Brashears v. Knoxville Police Dep't*, No. 03A01-9809-CV-00298, 1999 WL 93582, at *4 (Tenn.Ct.App. Feb. 25, 1999) (*no perm. app. filed*).

Dr. Cole filed a motion to dismiss Huttchson's complaint on the ground, *inter alia,* that Huttchson's claim for medical malpractice was barred by the one-year statute of limitations. Dr. Cole attached several exhibits to his motion, including an affidavit and an operation report, thereby effectively converting his motion into one for summary judgment.[FN5] The Hospital likewise moved for summary judgment based upon the statute of limitations.

FN5. *See* *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 951 (Tenn.Ct.App.1995) (concluding that, pursuant to Tenn.R.Civ .P. 12.02, movant's reliance upon matters outside pleadings converts motion to dismiss into motion for summary judgment).

In opposing the Defendants' motions, Huttchson contended that her cause of action did not accrue until February 11, 1997, when she visited her optometrist and discovered that the source of her eye injury was a chemical burn. The trial court denied the Defendants' motions, and this appeal followed.

In Tennessee, the statute of limitations for medical malpractice actions is one year. *See* Tenn.Code Ann. § 29-26-116(a)(1) (1980); *see also* Tenn.Code Ann. § 28-3-104(a)(1) (Supp.1996). The statute provides, however, that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Tenn.Code Ann. § 29-26-116(a)(2) (1980). Our supreme court has interpreted this codification of the discovery rule to

mean that the statute of limitations commences to run when the patient discovers, or reasonably should have discovered, in the exercise of reasonable care and diligence, "(1) the occasion, the manner, and the means by which a breach of duty occurred that produced [the patient's injury]; and (2) the identity of the defendant who breached the duty." *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn.1998) (quoting *Stanbury v. Bacardi*, 953 S.W.2d 671, 677 (Tenn.1997)). In order to trigger the commencement of the limitations period, the patient's knowledge need not include the precise nature of the patient's claim or the extent of her injury. *See Shadrick*, 963 S.W.2d at 733. The patient need only be aware that she has sustained an injury and that the injury resulted from the defendant's wrongful or tortious conduct. *See id.* at 733-34.

Applying these principles to the record before us, we conclude that Dr. Cole and the Hospital were entitled to summary judgment on their statute of limitations defense. We reach this conclusion because Huttchson's own testimony revealed that, on the date of her outpatient surgery, January 27, 1997, Huttchson knew both (1) that she had sustained an injury and (2) that the injury was caused by the nurse's action of accidentally spraying an anesthetic in her face and eyes.

***3** First, Huttchson's deposition testimony revealed that she was aware at the time of the accident that the nurse had sprayed the anesthetic in her face. Huttchson testified that "the nurse came along and said to me she needed to see my throat, and when I opened my mouth she started spraying, and it went all over my face." Huttchson also testified that she was aware some of the spray actually landed in her eyes. Right after the accidental spraying, Huttchson wiped her face and both eyes.

Huttchson's deposition testimony further revealed that, on the day the procedure was performed, she was aware that the nurse's act of spraying the anesthetic had caused injuries to her face and eyes. Huttchson testified that, after the nurse sprayed the anesthetic in her face, her skin tingled and her eyes burned. Later the same day, Huttchson noticed that her face and eyes were "real red" and that her eyes began to itch "real bad."

Huttchson also testified to a conversation that she had with her daughter after she arrived home on the evening of January 27, 1997:

Q. Did you have any visitors at home that night?

A. My youngest daughter came by.

....

Q. Did you mentioned [sic] to her what happened with the spray?

A. Yes.

Q. Do you remember what you told her?

A. She was asking me why my face was red and my eyes, and I told her what happened, and she told me I needed to see a doctor.

....

Q. She said you need to see a doctor. Did you agree with her?

A. Yes, I did.

According to Huttchson, she tried to call Dr. Cole's office that day to complain about the injuries to her face and eyes, but Dr. Cole did not return her call. Huttchson did talk to an employee in Dr. Cole's office, and she described the conversation that took place between them:

Q. You called [Dr. Cole's] office once that day?

A. Yes.

Q. Did you get an answer?

A. Someone answered, I don't know who.

Q. A lady?

A. Yes.

Q. What did you tell her?

A. I told her about the spray in my eyes, and that I was having headaches and my face was itching and burning.

Q. What did she say?

A. She said I'll let you talk with Dr. Cole, and I gave the number for him to call me, and he never called.

Based on the foregoing testimony, we conclude that Huttchson either knew, or should have known, on January 27, 1997, (1) the occasion, manner, and means by which a breach of duty occurred that produced her injuries; and (2) the identity of the defendant who breached the duty. *See* Shadrick, 963 S.W.2d at 733. On the morning of January 27, 1997, Huttchson knew that a nurse at the Hospital had accidentally sprayed an anesthetic in her face and eyes. Huttchson also knew that, as a result of this accident, she suffered injuries to her face and eyes in the form of redness, itching, and burning. These injuries were sufficiently serious to convince Huttchson and her daughter, by the evening of January 27, 1997, that Huttchson should see a doctor. Under these circumstances, Huttchson cannot avoid summary judgment by claiming that she did not know the extent of her injuries until February 11, 1997, when her optometrist confirmed that her eye condition resulted from a chemical burn. *See id.*

***4** Accordingly, the trial court's order is reversed, and this cause is remanded for further proceedings. Costs of this appeal are taxed to Plaintiff/Appellee Doris Huttchson, for which execution may issue if necessary.

Tenn.Ct.App.,2000.
Huttchson v. Cole
Not Reported in S.W.3d, 2000 WL 354405 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2002 WL 1800905 (Tenn.Ct.App.)
(Cite as: 2002 WL 1800905 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Vickie LEWIS,
v.
Otis CAMPBELL and Robert M. Dinwiddie, Jr.

No. M2000-03092-COA-R3-CV.
Aug. 7, 2002.

An Appeal from the Circuit Court for Warren County, No. 464; Charles Haston, Judge.
Aubrey Harper and Billy K. Tollison, III, McMinnville, Tennessee, for the appellant, Vickie Lewis.

Daniel H. Rader, III, Cookeville, Tennessee, for the appellee, Otis Campbell.

Henry Hine, Franklin, Tennessee, for the appellee, Robert M. Dinwiddie, Jr.

OPINION

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

HOLLY KIRBY LILLARD, J.

***1** This case involves allegations of medical malpractice and misrepresentation. In September 1998, the plaintiff patient began visiting the office of the defendant physician for medical treatment. In February or March 1999, the patient discovered that the person treating her was not the defendant physician. In June 1999, the patient discovered that the person treating her was a pharmacist. In April 2000, the plaintiff patient filed a lawsuit against the physician and the pharmacist, asserting medical malpractice and misrepresentation. The trial court granted summary judgment to the defendants based on the one-year statute of limitations. The plaintiff now appeals. We affirm, finding that plaintiff had sufficient knowledge in February or March 1999 to put her on notice of her cause of action, and, consequently, her April 2000 lawsuit was barred by the statute of limitations.

On September 22, 1998, Plaintiff/Appellant Vickie Lewis ("Lewis") made her first visit to the office of Defendant/Appellee Otis Campbell, M.D. ("Dr.Campbell"), for medical treatment. From the beginning, Lewis was treated by Defendant/Appellee Robert Dinwiddie ("Dinwiddie"), whom Lewis believed to be Dr. Campbell. Sometime after a February 9, 1999 office visit, Lewis learned that Dinwiddie was not Dr. Campbell and found out that he was Dr. Campbell's assistant.[FN1] Lewis visited Dr. Campbell's medical office again on March 2 and March 24, 1999, and she again saw Dinwiddie. The March 24 visit was her last. In June 1999, Lewis went to Dr. Campbell's office and approached Dinwiddie and asked to see his license. At that time, Dinwiddie told her that he was not a doctor, nurse, or nurse practitioner, but that he was a licensed pharmacist.

> FN1. Lewis discovered that Dinwiddie was not Dr. Campbell when she was told that Dr. Campbell is a black man. Dinwiddie is white.

On April 5, 2000, Lewis sued Dr. Campbell and Dinwiddie for medical negligence and misrepresentation. After Lewis's deposition was taken on August 15, 2000, both Dr. Campbell and Dinwiddie filed motions for summary judgment, based on the applicable one-year statute of limitations. *See* Tenn.Code Ann. §§ 28-3-104, 29-26-116. The motions were premised on Lewis's admission in her deposition that she dis-

covered in February 1999 that she was not being treated by Dr. Campbell. Lewis acknowledged that, after this discovery, she visited Dinwiddie two more times, knowing that he was not Dr. Campbell. From this, the defendants argue that in February or March 1999, Lewis knew or should have known, through the exercise of reasonable diligence, about the basis for her claims of malpractice and misrepresentation. This was more than one year prior to April 5, 2000, the date on which she filed suit. On November 3, 2000, the trial court entered an order granting the defendants' motions for summary judgment on the basis of the statute of limitations. Lewis now appeals.

On appeal, Lewis argues that the trial court improperly determined as a matter of fact that she should have known that Dinwiddie was not a physician as early as February or March of 1999. She argues that the issue of whether she exercised reasonable diligence in determining Dinwiddie's true status as a licensed pharmacist is a question that should have been left to the jury. Lewis also argues that the trial court erred in viewing the evidence in a light most favorable to the defendants, rather than in a light most favorable to her. She claims that if the trial court had construed the facts in her favor, it would have concluded that she did not discover that Dinwiddie was not a medical doctor until June 1999.

***2** We review the trial court's grant of summary judgment de novo with no presumption of correctness. *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn.1997); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn.1997). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

It is undisputed that the statute of limitations in a medical malpractice action is one year.[FN2] Tenn.Code Ann. § 29-26-116(a)(1). The cause of action accrues, and the limitations period begins to run, when the plaintiff discovers the injury or when the plaintiff, through reasonable diligence, should have discovered (1) the occasion, manner, and means by which the breach of duty occurred, and (2) the identity of the defendant that breached the duty. *See Stanbury v. Bacardi*, 953 S.W.2d 671, 676-77 (Tenn.1997). In *Stanbury,* the Tennessee Supreme Court explained:

> FN2. Though it appears that a one-year statute of limitation would also apply to Lewis's claim of misrepresentation, see Tennessee Code Annotated § 28-3-204, Lewis does not focus that theory of recovery in this appeal. Therefore, we will address the statute of limitations issue only as it relates to Lewis's medical malpractice claim.

> We emphasize that under the discovery rule, the statute begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know, that an injury has been sustained. It is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial. Again, a plaintiff need not "actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action.' "
> *Id.* at 678 (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994)). Thus, the "plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Id.* at 677 (quoting *Roe*, 875 S.W.2d at 657).

Lewis first argues that summary judgment was inappropriate because there was a disputed issue of material fact with respect to whether she should have discovered that Dinwiddie was not a physician in February or March 1999. She acknowledges that, in February or March 1999, she knew that Dinwiddie

was not Dr. Campbell. However, she claims that she assumed that Dinwiddie was a nurse or a nurse practitioner and did not know that he was a pharmacist until June 1999 when she confronted him directly.

In response, the defendants maintain that the undisputed facts compel the conclusion that Lewis was aware of facts sufficient to put a reasonable person on notice that she was being treated by a non-physician. They cite to Lewis's deposition, in which she testified that she became suspicious that Dinwiddie was not a physician in February 1999:

> Q. What made you first suspicious that Mr. Dinwiddie was not a medical doctor?
>
> A. When I found out that they were calling him Rob.
>
> Q. When was that-it had to be in March of '99 or February?
>
> *3 A. It was somewhere around there. And he began to act like he didn't know what he was doing.
>
> Q. Is that when he took you off Prozac in [sic] February 9th?
>
> A. February 9th.

Lewis testified that she was "shocked" to learn in February 1999 that the person who had been treating her was not Dr. Campbell. Based on this testimony, the defendants argue, Lewis's cause of action began to accrue in February or March 1999.

Lewis's complaint alleges that Dinwiddie committed malpractice by "exceeding the scope of his professional license and breaching his duty to Ms. Lewis by not informing her that he could not treat her and prescribe medication but could only fill prescriptions." As to Dr. Campbell, the complaint alleges that he "breached the duty of care he owed to Ms. Lewis by employing Defendant Dinwiddie, a pharmacist, to treat and prescribe medication for Ms. Lewis." Therefore, Lewis's cause of action accrued when she knew, or in the exercise of reasonable care and diligence should have known, that she was being treated by a non-physician. As in *Stanbury*, "[i]t is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial." Stanbury, 953 S.W.2d at 678. In her deposition testimony, Lewis asserts that, in February 1999, she was "shocked" to learn that Dinwiddie was not Dr. Campbell and was suspicious that Dinwiddie was not a physician. At that time, Lewis was on notice of facts that would have prompted a reasonable person to determine whether Dinwiddie was a physician. Indeed, she had adequate opportunity to make such inquiries at her last two office visits in March 1999. Under these circumstances, we must conclude that Lewis's cause of action against Dinwiddie and Dr. Campbell accrued no later than March 1999. Therefore, her lawsuit, filed in April 2000, was barred by the one-year statute of limitations. Consequently, the trial court did not err in granting the defendants' motion for summary judgment.

The decision of the trial court is affirmed. Costs are to be taxed to the appellant, Vickie Lewis, and her surety, for which execution may issue, if necessary.

Tenn.Ct.App.,2002.
Lewis v. Campbell
Not Reported in S.W.3d, 2002 WL 1800905 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2003 WL 22409452 (Tenn.Ct.App.)
(Cite as: 2003 WL 22409452 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Clarence "Al" MATZ and wife, Joann L. Matz,
v.
QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC., d/b/a Smith KLine Beecham Clinical Laboratories, Associated Pathologists, PLC., Estelle E. May, M.D., and Jarvis Leland Hughes, M.D.

No. E2003-00167-COA-R3-CV.
Aug. 21, 2003 Session.
Oct. 22, 2003.

Direct Appeal from the Circuit Court for Knox County, No. 3-247-01; Wheeler A. Rosenbalm, Circuit Judge.
John H. Cocke, Clarksdale MS, for Appellants.

Wynne C. Hall, Knoxville, Tennessee, for Appellees, Estelle E. May, M.D., and Associated Pathologists, PLC.

HERSCHEL PICKENS FRANKS, J. delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., joined and HOUSTON M. GODDARD, P.J., did not participate.

OPINION

HERSCHEL PICKENS FRANKS, J.

***1** Defendants granted summary judgment in medical malpractice action on grounds the statute of limitation had run. On appeal, we vacate and remand.

In this medical malpractice action, the Trial Court granted defendants summary judgment on the grounds that Plaintiffs "knew or should have known of their cause of action more than one year before the Complaint was filed" and that their claims were thus barred by the statute of limitations. Plaintiffs have appealed.

Plaintiffs' Complaint was filed on April 18, 2001, and plaintiffs alleged that Matz had a bleeding lesion on his head, and went to see Dr. Hughes in April of 1999 regarding the problem. The Complaint further alleged that Dr. Hughes took a biopsy which was sent to the defendant lab, where Dr. May examined the biopsy and did not find cancer. Further, that Dr. May suggested a follow up biopsy, which Dr. Hughes performed on April 19, 1999, and sent the biopsy to Associated Pathology, where it was again reviewed by Dr. May, and that Dr. May failed to recognize and diagnose melanoma. Plaintiffs alleged that because of the negligence of defendants, Matz' cancer was not diagnosed until April 26, 2000, when the tumor recurred and was diagnosed as melanoma, and that Matz now had a lesser chance of survival than he would have had if the cancer had been diagnosed earlier.

Defendants May and Associated Pathology filed a summary judgment motion, alleging that plaintiffs failed to file their Complaint within the one year statute of limitations, and asserted that Matz testified in his deposition that he thought he had cancer, and that it had just not been diagnosed. Ms. Matz testified in her deposition that her husband was certain he had cancer all along and that they had just failed to diagnose it. Thus, defendants argued that the suit was not timely filed, because Matz had a subjective belief that he had cancer for some time before it was actually diagnosed, and the Trial Court agreed and granted judgment to defendants.

Our standard of review in summary judgment cases is as follows:

> The standards governing an appellate court's review of a trial court's action on a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Tenn. R. Civ. P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. The moving party has the burden of proving that its motion satisfies these requirements.
>
> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Courts should grant a summary judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion.

***2** *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn.1995).

This is a medical malpractice case and, as such, is subject to the one year statute of limitations. Tenn.Code Ann. § 29-26-116. Thus, the issue is when the limitation period began to run.

Plaintiffs' argue they did not know that the first biopsy in 1999 showed cancer until the slides were later reviewed by Dr. Googe and he rendered his report on April 26, 2000. Plaintiffs assert that their Complaint was timely filed because it was filed on April 18, 2001. Defendants argue the Complaint was not timely because. Matz testified that he "knew" all along that he had cancer, even before it was diagnosed, and Matz was told that the last biopsy showed cancer no later than April 13, 2000, and that biopsy was taken from the same spot as the earlier ones.

This Court in *Green v. Sacks*, 56 S.W.3d 513, 522 (Tenn.Ct.App .2001) has explained:

> In 1974, the Tennessee Supreme Court adopted the discovery rule for determining when the statute of limitations begins to run in medical malpractice actions. *Teeters v. Currey*, 518 S.W.2d 512, 515 (Tenn.1974). The Tennessee General Assembly later codified the discovery rule in the Medical Malpractice Review Board and Claims Act in 1975, and the rule can now be found in Tenn.Code Ann. § 29-26-116(a)(2). The purpose of the rule is to "alleviate the intolerable result" of barring a patient's medical malpractice claim before the patient knows or should have known that the claim exists. *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn.1982).
>
> Under the discovery rule, the medical malpractice statute of limitations begins to run when the patient discovers, or reasonably should have discovered (1) the occasion, the manner, and the means by which a breach of duty that caused his or her injuries occurred and (2) the identity of the person who caused the injury. *Stanbury v. Bacardi*, 953 S.W.2d 671, 677 (Tenn.1997); *Roe v. Jefferson*, 875 S.W.2d 653, 656 (Tenn.1994); *Foster v. Harris*, 633 S.W.2d at 305. However, the discovery rule does not permit a patient to delay filing suit until he or she becomes aware of all the injurious consequences of the alleged negligence. *Shadrick v. Coker*, 963 S.W.2d at 733. Thus, the statute of limitations will begin running when the patient becomes aware of facts that would put a reasonable person on notice that he or she has sustained an injury as a result of a tortious act of a health care provider.

In considering the Medical Malpractice Claims Act of 1975 (codified at Tenn.Code Ann. § 29-26-116)

our Supreme Court said:

> "the legislature exercised its constitutional prerogative to balance competing public policy interests so as to constrain application of the discovery rule by adopting a three-year ceiling, but, at the same time, preserve the salutary aspects of *Teeters* which allowed an innocent plaintiff ample time to bring suit." *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341 (Tenn.1983).

***3** Thus, the discovery rule tolls the statute of limitations until the plaintiff knows, or reasonably should know, that he has been injured and by whom. Defendants counter that plaintiffs' suit was untimely because Matz testified he "knew all along" that the place on his head was cancer.

Matz' subjective belief or fear, however, had no factual basis, because the doctors' findings were that no cancer was present. Our discovery rule requires that the plaintiff be aware of "facts sufficient" to put a reasonable person on notice that he or she has suffered an injury as a result of the defendant's wrongful conduct." *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn.1998); *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). The discovery rule requires that a plaintiff know "the occasion, the manner, and the means by which a breach of duty that caused his or her injuries occurred." *Stanbury v. Bacardi*, 953 S.W.2d 671, 677 (Tenn.1997); *Roe.*

Here, the facts are that Matz "knew all along" that a lesion was removed and found to be non-cancerous. Matz later became aware that another lesion appeared that was found to be cancerous, but still at that point he had no factual basis for believing that the cancer was there "all along." Matz had no factual knowledge of the "occasion, manner, and means" by which defendants breached the duty that caused him harm. Moreover, Matz did not know and could not reasonably know that he had been harmed until April 26, 2000. It was not until he received the report from Dr. Googe on April 26, 2000, that he knew or had a factual basis for believing the cancer had been present in the first slides, and had been missed by Dr. May. His own doctor, Dr. Hughes, testified that he did not suspect that cancer had been present earlier and had been missed until after this report came out.

In "latent injury" malpractice cases, which require expert testimony to establish,[FN1] our Court has recognized that a plaintiff has actual knowledge of an injury where there has been expert opinion given of such injury, i.e. where the defendant admitted malpractice, or another expert opined that there was malpractice. *See Wilkins v. Dodson, Parker, et al.*, 995 S.W.2d 575 (Tenn.Ct.App.1998); *see also Roe.*

FN1. *See* Tenn.Code Ann. § 29-26-115.

In this case, Matz' injury is not the diagnosis of cancer, rather, it is the fact that it was missed by Dr. May in 1999 and allowed to progress until April 26, 2000. *See, e.g., Johnson v. Mullee*, 385 So.2d 1038 (Fla.Dist.Ct.App.1980)(breast cancer missed on first examination, but found after second exam and biopsy-evidence of metastasis found two years later. Court said no discovery of injury until evidence of metastasis was discovered. The spread of the cancer, not the cancer, was the injury.)

Other courts have rejected defendants' position. The Louisiana Supreme Court has recognized that "mere apprehension by plaintiff that something is wrong is not sufficient to start prescription unless plaintiff knew or reasonably should have known by exercising reasonable diligence that his problem condition may have been caused by acts of malpractice." *Gunter v. Plauche*, 439 So.2d 437 (La.1983). *Also see Duncan v. Spivak*, 114 Cal.Rptr.2d 166 (Cal.Ct.App.2001).

***4** We cannot say as a matter of law that plaintiff had actual knowledge of cancer when he had no factual basis for the same and was actually advised that

nothing was wrong. But, we also must examine whether plaintiff acted reasonably given the facts which he did possess, or whether these facts should have given him constructive knowledge that he had been injured. Generally, the question of whether a plaintiff should have discovered his injury earlier based on the facts known to him is a question of fact which must be determined by a jury. *McClellan v. Stanley*, 978 S.W.2d 943 (Tenn.Ct.App.1998). *Also see Chidester v. Elliston*, 1997 WL 71932 (Tenn.Ct.App. Feb. 20, 1997); *Green v. Sacks*, 56 S.W.3d 513 (Tenn.Ct.App.2001). This line of reasoning has been followed by other states, as well. *Duncan v. Spivak*, 114 Cal.Rptr.2d 166 (Cal.Ct.App.2001). In that case plaintiff had testified in his deposition that he had known for some time that something was wrong because he had such pain, but he did not know that the defendant had done anything wrong until the exploratory surgery revealed the source of his pain. In that case, plaintiff argued that there was an issue of fact regarding when he discovered his injury, and the California Court of Appeals agreed, and emphasized that plaintiff did not discover the facts essential to his claim until the later exploratory surgery, and that to hold otherwise would require a plaintiff to file suit with no objective proof of malpractice. That Court ruled it was a question of fact for the jury as to whether plaintiff's efforts to discover the facts were diligent. To the same effect, *see Lebrecht v. Tuli*, 473 N.E.2d 1322 (Ill.App.Ct.1985) and *Janetis v. Christensen*, 558 N.E.2d 304 (Ill.App.Ct.1990); and *Bradtke v. Reotutar*, 574 N.E.2d 110 (Ill.App.Ct.1991). (The *Bradtke* Court recognized that it had previously refused to hold as a matter of law that a subjective belief of misdiagnosis, combined with worsening symptoms, triggered the patient's duty to investigate and concluded that the issue of when discovery occurred was a question of fact.)

The question of when Matz' injury was reasonably discoverable given Mr. Matz' knowledge and circumstances is a question of fact inappropriate for determination by summary judgment. As our Supreme Court has recognized, summary judgment is not the appropriate vehicle for resolving conflicting inferences reasonably drawn from the facts-rather, its purpose is to resolve controlling issues of law. *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31 (Tenn.1988). Whether Matz knew or reasonably should have known of his injury and its cause is not an issue of law, but of fact. Since the facts and inferences in this case support more than one reasonable conclusion, summary judgment was improperly granted. *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn.1998).

Defendants rely on the case of *Crawford v. Beatty*, 2003 WL 113122 (Tenn.Ct.App. Jan. 14, 2003), wherein the defendant physicians were granted summary judgment based on the statute of limitations. *Crawford* is distinguishable from the case at bar because the plaintiff in *Crawford* had an objectively verifiable basis for her knowledge, which she then tried to conceal. *Id.* Plaintiff in this case was forthright about his belief that he had cancer even though he was told otherwise, but he had no objective basis for this belief. Plaintiff also suffered mental problems for which he was hospitalized at around the time of the biopsy of the second lesion, which further militates in favor of allowing his suit to go forward, because his subjective belief was obviously an irrational fear with no factual basis.

***5** We vacate the summary judgment and remand to the Trial Court for determination of the fact finder when plaintiff reasonably could and should have discovered his injury and its cause.[FN2]

> FN2. Defendants allege that the summary judgment was proper because plaintiff failed to properly respond to the statement of undisputed material facts pursuant to Tenn. R. Civ. P. 56. This issue was not raised at the Trial Court level and a review of the record demonstrates that plaintiff did, in fact, file a response to the statement, along with a brief and numerous exhibits which set forth plain-

tiff's position.

The cause is remanded, with the cost of the appeal assessed to defendants.

Tenn.Ct.App.,2003.
Matz v. Quest Diagnostics Clincal Laboratories, Inc.
Not Reported in S.W.3d, 2003 WL 22409452 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2006 WL 1044142 (Tenn.Ct.App.)
(Cite as: 2006 WL 1044142 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
William B. McCULLEY and Jean McCulley, n/o/k and Administrators of the Estate of Robin McCulley,
v.
Dr. Brian GARBER, M.D.

No. E2005-01606-COA-R3-CV.
Feb. 7, 2006 Session.
April 20, 2006.

Direct Appeal from the Circuit Court for Knox County, No. 1-279-03; Dale C. Workman, Circuit Judge.
Brandon K. Fisher, Clinton, Tennessee, for appellants.

Robert M. Stivers, Knoxville Tennessee, for appellee.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

OPINION

HERSCHEL PICKENS FRANKS, P.J.

***1** In this action based on defendant's alleged medical malpractice, the Trial Court granted defendant summary judgment on the grounds the statute of limitations had run on the claim. On appeal, we affirm.

Plaintiffs, as next of kin and administrators of the estate of Robin McCulley, brought this action against Dr. Brian Garber, alleging medical malpractice in defendant's treatment of Robin McCulley.

The Complaint states that McCulley died on January 13, 2002, after battling crohn's disease, that she had been treated by Dr. Wray for more than a year prior to her death, and that she went to the emergency room at St. Mary's LaFollette in December 2001 and was diagnosed with a visceral perforation. The Complaint further alleges that she was airlifted to St. Mary's in Knoxville, where defendant performed exploratory surgery on her on December 10 and took samples, but did not perform a diverting ileostomy. She eventually lapsed into a coma, and defendant performed a second surgery on December 19, 2001, where he found a perforation and performed a colon resection and colostomy. McCulley did not improve, and died on January 13, 2002.

The Complaint alleges that plaintiffs were never told of defendant's failure to find the perforation during the first surgery, and that defendant and his staff led plaintiffs to believe that McCulley's problems were the result of substandard care by Dr. Wray.

Plaintiffs allege that they initially filed suit against Dr. Wray, and then found out during discovery in that case that Dr. Garber was responsible. They allege that Dr. Garber was negligent in his treatment of their daughter, and that his negligence caused her death.

Defendant's Answer asserts that during the first surgery, both he and another surgeon inspected the decedent's abdomen and found no perforation. He further asserted that the perforation he found during the second surgery was not present during the first surgery, and thus, he was not negligent.

Defendant then filed a Motion for Summary Judgment, alleging that plaintiffs' Complaint was filed beyond the applicable statute of limitations. He filed a Statement of Undisputed Facts, stating that the Complaint filed on May 5, 2003, alleged malpractice in the surgery he performed on December 10, 2001, some 17

months before the Complaint was filed. Defendant stated that Mr. McCulley testified in his deposition that he believed from the date of that first surgery that Dr. Garber's carelessness caused his daughter's death, and that neither the defendant nor anyone on his staff did anything to make plaintiffs believe that Dr. Wray was negligent.

Defendant attached the deposition of Mr. McCulley, wherein he testified that his wife had passed away during the pendency of this action, and that a doctor at St. Mary's LaFollette showed him his daughter's x-ray before she was airlifted to Knoxville, and told him that it showed there was a perforation in her colon. Mr. McCulley testified that after being taken to Knoxville, his daughter underwent surgery by defendant, and that defendant told him that he could not find the tear, but he "cleaned her up real good" and that she would be all right. McCulley testified that his daughter initially improved, but then worsened again, and defendant advised them that she needed a second surgery or she would die. McCulley testified the second surgery was performed by Dr. Garber on December 19, 2001, and he then told them he found the tear and fixed it. McCulley thought it was the same tear they had found in LaFollette. He stated that he could not remember defendant ever telling him anything bad about Dr. Wray. McCulley testified that after his daughter died, he obtained copies of her hospital records (he could not remember exactly when) and he delivered the records to his attorney.

***2** McCulley testified that he always thought Dr. Garber was negligent and that his carelessness caused the daughter's death, from the time she died or even before. McCulley discussed the fact that Dr. Garber could not find the perforation that the doctor in LaFollette saw on the x-ray, and testified that a nurse at the hospital told his niece that Dr. Wray had not administered proper treatment to his daughter, but he had no information that the nurse worked for Dr. Garber.

Defendant also attached a copy of the Complaint plaintiffs filed against Dr. Wray, and the Order of Voluntary Dismissal in that case.

Plaintiffs' unsworn Response asserted that Dr. Garber's nurse told Mrs. McCulley and their niece that Dr. Wray was negligent, that Dr. Garber told plaintiffs that the tears occurred after the first surgery, and that during discovery in the Wray lawsuit, plaintiffs discovered that Dr. Garber was not truthful about the first surgery.

Dr. Garber filed an Affidavit, asserting that none of his employees cared for Ms. McCulley nor had any contact with her family while she was in the hospital, and that all nursing personnel at the hospital were employees of St. Mary's.

The Trial Court granted defendant Summary Judgment, because the suit was filed outside the applicable statute of limitations, Tenn.Code Ann. § 29-26-116, and stated in the hearing that the discovery rule would not apply because Mr. McCulley testified he thought Dr. Garber was negligent from the beginning.

Plaintiffs' issue on appeal is whether the Trial Court erred in holding that this action was barred by the statute of limitations?

The issue before this Court is reviewed *de novo* but accorded no deference to the conclusions of law made by the Trial Court. *Southern Constructors, Inc., v. Loudon County Board of Education*, 58 S.W.3d, 706, 710 (Tenn.2001).

Plaintiffs insist that the statute of limitations is not a bar to their cause of action by virtue of the tolling provisions of Tenn.Code Ann. § 29-26-116, which state:

(a)(1) The statute of limitations in malpractice ac-

tions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

McCulley testified that he did not discover the actual injury to his daughter and the alleged wrongful conduct by defendant that caused said injury until it was revealed in discovery in his lawsuit against Dr. Wray, which was within one year of the filing of this Complaint. However, the Trial Court ruled that the action was time-barred, because of McCulley's statement during his deposition that he believed from the time of his daughter's death that Dr. Garber's carelessness caused her death.

***3** Tenn. R. Civ. P. 56.03 provides that summary judgment is appropriate where (1) there is no genuine issue of material fact relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn.1993); *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn.1993). The moving party has the burden of proving that it has satisfied the requirements of Rule 56.03. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn.1991). Summary judgment should be granted only when the facts and conclusions drawn from the facts permit a reasonable person to reach only one conclusion, that the movant is entitled to judgment as a matter of law. *Staples v. CBL & Assoc.*, 15 S.W.3d 83 (Tenn.2000).

As our Supreme Court has explained:

The statutory period of limitations in medical malpractice cases is one year after the cause of action accrues. Tenn.Code Ann. § 29-26-116(a)(1). The point in time at which the cause of action accrues is governed by § 29-26-116(a)(2), which provides that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." This Court has interpreted § 29-26-116(a)(2) to mean that the statute of limitations in a medical malpractice case is tolled until the plaintiff "discovered, or reasonably should have discovered, (1) the occasion, the manner, and the means by which a breach of duty occurred that produced his injuries; and (2) the identity of the defendant who breached the duty." *Foster v. Harris*, 633 S.W.2d 304 (Tenn.1982). Moreover, we have held that the discovery rule applies only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he has a right of action .... the statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry.

Hoffman v. Hospital Affiliates, 652 S.W.2d 341, 344 (Tenn.1983). It is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a "right of action"; the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.

Roe v. Jefferson, 875 S.W.2d 653, 656-657 (Tenn.1994).

Generally, the question of when a plaintiff is

deemed to have constructive knowledge of the injury and its cause, and whether the plaintiff acted reasonably in trying to ascertain the cause based on the facts known to him, is a question of fact, *McIntosh v. Blanton*, 164 S.W.3d 584 (Tenn.Ct.App.2004); *Fluri v. Fort Sanders Regional Medical Center*, 2005 WL 3038627 (Tenn.Ct.App. Nov. 14, 2005); *Matz v. Quest Diagnostics Clinical Labs., Inc.*, 2003 WL 22409452 (Tenn.Ct.App. Oct. 22, 2003).

***4** McCulley testified that he had a subjective belief that the defendant was careless somehow and that his carelessness contributed to his daughter's death. He also testified that defendant told him that the perforations he repaired during the second surgery were not present during the first surgery. McCulley testified that Dr. Garber told him after the first surgery that he did not find a tear, and that his daughter would be fine. McCulley further stated that a nurse at the hospital told his wife and niece that it was Dr. Wray who was negligent in his treatment of the decedent. McCulley testified that he did not learn that defendant was negligent until such information came out during the discovery phase of his lawsuit against Dr. Wray.

We held in *McIntosh v. Blanton, et al.*, 164 S.W.3d 584, (Tenn . Ct.App.2004):

> Under the discovery rule, ... the determination of when the statute of limitations begins to run requires a determination of when the plaintiff had sufficient knowledge that she had sustained an injury.... The inquiry does not require that the plaintiff had knowledge that a "breach" of the appropriate legal standard" had occurred. *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). The statute of limitations begins to run when the plaintiff is "aware of the facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct," and the plaintiff knows the identity of the person who engaged in the conduct.

In this case, while the plaintiff did not know that a breach of the appropriate legal standard had occurred, the record reveals he had sufficient information to put him on notice that an injury had occurred and that the injury was caused by a wrongful act. *Id.* The information plaintiff had from the medical records at St. Mary's LaFollette and statements by third parties, established that he had sufficient knowledge that a wrong had occurred, and as a reasonable person, he would be put on inquiry.[FN1] *Roe.* Accordingly, we affirm the Trial Court's ruling that the statute of limitations bars plaintiffs' claim.

> FN1. In his deposition, plaintiff testified that the doctor at St. Mary's in LaFollette had pointed out to plaintiff "a break or a tear" on his daughter's colon, which constituted an emergency and required that she be airlifted to Knoxville as soon as possible, and that he didn't understand why defendant did not find the tear when he performed the initial surgery.

> Plaintiff testified in his deposition:
>
> Q. Now you did understand that your wife had been told by Dr. Wray's office that it was Dr. Garber's fault?
>
> A. Don't ask me where I got that, I heard that, yes....
>
> Q. Now is that based on the February 20, 03 letter from Salzburg, is that what you're talking about when you say you learned that?
>
> A. No.
>
> Q. What is it based on?
>
> A. I assumed that all the time.

> Q. I'm sorry?
>
> A. I did blame Dr. Gerber for carelessness or whatever it was that caused her her life [sic].
>
> Q. And you felt like that from when she died?
>
> A. Yes.

The Judgment of the Trial Court is affirmed, and the cause remanded, with the cost of the appeal assessed to William B. McCulley and Jean McCulley.

Tenn.Ct.App.,2006.
McCulley v. Garber
Not Reported in S.W.3d, 2006 WL 1044142 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2007 WL 906760 (Tenn.Ct.App.)
(Cite as: 2007 WL 906760 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Jimmy Alan MURPHY, et al.
v.
LAKESIDE MEDICAL CENTER, INC.

No. E2006-01721-COA-R3-CV.
Feb. 23, 2007 [FN1] Session.

FN1. Oral arguments in this matter were heard as part of the Court's CASE Project (Court of Appeals Affecting Student Education), on February 23, 2007, at Sequoyah High School in Monroe County, Tennessee.

March 26, 2007.

Appeal from the Circuit Court for Hamilton County, No. 05 C 253; W. Neil Thomas, III, Judge.
Mark E. Whittenburg, Chattanooga, Tennessee, for the Appellants, Jimmy Alan Murphy and wife, Glenda Murphy.

Arthur P. Brock and Timothy J. Millirons, Chattanooga, Tennessee, for the Appellee, Lakeside Medical Center, Inc.

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, JJ., joined.

OPINION

SHARON G. LEE, J.

***1** The issue presented in this medical negligence case is whether the Plaintiffs' lawsuit was timely filed. At the request of Mr. Murphy's employer, physicians at Lakeside Medical Center (the "Medical Center") performed an annual physical examination, including a hearing test, on Mr. Murphy for over 20 years. Mr. Murphy was diagnosed with noise-induced hearing loss by an independent physician on January 21, 2004, and reported this information to his employer the next day. On February 13, 2004, Mr. Murphy obtained copies of the Medical Center's records indicating that Mr. Murphy had been experiencing hearing loss at a medically unacceptable rate for the past eight years. The Plaintiffs, Mr. Murphy and his wife, Glenda Murphy, filed their lawsuit on February 2, 2005, alleging that the Medical Center negligently failed to diagnose and treat Mr. Murphy's hearing loss over a period of several years, and that the Medical Center fraudulently concealed Mr. Murphy's hearing loss. The trial court granted the Medical Center's motion for summary judgment, finding that the Plaintiffs filed their complaint after the one-year statute of limitations had expired. After careful review, we hold that the Plaintiffs had notice of their claim no later than January 21, 2004, and their lawsuit was not timely filed. We also hold that the Plaintiff's allegation of fraudulent concealment is without merit. The decision of the trial court is affirmed.

I. Background

In 1972, Mr. Murphy was hired by W.R. Grace & Co., a Chattanooga chemical manufacturer. The work environment is noisy, and in the mid-1970s or early 1980s, W.R. Grace contracted with Lakeside Medical Center to perform annual physical examinations, including hearing tests, for its employees. Mr. Murphy had his hearing checked at the Medical Center almost every year. In the mid-1990s, Mr. Murphy and his wife began noticing that Mr. Murphy was not hearing as well as he previously had. Although Mr. Murphy did not discuss this gradual hearing loss with his pri-

mary care physician, Dr. Glenn Beasley, he testified that he discussed it with the Medical Center doctors several times. None of the Medical Center's doctors ever told Mr. Murphy that he was experiencing work-related hearing loss. Dr. Jim Davis, a physician at the Medical Center who examined Mr. Murphy, told Mr. Murphy that his hearing was fine. Dr. Bruce Johnson, another physician at the Medical Center, told Mr. Murphy several times, "You're going to lose a little hearing with age. It looks normal to me," "I don't see anything to be worried about at all," and similar comments.

Mr. Murphy's hearing continued to deteriorate over the next decade. On January 13, 2004, Mr. Murphy complained to Dr. Beasley of decreased hearing in both ears that had grown worse over the past six months. Dr. Beasley referred Mr. Murphy to Dr. Christopher St. Charles, an otolaryngologist.[FN2] On January 21, 2004, Dr. St. Charles diagnosed Mr. Murphy with "significant likely noise induced sensorineural hearing loss." Dr. St. Charles also indicated that Mr. Murphy was a hearing aid candidate and advised him to take additional precautions around loud noises in the future. The following afternoon, Mr. Murphy reported his hearing loss to Dusty Rominger, the safety supervisor at W.R. Grace, and filled out an "Employee First Report of Accident" form. On the form, Mr. Murphy listed January 21 as the date of the accident. He described the accident as "Exposer [sic] to loud noises over 32 year career caused permanent damage to my hearing," and stated that the resulting injury was "severe hearing loss in both ears."

> FN2. An otolaryngologist is a physician who specializes in treatment of the ear, nose, and throat.

***2** On January 26, 2004, Mr. Rominger asked Mr. Murphy to return to the Medical Center to have his hearing evaluated by Dr. Johnson. Dr. Johnson disagreed with the diagnosis of Dr. St. Charles, so Mr. Rominger then asked Mr. Murphy to go to Dr. Jeffrey Adams for another hearing assessment. On February 9, 2004, Dr. Adams confirmed Dr. St. Charles' diagnosis. At that time, Mr. Murphy also received a copy of a graph that showed the results of Dr. Adams' testing and the extent of Mr. Murphy's hearing loss. After returning to work, Mr. Murphy submitted a written request to obtain copies of the Medical Center's graphs from his annual hearing tests. Those records were provided to him on February 13, 2004, by Mr. Rominger, who allegedly told Mr. Murphy that the Medical Center's records indicated that Mr. Murphy's hearing had been deteriorating at a medically unacceptable rate for the past eight years. Mr. Murphy stated that it was then that he realized that the Medical Center "had the numbers in front of them from year to year but that they fraudulently withheld, did not know how to interpret or negligently failed to interpret" the hearing exam results, resulting in further damage to Mr. Murphy's hearing.

On February 2, 2005, the Plaintiffs filed their lawsuit against the Medical Center, alleging negligence and fraudulent concealment. Upon motion of the Medical Center, the trial court entered summary judgment in favor of the Medical Center, finding that the Plaintiffs' complaint was not timely filed, based on expiration of the statute of limitations found in Tenn.Code Ann. § 29-26-116. The Plaintiffs appeal.

II. Issues

The issues we address in this appeal are restated as follows:

1. Whether the trial court erred in granting summary judgment to the Medical Center based upon the expiration of the statute of limitations.

2. Whether the trial court erred in finding that the Medical Center did not fraudulently conceal knowledge of Mr. Murphy's hearing loss, thus tolling the statute of limitations.

III. Analysis

A. Standard of Review

Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn.2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993)). The nonmoving party may not simply rely upon the pleadings, but must instead set forth specific facts, by affidavits or other discovery materials, demonstrating the existence of a genuine issue of material fact for trial. *Byrd*, 847 S.W.2d at 211. The Supreme Court has emphasized that "genuine issue" in this context "refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts." *Id.* (citing *Price v.. Mercury Supply Co.*, 682 S.W.2d 924, 929 (Tenn.Ct.App.1984)).

***3** The standards governing the assessment of evidence in the summary judgment context are well established. Courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. See *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997); *Byrd*, 847 S.W.2d at 210-211. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn.1995).

Because a trial court's decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. See *Staples*, 15 S.W.3d at 88; *Carvell*, 900 S.W.2d at 26. Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. *Staples*, 15 S .W.3d at 88.

B. Discovery of the Cause of Action

The Plaintiffs assert that the trial court erred in finding their claim barred by the statute of limitations. The statute of limitations for medical malpractice cases is one year, but "[i]n the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be (1) year from the date of discovery." Tenn.Code Ann § 29-26-116(a).

The Plaintiffs invoke the "discovery rule" set forth above as a means of saving their claim from summary judgment. Plaintiffs state that they did not learn of a potential cause of action against the Medical Center until February 13, 2004, when Mr. Murphy received copies of his records from the Medical Center. Therefore, the Plaintiffs assert that their lawsuit was not barred by the statute of limitations, because they filed the claim within a year of discovering their cause of action against the Medical Center.

The Tennessee Supreme Court adopted the discovery rule more than 30 years ago in *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn.1974). In *Teeters*, the plaintiff discovered that she was pregnant two and a half years after undergoing a tubal ligation for the purpose of sterilization. *Id.* at 512. Eleven months after learning of her pregnancy, she sued the doctor who had performed the surgery. *Id.* at 513. The trial court granted the defendant's motion for summary judgment based on the statute of limitations. *Id.* at 514. The Supreme Court reversed, stating, "We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown or unknowable." *Id.* at 515. The following year, the General Assembly codified the discovery rule in the Medical Malpractice Review Board and Claims Act. *Puckett v. Life Care of America*, No.

E2004-00803-COA-R3-CV, 2004 WL 2138337, at *4 (Tenn. Ct.App. E.S., filed Sept. 24, 2004); see Tenn.Code Ann. § 29-26-116(a)(2).

***4** Under the discovery rule, the statute of limitations in a medical malpractice case begins to run "when the patient discovers, or reasonably should have discovered (1) the occasion, the manner, and the means by which the breach of duty that caused his or her injuries occurred, and (2) the identity of the person who caused the injury." *Id.* However, the plaintiff is not entitled to wait until he or she knows all of the injurious consequences caused by the alleged negligence before filing suit. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn.1998).

According to Mr. Murphy, every doctor who has diagnosed him with severe hearing loss has said that the damage is irreparable. Dr. St. Charles also told Mr. Murphy that further damage could have been prevented if Mr. Murphy's hearing loss had been diagnosed sooner. Mr. Murphy recounted part of his conversation with Dr. St. Charles as follows:

> Dr. St. Charles, the day he diagnosed my severe hearing loss, ... he showed me the chart and where I fit in at the time. He said: "I wish we could have stopped it in this area [FN3] and put your hearing aids in, Jimmy, because every study indicates, if we get your hearing aids in, we can stop the progression of the loss."
>
> > FN3. Mr. Murphy explained that Dr. St. Charles was pointing at the shaded area of the chart which indicated the normal hearing range for adults.

Although Dr. St. Charles did not explicitly state that the Medical Center had failed to diagnose Mr. Murphy's hearing loss, Dr. St. Charles did tell Mr. Murphy that his hearing loss had developed over a number of years and that further damage to his hearing could have been avoided if the problem had been diagnosed earlier. Mr. Murphy stated that when Dr. Johnson disagreed with Dr. St. Charles' diagnosis, he was confused and did not know who to believe. Even after Dr. Adams confirmed Dr. St. Charles' findings regarding Mr. Murphy's severe hearing loss, Mr. Murphy said he still was unaware of potential negligence on the part of the Medical Center until February 13, 2004, when he received the Medical Center's records from his annual hearing tests. Mr. Murphy therefore asserts that the statute of limitations did not begin to run until that date. However, the Plaintiffs' subjective reactions are not controlling of whether the statute of limitations should be tolled under the discovery rule. *Draper*, 1991 WL 7809, at *3. Rather, "the issue is not when the plaintiff realized he had a cause of action but when, in the exercise of reasonable care and prudence, an ordinary person could and should have realized that a cause of action existed." *Draper*, 1991 WL 7809, at *3. Considering the fact that the Medical Center was responsible for conducting Mr. Murphy's annual hearing tests, we believe that Dr. St. Charles' diagnosis and statements to Mr. Murphy would have placed an ordinary person in Mr. Murphy's position on notice of possible negligence.

The Plaintiffs argue that the conflicting diagnoses provided by Dr. St. Charles, Dr. Johnson, and Dr. Adams confused them to such a degree that they could not have reasonably been expected to know that Mr. Murphy's hearing loss was potentially the result of a wrongful act by the Medical Center. We disagree. It has been well established that the statute of limitations is tolled "only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person, is not put on inquiry." *Pugh v. State*, No. W2004-01609-COA-R3-CV, 2005 WL 280348, at *3 (Tenn. Ct.App. W.S., filed Feb. 3, 2005). On January 21, 2004, the date that Dr. St. Charles diagnosed Mr. Murphy with "significant likely noise induced sensorineural hearing loss," Mr. Murphy was put on notice that doctors at the Medical Center might have failed to diagnose his hearing loss

during his previous hearing tests. The fact that Dr. Johnson once again denied that Mr. Murphy had severe hearing loss following Dr. St. Charles' diagnosis is irrelevant for the purpose of determining when the statute of limitations began running. By the time of Dr. Johnson's assessment, Mr. Murphy had already been placed on notice of possible negligence by the Medical Center. Likewise, Mr. Murphy's acquisition of several years' worth of his hearing test records from the Medical Center, which confirmed that he had been experiencing significant hearing loss for at least the past eight years, does not change the fact that Mr. Murphy had already been placed on notice of possible negligence by the Medical Center. The focus of our inquiry is when a reasonable person should have been placed on notice of potential wrongful conduct which resulted in an injury, not when a plaintiff knows beyond doubt that his or her injury has been caused by wrongful conduct or when a plaintiff finds additional evidence of malpractice:

> ***5** [A] plaintiff is deemed to have discovered the right of action if he or she is aware or should be aware of facts sufficient to put a reasonable person on notice that an injury has been suffered as a result of wrongful conduct. The later discovery of additional acts of negligence would not toll the statute of limitations once the discovery rule has initially been satisfied.

Sommer v. Womick, No. M2004-01236-COA-R3-CV, 2005 WL 1669843, at *4 (Tenn. Ct.App. M.S., filed July 18, 2005) (internal citation omitted).

We have noted that "the statute of limitations is tolled only during that period of time when the plaintiff has neither actual nor constructive knowledge of (1) the injury, (2) the wrongful conduct causing that injury, and (3) the identity of the party or parties who engaged in that wrongful conduct." *Fluri v. Fort Sanders Regional Medical Center*, No. E2005-00431-COA-R3-CV, 2005 WL 3038627, at *4 (Tenn. Ct.App. E.S., filed Nov. 14, 2005). We find that Mr. Murphy had knowledge of all three of these facts on January 21, 2004, the date of Mr. Murphy's appointment with Dr. St. Charles. At that time, Mr. Murphy was aware that he had sustained an injury-partial loss of his hearing. Because of Dr. St. Charles' statements, Mr. Murphy should also have been aware that his injury was due, at least in part, to wrongful conduct, because an earlier diagnosis would have avoided much of the hearing loss that he has suffered. Finally, Mr. Murphy was aware of the identify of the alleged tortfeasor, as the Medical Center conducted Mr. Murphy's annual physicals and hearing tests.

Furthermore, statements by Mr. Murphy indicate he recognized that the Medical Center may have been negligent before he received the records from that facility. During his deposition, the following exchange took place between counsel for the Medical Center and Mr. Murphy:

> **Counsel:** At what point did you place blame or find fault or become angry or disgusted, discouraged, whatever, with Lakeside and Dr. Johnson?
>
> **Mr. Murphy:** I can't place a time. It's when I come to the realization that he had this information and that he had misdiagnosed me for as long as he had been there, and this was his fault.
>
> **Counsel:** And what-what brought that about? Did you go talk to a physician? Has a physician told you that Dr. Johnson misdiagnosed you?
>
> **Mr. Murphy:** No. From what the specialist told me, I realized him saying, "You lose some with age," was a lie. That's-
>
> **Counsel:** Okay.
>
> **Mr. Murphy:** At what day I come to that realiza-

tion, I can't tell you.

Counsel: And, by specialist, you mean by what Dr. St. Charles told you, you put together that, in your words, that Dr. Johnson had lied to you?

Mr. Murphy: Dr. St. Charles, and then the company ... sent me to their specialist....

Counsel: Okay.

Mr. Murphy: He give me the same diagnosis as Chris St. Charles.

Counsel: Okay.

***6** The Plaintiffs assert they were unaware of a potential claim against the Medical Center until they received the facility's records from Mr. Murphy's previous hearing tests. However, we find that the Plaintiffs already had knowledge of possible negligence by the Medical Center before Mr. Murphy received the records on February 13, 2004. As we have stated before, "[t]he discovery rule was not meant to allow a party to delay filing his claim until after he has completed the process of discovering all the factors that affect its merits." *Steele*, 1995 WL 623067, at *5.

After careful review, we find from the undisputed facts that the Plaintiffs had notice of their claim no later than January 21, 2004. Thus, the trial court did not err in finding that the Plaintiffs' suit was not timely filed within the one-year statute of limitations set forth in Tenn.Code Ann. § 29-26-116.

C. Fraudulent Concealment

The Plaintiffs also assert that the statute of limitations was tolled because the Medical Center fraudulently concealed knowledge of Mr. Murphy's hearing loss. The elements of a fraudulent concealment claim have been set forth by the Tennessee Supreme Court as follows:

> [A] plaintiff ... attempting to toll the statute of repose contained in T.C.A. 29-26-116(a)(3) by relying upon the fraudulent concealment exception to the statute must establish that (1) the health care provider took affirmative action to conceal the wrongdoing or remained silent and failed to disclose material facts despite a duty to do so, (2) the plaintiff could not have discovered the wrong despite exercising reasonable care and diligence, (3) the health care provider knew of the facts giving rise to the cause of action and (4) a concealment, which may consist of the defendant withholding material information, making use of some device to mislead the plaintiff, or simply remaining silent and failing to disclose material facts when there was a duty to speak.

Shadrick, 963 S.W.2d at 736. In the case at bar, the Plaintiffs allege that doctors at the Medical Center repeatedly misdiagnosed Mr. Murphy's hearing loss as a normal consequence of aging, rather than a work-related injury. However, the failure to correctly diagnose an ailment cannot be the basis for a fraudulent concealment claim unless the defendant had knowledge of the correct diagnosis. We have stated previously that "if the defendants failed to diagnose the condition of the plaintiff and such failure to diagnose the true condition fell below the applicable standard of care, it could not also consitute fraudulent concealment.... [H]ow can one fraudulently conceal that which one does not know?" *Mayers v. Miller Medical Group*, No. 01-A-01-9802-CV00101, 1998 WL 848095 (Tenn. Ct.App. M.S., filed Dec. 8, 1998). Furthermore, we find that the plaintiff could have discovered the Medical Center's alleged misdiagnosis by exercising reasonable care and diligence; the Medical Center promptly complied with Mr. Murphy's request to receive a copy of his medical records after he submitted the request to his safety supervisor at W.R. Grace. Thus, we hold that the Plaintiffs' allegations of fraudulent concealment by the Medical Center are without merit, and the statute of limitations was

not tolled for that purpose.

IV. Conclusion

*7 After careful review, we hold that the trial court was correct in granting summary judgment to the defendant Medical Center based on the expiration of the statute of limitations. We affirm and remand this case to the trial court for further proceedings consistent with this opinion. Costs of appeal are taxed against the Appellants, Jimmy Murphy and Glenda Murphy.

Tenn.Ct.App.,2007.
Murphy v. Lakeside Medical Center, Inc.
Not Reported in S.W.3d, 2007 WL 906760 (Tenn.Ct.App.)

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Not Reported in S.W.2d, 1996 WL 455864 (Tenn.Ct.App.)
(Cite as: 1996 WL 455864 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Deborah PARRIS, Plaintiff/Appellant.
v.
Dr. Phillip LAND, Defendant/Appellee.

No. 53505-6 T.D.
Aug. 14, 1996.

From the Circuit Court of Shelby County at Memphis.
Honorable George H. Brown, Jr., Judge
Alan Bryant Chambers, Timothy R. Holton, CHAMBERS, CROW, DURHAM & HOLTON, Memphis, Tennessee Attorneys for Plaintiff/Appellant.

J. Cecil McWhirter, Sally F. Barron, McWHIRTER & WYATT, Memphis, Tennessee Attorneys for Defendant/Appellee.

FARMER, Judge.

*1 This is a dental malpractice case wherein Appellant, Deborah Parris, appeals from the summary judgment entered by the trial court in favor of the appellee, Dr. Phillip Land. For reasons hereinafter expressed, we agree that Appellant's action is time barred under T.C.A. § 29-26-116 and, therefore, affirm.

On April 30, 1993, Ms. Parris filed a complaint alleging that in November 1991, she underwent surgery by Dr. Land for the extraction of four wisdom teeth. She alleged that Dr. Land was negligent in performing the procedure which proximately caused the severing of the right lingual nerve in her mouth. It was alleged that Dr. Land also "split or otherwise injured [her] jaw bone" during the procedure. Parris alleged that following the procedure, the entire right side of her mouth and jaw "remained numb and without any feeling or sensation" and that "since the date of the surgery ... up to the present day, [she] continues to have no feeling or sensation on the right side of her mouth and jaw." Parris alleged that during the time period between the surgical procedure and January 1993, Dr. Land told her the numbness "would eventually wear off, and that she need not be concerned with it." It was alleged that in January 1993, Dr. Land suggested that Parris see an oral surgeon for treatment of the numbness. Parris alleged that Dr. Land fraudulently concealed her true condition and injuries from the time of the surgery until January 1993.

Dr. Land answered the complaint, denying all material allegations therein and affirmatively asserting that the action was barred by the applicable statute of limitations. Dr. Land moved for summary judgment relying upon the depositions of the parties and his own affidavit. In response, Ms. Parris submitted the affidavit of Dr. Richard Dixon and also relied upon the parties' depositions.

Appellant frames the issues on appeal as follows:

1. Whether material disputed facts prevented the grant of a summary judgment.

2. Whether the discovery rule tolled the one-year statute of limitations in a dental malpractice action.

Summary judgment is to be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *E.g.* Gray v. Amos, 869

S.W.2d 925, 926 (Tenn.App.1993); Rule 56.03 T.R.C.P. It is incumbent upon the party seeking summary judgment to persuade the court that no genuine and material factual issues exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn.1993). Once the moving party does so, the nonmoving party must then demonstrate, by affidavits or other discovery materials, that a genuine material factual dispute exists warranting a trial. *Byrd*, 847 S.W.2d at 211. The nonmoving party cannot rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. *Id.*

The affidavit of Dr. Land states, in pertinent part, as follows:

> ***2** I first saw [Parris] as a patient on September 23, 1991 during which time I, ... evaluated her third molars (also known as wisdom teeth). I again saw Ms. Parris on October 1, 1991 during which time we, ... discussed the subject of her wisdom teeth. On November 13, 1991 I extracted Ms. Parris' wisdom teeth.... In my opinion the technique I used in the removal of the teeth was proper....
>
> Shortly after the extractions Ms. Parris complained of paresthesia (numbness) within her mouth, particularly part of the right side of her tongue and gums. I felt that her paresthesia would improve with time, and so advised her. On January 8, 1992, March 22, 1992 and April 9, 1992, we had conversations about the numbness, and on each occasion I told her that I believed her numbness was transient and sooner or later the paresthesia would heal spontaneously. In making those remarks to her, I did so in a good faith belief that her feeling would return and that her numbness was not permanent. Never, at anytime, did I fraudulently conceal any information from her, and, in particular, I did not make any fraudulent remarks to her about her numbness. I felt that her lingual nerve might have been insulted during the removal of tooth number 32 causing the numbness but, as said, I did not feel the numbness was permanent, and so advised her.
>
> On the occasions when I saw plaintiff after the extractions and we discussed her numbness, I told her that I felt the numbness would be temporary and that I believed that sooner or later the numbness would heal spontaneously. In making those comments, I did so in good faith using my best judgment. I actually felt that the numbness was transient and was not permanent.

Ms. Parris states the following in her deposition, as here pertinent: She experienced numbness in the bottom right side of her jaw and tongue by the second or third day after Dr. Land performed the surgery. She informed Dr. Land of the numbness within days of the surgery and "[h]e kept saying don't worry about it. It will come back. Sometimes it takes a little longer for the feeling to come back in different areas." Dr. Land also told her that the healing process could take "up to a year to come back. If after a year nothing has happened then we will worry about it." Parris saw Dr. Land approximately every two to three days for the first two weeks following the surgery. She was last seen by Dr. Land in April 1992.[FN1] Parris first became concerned that her condition might be permanent three to four months following the procedure. Since first experiencing it, the numbness has never changed locations or spread to more or less parts of her mouth.

> FN1. It is undisputed that in January 1993, Dr. Land suggested that Parris consult an oral surgeon for her complaints.

Parris was further questioned as follows:

> Q. When Dr. Land would tell you that he felt the feeling would come back, did you gain the impression from listening to him that he was telling you a lie, or did you gain the impression that he in good faith believed it would come back whether it did or not?

Not Reported in S.W.2d, 1996 WL 455864 (Tenn.Ct.App.)
(Cite as: 1996 WL 455864 (Tenn.Ct.App.))

*3 A. I believed he thought that it would.

Q. Come back?

A. Come back.

....

Q. .... Do you think he was being honest with you?

A. I don't know.

....

A. I now know that it hasn't come back that his statement was incorrect, but I don't know if he thought he was being honest.

....

Q .... did Dr. Land ever tell you anything that would make you think he would tell you a falsehood?

A. No.

Q. So insofar as you know, and you don't know for certain, but insofar as you know he may have been telling you with a good faith belief that the numbness would eventually wear off?

A. He may have been. I would have no way of knowing.

Q. If I understand what you're telling me, you knew that the numbness resulted from the extraction of the teeth and you knew you had the numbness within two or three days after the extraction of the teeth, but you thought it would be temporary based on what Dr. Land told you?

A. Yes, sir.

Parris consulted a Dr. Bernstein in November 1992 regarding her condition. After an examination, Bernstein informed her that he did not believe any sensation would return considering the amount of time that had passed since the surgery and that she should not have waited a year to correct the problem. She was referred to various other oral surgeons who basically relayed the same information. She was ultimately referred to a Dr. Meyer in Atlanta who agreed to attempt corrective surgery. Dr. Meyer informed her that something should have been done within the first three to six months and that her chances of the surgery being a success were 50/50. Parris underwent corrective surgery for her condition in June 1993 which was unsuccessful.[FN2]

FN2. Dr. Land's deposition corroborates his affidavit. Dr. Dixon's affidavit addresses the issue of Dr. Land's alleged deviation from the standard of care only; it does not concern the statute of limitations argument.

In ruling on motions for summary judgment, the trial court and this Court must consider the matter in the same manner as a motion for a directed verdict made at the close of the plaintiff's proof, i.e., all evidence must be viewed in a light most favorable to the motion's opponent and all legitimate conclusions of fact must be drawn in that party's favor. *Gray*, 869 S.W.2d at 926. It is Appellee's position that the present claim is time barred under the provisions of T.C.A. § 29-26-116, which provide as follows:

(a) (1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within the said one (1) year period, the period

of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

Appellant counters that the discovery rule applies in this case to toll the running of the statute. She argues that Dr. Land "persistently" informed her that her numbness was temporary and that she should wait a year before being concerned. Thus, she did not know her condition was permanent until after the year had passed and she sought a second opinion, whereupon she discovered the permanency of her condition and filed suit "approximately four months" later on April 30, 1993.

*4 Appellee relies primarily upon *Bennett v. Hardison*, 746 S.W.2d 713 (Tenn.App.1987). In almost identical facts to our own, the plaintiff in *Bennett* underwent surgery for the removal of a wisdom tooth by the defendant dentist on February 24, 1984. After the extraction, the defendant informed the plaintiff's companion that plaintiff would experience a "temporary" numbness. The numbness, however, was permanent. The plaintiff filed suit on October 3, 1985 alleging that the defendant failed to inform plaintiff of the risks of dental surgery. In response to the defendant's argument that the action was time barred, the plaintiff relied upon the discovery rule to argue that he did not learn his condition was permanent until October 1984 when another doctor told him the numbness was permanent. *Bennett*, 746 S.W.2d at 713. The trial court held the action time barred and entered summary judgment for the defendant. *Id.*

In affirming the trial court, the court of appeals, middle section, held:

It is uncontroverted that plaintiff experienced the numbness immediately after the surgery and that the extent or effect of the numbness did not change from the date of inception until the date of suit.... Plaintiff did not see defendant after the surgery, but Dr. Draper removed the stitches a week later and told plaintiff that nerve numbness was not an unusual result of the extraction performed by defendant....

Plaintiff's reliance upon the discovery rule is based upon the assumption that temporary numbness and permanent numbness are two entirely separate injuries or results, and that knowledge of temporary numbness is not knowledge of permanent numbness.

In *Security Bank & Trust Co. v. Fabricating, Inc.*, Tenn.1983, 673 S.W.2d 860, in discussing the one year statute of limitations on legal malpractice suits, the Supreme Court said:

.... A plaintiff cannot be permitted to wait until he knows all of the injurious effects as consequences of an actionable wrong. *Taylor v. Clayton Mobile Homes, Inc.*, Tenn.1974, 516 S.W.2d 72. (673 S.W.2d at 864, 865).

In *Hoffman v. Hospital Affiliates, Inc.*, Tenn.1983, 652 S.W.2d 341, the Supreme Court reversed a dismissal of a medical malpractice case based upon the statute of limitations and said:

The "discovery rule" would apply only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he had a right of action. Furthermore, the statute is tolled only during the period when the plaintiff had no knowledge at all that a wrong had occurred, and, as a reasonable person is not put on

> inquiry. (652 S.W.2d 341 at 344.)
>
> ....
>
> Even though plaintiff may have been justified in accepting a brief period of numbness as a necessary incident of the surgery, absent evidence of some unusual cause for the delay, the defendant was not justified in delaying the "discovery" of the permanence of his injury from February 24, 1984, until "around October, 1984", a period of some 8 months. At some time during that 8 months, any reasonable person would have concluded that the brief, temporary numbness normally incident to oral surgery had outlasted its welcome and had become an unacceptable incident to the surgery. This is especially true because there is no evidence of any improvement in the numbness during the period. An improvement might have justified a wait for further improvement,....
>
> ***5** *Id.* at 714.

The similarities between *Bennett* and our own case are quite apparent. As in *Bennett,* Parris experienced numbness in a relatively short time following the surgery (two to three days) and at no time since the surgery has she experienced any signs of improvement. Even accepting as true Dr. Land's statement to her that she should not be concerned for one year, she concedes that she began worrying that her condition was permanent well before that year's end (three to four months following the surgery), in February or March of 1992. Yet suit was not filed until over a year later on April 30, 1993. In light of *Bennett,* we conclude that Parris, in the exercise of reasonable care and diligence, should have discovered her cause of action prior to April 30, 1992, (more than five months after the surgery) and that the statute of limitations began running prior to this time.

We further do not find the record to support Appellant's claim that Appellee fraudulently concealed her cause of action. Fraudulent concealment is shown when the physician has knowledge of the wrong done and conceals such information from the patient. *Housh v. Morris,* 818 S.W.2d 39, 43 (Tenn.App.1991). Honest mistakes on the part of the physician, standing alone, are not sufficient evidence to establish fraudulent concealment. *Housh,* 818 S.W.2d at 43. The record before us does not suggest that Dr. Land was dishonest in his statements to Ms. Parris that her condition was temporary and that she should not be concerned until one year had passed. However mistaken Dr. Land may have been, the record does not suggest that he actually knew otherwise. Ms. Parris testified that she thought Dr. Land believed her condition was transient and she had no way of knowing whether or not he was conveying a falsehood. Moreover, we liken the present action to the situation in *Housh* wherein this court held that the physician's statements to his patient, who was rendered permanently disabled after undergoing surgery at his hands, that she would walk again merely concealed the "extent" of her injuries. *Housh* held that "[t]his simply will not operate to toll the statute of limitations." *Housh,* 818 S.W.2d at 43.

Viewing the evidence in a light most favorable to Ms. Parris, we are compelled to conclude that the one year statute of limitations applies to bar her suit. The judgment of the trial court entering summary judgment in favor of Appellee is, accordingly, affirmed. Costs are assessed against Deborah Parris, for which execution may issue if necessary.

HIGHERS and LILLARD, JJ., concur.

Tenn.App.,1996.
Deborah Parris v. Dr. Phillip Land
Not Reported in S.W.2d, 1996 WL 455864 (Tenn.Ct.App.)

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Not Reported in S.W.2d, 1996 WL 200338 (Tenn.Ct.App.)
(Cite as: 1996 WL 200338 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Theresa STANBURY and spouse, John H. Stanbury, Plaintiffs/Appellees,
v.
Brian E. BACARDI and Hospital Corporation of America, d/b/a Centennial Medical Center, Defendants/Appellants.

No. 01-A-01-9509-CV00420.
April 26, 1996.
Permission to Appeal Granted Sept. 9, 1996.

APPEAL FROM THE FIRST CIRCUIT COURT OF DAVIDSON COUNTY AT NASHVILLE, TENNESSEE HONORABLE HAMILTON V. GAYDEN, JR., JUDGE

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OPINION

TODD, J.

***1** The defendant, Brian E. Bacardi, has appealed from a jury verdict and judgment awarding plaintiff, Theresa Stanbury, $211,000 and her husband, John H. Stanbury, $10,000, as damages for alleged malpractice in surgery and treatment of Mrs. Stanbury. The other captioned defendant, Hospital Corporation of America, was dismissed by nonsuit and is not involved in this appeal.

The sole issue on appeal is whether plaintiffs' suit is barred by the one year medical malpractice statute of limitations, T.C.A. § 29-26-116.

The patient first saw defendant on November 22, 1991. On December 11, 1991, defendant performed the following surgical procedures on both feet of the patient:

(a) transpositional osteotomy fifth metatarsal with internal fixation bilateral;

(b) arthroplasty proximal interphalangeal joint third, fourth and fifth bilateral;

© exostectomy remodeling distal medial fifth bilateral;

(d) middle phalangectomy fourth bilateral;

(e) flex ortenotomy third, fourth and fifth bilateral; and

(f) tenoplasty extensor digitorus longus bilateral.

On December 20, 1991, the surgical dressings were removed from the patient's feet and she was able to observe the outward evidence of the procedures performed on December 11, 1991. The patient was seen by defendant on January 10, 1992, January 17, 1992, February 14, 1992, and March 17, 1992. On April 3, 1992, defendant performed a further surgical procedure to correct a misalignment of the fifth toe on the right foot. On May 5, 1992, defendant removed the sutures from the site of the surgery and informed the

patient that there was nothing further he could do to relieve her problems.

This suit was filed on April 30, 1993. The complaint alleged deviation from the recognized standard of acceptable medical practice in the following particulars:

A. Negligently recommending surgery to the plaintiff which was not indicated, given her signs, symptoms and physical condition;

B. Failing to obtain the plaintiff's informed consent to the surgery performed on December 11, 1991;

C. Negligently performing the surgical procedures on December 11, 1991 and April 3, 1992;

D. Performing unnecessary surgery on December 11, 1991 and April 3, 1992;

E. Negligently providing post-surgical care including the failure to maintain antiseptic techniques;

F. Negligently causing an infection to Theresa Stanbury's feet by ignoring basic principles of antiseptic;

G. Ignoring the patient's complaints of pain and infection;

H. Intentionally and falsely preparing his office notes with the intent to conceal from the plaintiff and anyone else her true condition and result.

Defendants' answer included the affirmative defense of statute of limitations.

The Trial Court submitted to the jury several issues of fact, including the following:

3(a) Did the defendant, Brian Bacardi, deviate from the recognized standard of care for podiatrists in this community by negligently performing the surgical procedures on December 11, 1991, and/or April 3, 1992, on the plaintiff, Theresa Stanbury?

***2** As to this question the foreman of the jury asked the following question and the Trial Judge responded as follows:

MR. ROBINSON: I think the misunderstanding is are we to decide on that question, whether or not during the actual surgery itself, was a mistake made?

THE COURT: Okay. That's what I thought you meant. No, that's not part of the lawsuit. Okay. The lawsuit, "negligent" refers to other acts of alleged malpractice. But as far as the operation itself, that's not part of the lawsuit.

On February 14, 1995, the Trial Court entered a "Final Decree" reciting:

... After deliberating on February 1 and 2, 1995, the jury returned a verdict in favor of the plaintiff, Theresa Stanbury, on the issues of recommending and performing unnecessary surgery, lack of informed consent and negligently performing surgery, and awarded Theresa Stanbury compensatory damages of Two Hundred Eleven Thousand ($211,000.00) Dollars. The jury also returned a verdict for the plaintiff, John Stanbury, for his claim for loss of consortium in the amount of Ten Thousand ($10,000.00) Dollars....

Judgment was entered accordingly.

On February 24, 1995, the Trial Court entered an order containing the following:

... At the close of the plaintiff's case in chief, the

defendant moved for a directed verdict on the entire cause on the grounds that the plaintiff's cause of action was barred by the one year statute of limitations of the Tennessee Medical Malpractice Act.

Defendant's Motion for Directed Verdict was denied and the Court held that as a matter of law, plaintiff's claim was not barred by the Statute of Limitations of the Medical Malpractice Act.

Further, defendant moved for a directed verdict on the following issues:

1. Negligently providing post-surgical care, including the failure to maintain antiseptic techniques;

2. Negligently causing an infection to Theresa Stanbury's feet by ignoring basic principles of antiseptic;

3. Ignoring the patient's complaints of pain and infection;

4. Intentionally and falsely preparing his office notes with the intent to conceal from the plaintiff and anyone else her true condition and result. The Court was of the opinion that defendant's Motion for Directed Verdict on these issues was well taken.

Defendant also moved for a directed verdict on the issue of negligently performing the surgical procedures on December 11, 1991 and April 3, 1992. The Court was of the opinion that defendant's motion on this issue was not well taken and was overruled.

At the close of all of the proof, the defendant moved for directed verdict on the grounds that plaintiff failed to present competent expert testimony concerning the standard of care for podiatrists practicing in the Nashville, Davidson County community during the years 1991 and 1992.

The Court was of the opinion that this motion was not well taken and it was denied.

On appeal to this Court, defendant states the issue as follows:

***3** Whether the Trial Court erred in denying defendant's motion for directed verdict on the statute of limitations and holding as a matter of law that plaintiffs' cause of action was not time barred.

It is undisputed that this suit was filed more than a year after all services rendered by defendant except the final office visit on May 5, 1992. Nevertheless, plaintiffs insist that the statute of limitations had not expired on April 30, 1993, when this suit was filed, upon theories of continuing treatment and fraudulent concealment. In support of these theories, plaintiffs cite the following:

1. Defendant continued to treat Mrs. Stanbury to and including May 5, 1992, when he removed the sutures from her last surgery.

2. On May 5, 1992, defendant told the patient that healing would take about a year. In this respect, Mrs. Stanbury testified:

Q. Did Dr. Bacardi talk to you about how long it was going to take you to recover after he did surgery on your right toe?

A. Only at the last visit where he decided that I wasn't pleased with it so he didn't like my response and he just said, "You've got to give it at least a year and then worry about it."

....

Q. Now, at this last office visit, did you complain

to Dr. Bacardi about what was going on?

A. Oh, yes. Of course.

Q. And what did he tell you about what to expect from your feet?

A. He said that I was trying to resolve something that needed more time. Needed time. To give yourself a year and see what you feel after that.

....

Q. Well, was there any length of time mentioned or any indication given by him of how long you were going to be off work?

A. Not until after everything was done. When he said he couldn't do nothing for me he said, "Give it a year and see if you're happy then."

Defendant testified as follows:

Q. Dr. Bacardi, you're telling the jury from here to here is straight?

A. I also said that the digit is bandaged purposely in some over-correction at the time of surgery, and that's routine with the little toe, because they do tend to pull back in towards the fourth.

Sometimes we get that pulling in of the fifth toe towards the fourth toe down the road, a half year or a year later. That's not unusual. And what we do during the surgery is to bandage that toe in a little over-correction purposely. And as time goes on, you will see the toe remains straight.

No other evidence is cited or found which would defeat the defense of statute of limitations.

T.C.A. Section 29-26-116 provides in pertinent part as follows:

Statute of limitations.-Counterclaim for damages.-(a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

***4** "Discovery" means the discovery of the existence of a right of action, that is, facts which would support an action for tort against the tortfeasor. Such facts include not only the existence of an injury, but the tortious origin of the injury. *Hathaway v. Middle Tenn. Anaesthesiology*, Tenn.App.1986, 724 S.W.2d 355.

This rule was previously followed by Tennessee Courts, *Teeters v. Curry*, Tenn.1974, 518 S.W.2d 512, 93 A.L.R.3rd 207; but was codified by the quoted section of the Code. *Housh v. Morris*, Tenn.App.1991, 818 S.W.2d 39.

The gravamen of plaintiffs' action is that, on December 11, 1991, defendant performed surgery negligently, without actual or informed consent, and without advising the patient of the lengthy recovery period to follow the surgery. The evidence is uncontradicted that plaintiffs discovered or should have discovered facts supporting each of these complaints

more than a year prior to the institution of this suit on April 30, 1993.

As stated above, the complaint alleged the performance of unnecessary surgery. There is expert evidence that at least some of the surgery was unnecessary, but the claim for same is barred unless saved by the "discovery rule." No evidence is cited or found that plaintiff did not discover or should not reasonably discovered that the surgery was unnecessary at least one year before this suit was filed. The brief of appellee does not rely upon this aspect of the rule.

There is no evidence that any fact necessary to support plaintiffs' suit was fraudulently concealed from them at such a time and under such circumstances as would extend the statutory time for bringing suit until April 30, 1993.

Plaintiffs rely upon the "continuing treatment doctrine." In *Frazor v. Osborne*, 57 Tenn.App. 10; 414 S.W.2d 118 (1966), a surgeon left a surgical sponge imbedded in the patient and thereafter continued to treat the unhealed incision without probing the incision for a foreign object. The Trial Court directed a verdict for the surgeon on the ground of the statute of limitations. This Court reversed and remanded for a new trial stating:

> Bearing in mind that there is evidence in this case to indicate that the professional relationship between the decedent and the defendant, Dr. J.W. Osborne, did not cease until the discovery of the imbedded sponge in May, 1961, or sometime after that, it is our view that the evidence is such that the question of whether or not this professional relationship did continue until within one year of the filing of the suit is one that should have been submitted to the jury, and, if found by the jury that said relationship continued until within the statutory period of one year, the question of liability for negligence would have been for the jury to decide.

Frazor, 57 Tenn.App. at 20.

In *Frazor*, the negligence included failure to discover the cause of the unhealed wound. So long as Dr. Osborne continued as the treating physician, his duty to discover and his failure to discover continued. Thus, under the circumstances of *Frazor*, the continuance of the physician relationship resulted in the continuance of the negligent failure to discover the sponge.

***5** No such set of circumstances are shown in the present case. The professional relationship did continue, but there is no evidence that the negligence, if any, of defendant continued into the one year period preceding the filing of this suit. The only professional services rendered within one year preceding suit was the removal of sutures on May 5, 1993; and there is no showing of any negligence in the removal of the sutures, or, for that matter, in the performance of the last surgery on April 3, 1992, which included the insertion of the sutures which were removed on May 5, 1992.

The opinion in *Frazor* contains some language which may be interpreted as supporting a rule that no statute of limitations or malpractice begins to run until the termination of the doctor-patient relationship. This Court does not so interpret such language which referred only to breach of duties (such as duty to discover) which continued so long as the physician continued to treat the disorder which resulted from the continued failure to discover the cause.

Moreover, since the recognition of the continuing treatment doctrine in *Frazor*, its applicability has been eroded or entirely eliminated by the above cited statute and subsequent decisions.

In *Housh v. Morris, supra,* this Court affirmed a summary judgment dismissing a medical malpractice suit and said:

> Since the holding in *Frazor,* our courts have adopted and continuously applied the "discovery rule." This rule is codified and made applicable to malpractice actions by T.C.A. § 29-26-116. The present action is governed by T.C.A. § 29-26-116.

For the foregoing reasons, this Court finds that the Trial Court erred in failing to direct a verdict for the defendant on the ground of the bar of the statute of limitations.

The judgment of the Trial Court in favor of both plaintiffs is reversed and vacated, and plaintiffs' suit is dismissed at their cost. The cause is remanded to the Trial Court for entry in conformity with this opinion and such other proceedings as may be necessary.

CANTRELL, J., concurs.

OPINION
CONCURRING IN PART & DISSENTING IN PART

I concur with the majority's decision that Theresa Stanbury's lack of informed consent claim is time-barred. However, I have prepared this separate opinion for two reasons. First, the majority has erroneously dismissed Ms. Stanbury's claims regarding advising and performing unnecessary surgery which stand on a footing different from her lack of informed consent claim. Second, it is time to hold unequivocally that the continuing treatment doctrine has been completely subsumed into the discovery rule.

I.

Ms. Stanbury is an assembly line worker at Saturn Corporation in Columbia. In 1991 she developed a corn on the fifth toe of her right foot that caused her discomfort when she was required to stand for ten hours during her shift. A physician removed the corn and recommended that she consult a podiatrist. Accordingly, Ms. Stanbury met with Dr. Brian Bacardi on November 22, 1991. After a cursory examination, Dr. Bacardi recommended a minor surgical procedure to prevent her fifth toe on her right foot from laying on top of her fourth toe. Dr. Bacardi assured Ms. Stanbury that her recovery time would be short and that her work schedule would not be interrupted.

***6** Ms. Stanbury signed two consent forms prior to her December 11, 1991 surgery. One document on Dr. Bacardi's stationery entitled a "Surgery Informer" contained a brief discussion of the general risks and complications of surgery but did not identify the nature of the surgery Dr. Bacardi planned to perform. The second document was a Centennial Medical Center form entitled "Consent for Operation, Administration of Anesthesia, and Other Procedures." In the space provided for describing the operation to be performed, someone hand wrote: "Bilateral Osteotomy, Bilateral Repair Tailor Bunion, Bilateral Arthroplasty, Bilateral Realignment Digit 4 and 5, Bilateral Removal 5th Toenail." Ms. Stanbury insists that no one explained the nature of these procedures and that she did not know that she had consented to surgical procedures on both her feet or to anything other than the minor procedure Dr. Bacardi had described in his office several weeks earlier.

Dr. Bacardi performed extensive surgery on both feet while Ms. Stanbury was under a general anesthetic. During the mid-afternoon, Ms. Stanbury was released from the hospital in a wheelchair with both feet heavily bandaged. Ms. Stanbury described her feet as "[t]wo big white blobs." When Dr. Bacardi removed the surgical dressing during her first office visit on December 20, 1991, Ms. Stanbury stated that she was in "complete and utter shock" and that she "couldn't believe all that had been done. There were so many stitches and so many things, it was just unbelievable." She also noticed that the fifth toe on her right foot was not touching the floor but rather was sticking straight up in the air.

Ms. Stanbury had four more office visits with Dr. Bacardi between January 10 and March 17, 1992. On

April 3, 1992, Dr. Bacardi performed additional surgery to attempt to correct the misalignment of the fifth toe on Ms. Stanbury's right foot. During a post-operative office visit on May 5, 1992, Dr. Bacardi informed Ms. Stanbury that there was nothing more he could do for her and that it would take approximately one year for her feet to fully heal.

Ms. Stanbury and her husband filed a malpractice action against Dr. Bacardi and Hospital Corporation of America on April 30, 1993. They alleged that Dr. Bacardi had been negligent in advising her to have surgery, in performing the surgery itself, and in providing her with post-operative care. They also asserted that Dr. Bacardi had performed unnecessary surgery, that he had failed to obtain her consent to the surgery he performed on December 11, 1991, that he had ignored her complaints of pain and infection, and that he had falsified his office notes to conceal Ms. Stanbury's real condition. Dr. Bacardi responded by denying wrongdoing and by asserting that all the claims were barred by the statute of limitations.

The trial court directed a verdict for Dr. Bacardi at the close of the plaintiffs' proof on the theories of negligent post-operative care, ignoring Ms. Stanbury's complaints of pain and infection, and intentionally falsifying his office notes. It submitted the issues concerning lack of informed consent, advising and performing unnecessary surgery, and negligently performing the surgery to the jury. During the jury's deliberations, however, the trial court withdrew the claim for negligently performing the surgery from the jury. The jury returned a verdict awarding Ms. Stanbury $211,000 and Mr. Stanbury $10,000.

II.

*7 Until December 1974, negligence actions against health care providers, like all other actions for injuries to the person, were required to be filed within one year after the date of the wrongful act that caused the plaintiff's injury. *Albert v. Sherman*, 167 Tenn. 133, 135, 67 S.W.2d 140, 141 (1934); *Bodne v. Austin*, 156 Tenn. 353, 364-65, 2 S.W.2d 100, 103 (1928); Tenn.Code Ann. § 28-304. The two most common exceptions to this rule involved continuing torts and the fraudulent concealment of the injury. [FN1]

FN1. The facts of this case do not support Ms. Stanbury's claim that Dr. Bacardi fraudulently concealed her injury. It was evident to Ms. Stanbury as soon as she regained consciousness that Dr. Bacardi had performed surgery for which she had not consented. There was no way that Dr. Bacardi could have concealed from Ms. Stanbury that he had operated on her left foot in addition to her right foot.

The Eastern Section of this court adopted the continuing tort principle in 1938 in a case involving an employee who became disabled by breathing chemical particles in his employer's plant over an extended period of time. Noting that the employer had a duty to protect its employees from breathing these particles, the court held that the employer had committed "one continuous tort, beginning with the employment and ending only at the time of total disability of the employee and the termination of his employment." *Tennessee Eastman Corp. v. Newman*, 22 Tenn.App. 270, 279, 121 S.W.2d 130, 135 (1938). Accordingly, the Eastern Section held that the employee's action against the employer was timely since it was filed within one year of the onset of his disability and the termination of his employment. *Tennessee Eastman Corp. v. Newman*, 22 Tenn.App. at 279, 121 S.W.2d at 135.

Twenty-two years later, the Middle Section of this court extended the continuing tort principle to medical malpractice actions. In a case involving a surgical sponge that was negligently left in a patient's body for ten years, the court held that the statute of limitations would be tolled for the duration of the doctorpatient relationship when the plaintiff proved continuing negligent treatment by the physician. *Frazor v. Osborne*, 57 Tenn.App. 10, 19-20, 414

S.W.2d 118, 122-23 (1966). Accordingly, the continuing tort principle became known as the continuing treatment doctrine in the context of medical malpractice cases.

At about the same time, other victims of malpractice were urging the courts to adopt a discovery rule that would delay the accrual of the cause of action until a plaintiff discovered his or her injury. This court repeatedly declined to depart from the traditional rule that a medical malpractice plaintiff's cause of action accrues on the date that the wrongful act causing the injury occurs. *Clinard v. Pennington*, 59 Tenn.App. 128, 136, 438 S.W.2d 748, 752 (1968); *Hall v. De Saussure*, 41 Tenn.App. 572, 580, 297 S.W.2d 81, 85 (1956).

The Tennessee Supreme Court adopted the discovery rule on December 9, 1974, in a medical malpractice case where the continuing treatment doctrine was unavailable because the doctor-patient relationship had terminated approximately three years before suit was filed. The Court held that a cause of action for medical malpractice "accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury." *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn.1974). The Court did not address the relationship between the newly adopted discovery rule and the continuing treatment doctrine. However, Justice Harbison's separate concurrence implied that the statute of limitations continued to be tolled as long as the doctor-patient relationship continued even if the patient discovered the injury. *Teeters v. Currey*, 518 S.W.2d at 518.

***8** Approximately six months later the General Assembly included the *Teeters v. Currey* discovery rule in the Medical Malpractice Review Board and Claims Act of 1975.[FN2] Now codified at Tenn.Code Ann. § 29-26-116(a)(2) (1980), the legislative version of the discovery rule provides that "[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery." Thus, the statute of limitations for medical malpractice actions is tolled during the period that the plaintiff has not discovered that a wrong has occurred. *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn.1983). Discovery takes place when the plaintiff is aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of wrongful conduct. *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994). These facts include the occasion, the manner, and the means by which the breach of duty that produced the injury occurred and the identity of the person who breached the duty. *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn.1982); *Hathaway v. Middle Tenn. Anesthesiology, P.C.*, 724 S.W.2d 355, 359 (Tenn.Ct.App.1986).

FN2. Act of May 21, 1975, ch. 299, § 15(a), 1975 Tenn. Pub. Acts 662, 671.

The courts did not address the relationship between the discovery rule and the continuing treatment doctrine until 1986 when the Eastern Section of this court heard an appeal involving the dismissal of a malpractice action for the over prescription of addictive drugs. Even though the patient filed suit within one year after the professional relationship with his physician ended, the Eastern Section held that the continuing treatment doctrine was inapplicable because another physician had informed him more than one year before the suit was filed that he was taking too many drugs. *French v. Fetzer*, C.A. No. 43, slip op. at 3 (Tenn.Ct.App. Feb. 20, 1986). The Tennessee Supreme Court granted the patient's application for permission to appeal and later issued a per curiam opinion affirming the Eastern Section's decision, stating: "we find there is no question but that plaintiff had actual knowledge of his malpractice claim no later than February, 1982 ... and that the subsequent treatment of plaintiff by defendant was in fact a continuation and did not involve new or different drugs."

French v. Fetzer, C.A. No. 43, slip op. at 2 (Tenn. June 22, 1987) (per curiam opinion not for publication).

Three years later, the Western Section of this court addressed the relationship between the discovery rule and the continuing tort principle in a case involving an employee who claimed to have been injured by prolonged use of a defective tractor. The Western Section stated

> We believe that the "continuous tort" doctrine must be applied in conjunction with the "discovery rule." Thus, in a case involving a continuing tort, the cause of action accrues at the time the professional relationship or course of treatment is terminated unless, under the "discovery rule," the cause of action is deemed to have accrued at a different point in time. A plaintiff is not entitled to a new limitations period to begin with the appearance of each new injury or complication.

***9** *Kenton v. United Technology,* Shelby Law No. 71, slip op. at 6 (Tenn.Ct.App. March 26, 1990) (no Tenn. R.App. P. 11 application filed). Accordingly, the court held that the employee's suit was barred because he had discovered his injury more than one year before filing suit.

One year later, the Middle Section of this court recognized similar reasoning in a medical malpractice case. The court held that the jury should decide whether "the plaintiff knew of the malpractice for a period prior to suit exceeding the statutory limitations period." *Higgins v. Estate of Crecraft,* App. No. 01-A-01-9008-CV-00311, slip op. at 13 (Tenn.Ct.App. Feb. 21, 1991) (no Tenn. R.App. P. 11 application filed). The Western Section reached a similar result three months later in a case involving lack of informed consent for hip replacement surgery. *Housh v. Morris,* 818 S.W.2d 39, 43-44 (Tenn.Ct.App.1991).

Two years later, the Middle Section invoked the continuing treatment rule to save a patient's cause of action against her psychiatrist from a summary judgment based on the one-year statute of limitations. *Roe v. Jefferson,* App. No. 01-A-01-9212-CV-00476, slip op. at 17 (Tenn. Ct.App. April 16, 1993). The Supreme Court, however, reversed the decision because it found that the patient had discovered the psychiatrist's wrongful conduct before their professional relationship ceased and more than one year before suit was filed. *Roe v. Jefferson,* 875 S.W.2d at 658. The Western Section applied the *Roe v. Jefferson* holding when it held that a patient's malpractice action against her psychotherapist accrued when she discovered that the defendant's conduct was wrong, not when her relationship with the defendant ended. *Clifton v. Bass,* 908 S.W.2d 205, 210 (Tenn.Ct.App.1995).

The cases decided since 1986 indicate that the continuation of a professional relationship no longer plays a role in determining when a cause of action for professional malpractice accrues. The Tennessee Supreme Court removed any doubt about this when it held that a cause of action for legal malpractice accrues when a client learns of his or her injury and that the injury was caused by the lawyer's negligence. *Carvell v. Bottoms,* 900 S.W.2d 23, 28 (Tenn.1995). Accordingly, the Court held that clients must sue their lawyers for malpractice within one year after discovering their injury, even if their lawyer is still representing them. *Carvell v. Bottoms,* 900 S.W.2d at 30.

The rule in both medical and legal malpractice actions is now the same. Notwithstanding the existence of an ongoing professional relationship, a cause of action for professional malpractice accrues and the statute of limitations begins to run when the patient or the client discovers, or reasonably should have discovered, that he or she has been injured by the negligent conduct of his or her lawyer or health care provider. The fact that the lawyer or health care provider continues representing or treating the client or patient

will not toll the running of the statute of limitations once the injury has been discovered.

III.

***10** Deciding that Ms. Stanbury's lack of informed consent claims were untimely cannot end our inquiry in this case. Ms. Stanbury also claimed that Dr. Bacardi performed the surgery on her feet in a negligent manner, that he negligently advised her to undergo unnecessary surgery, and that he performed unnecessary surgery on her feet. I will take these claims in turn.

A.

Negligent Performance of Surgery

Ms. Stanbury claimed that Dr. Bacardi performed the surgery on her feet in a negligent manner. The trial court declined to grant the doctor's motion for a directed verdict on the issue at the close of Ms. Stanbury's proof; however, it effectively withdrew the issue from the jury after deliberations began when the jury requested clarification of portions of the verdict form.[FN3] While I have serious misgivings about the manner in which the trial court disposed of this issue, the trial court's conduct was, at most, harmless error.

> FN3. During its deliberations, the jury sought clarification concerning question three on the verdict form that asked "Did the Defendant, Brian Bacardi, deviate from the recognized standard of care for podiatrists in this community by negligently performing surgical procedures on December 11, 1991, and/or April 3, 1992, on the Plaintiff, Theresa Stanbury?" The trial court agreed with the jury's characterization that this question concerned "the fact that surgery was performed, not how it was performed, not how successful it was." The trial court also instructed the jury that "as far as the operation itself, that's not part of the lawsuit."

Considering the record as a whole, I am unable to find any proof presented by Ms. Stanbury tending to show that Dr. Bacardi performed her surgery in a negligent manner. The only expert testimony remotely addressing this issue was that of Dr. James Rogers, a board certified podiatrist, who testified on Ms. Stanbury's behalf. Dr. Rogers stated that there was a misalignment of the bone where Dr. Bacardi performed the arthroplasty on Ms. Stanbury's right foot that did not exist before the surgery, but he did not opine that the misalignment was caused by Dr. Bacardi's negligent surgical technique.

Dr. Rogers's testimony does not establish that Dr. Bacardi performed the surgery negligently. Finders of fact cannot infer negligence from a bad result. *See, e.g., Johnson v. Lawrence,* 720 S.W.2d 50, 56 (Tenn.Ct.App.1986); *Redwood v. Raskind,* 49 Tenn.App. 69, 75-76, 350 S.W.2d 414, 417 (1961); *see also* Tenn.Code Ann. § 29-26-115(d)(1980) (the jury in a malpractice action shall be instructed that injury alone does not give rise to a presumption of the defendant's negligence). Thus, in medical malpractice cases, a plaintiff cannot establish a doctor's negligence merely by showing that an operation produced a bad result, *Butler v. Molinski,* 198 Tenn. 124, 133-34, 277 S.W.2d 448, 452 (1955), or even that aggravation followed the doctor's treatment. *Poor Sisters of St. Francis v. Long,* 190 Tenn. 434, 440, 230 S.W.2d 659, 662 (1950).

B.

The Unnecessary Surgery Claims

Ms. Stanbury also claimed that Dr. Bacardi negligently advised her to undergo surgery for the corn on her right fifth toe and that he also performed unnecessary surgery elsewhere on both of her feet. Dr. Bacardi asserted that these claims, like the informed consent claims, were time-barred because Ms. Stanbury filed suit more than one year after her surgery. Dr. Bacardi's argument is without merit because the running of the statute of limitations with regard to Ms. Stanbury's unnecessary surgery claims involves facts

and criteria that are quite different from those involved with the informed consent claims.

***11** The majority has decided to dismiss Ms. Stanbury's unnecessary surgery claims because she "does not rely upon this aspect of the rule" in her brief and because she cited no evidence that she "did not discover or should not reasonably [have] discovered that the surgery was unnecessary at least one year before this suit was filed." I find this reasoning both curious and entirely unpersuasive for three reasons. First, Dr. Bacardi, as the party seeking to dismiss Ms. Stanbury's claims based on the statute of limitations, had the burden of demonstrating that Ms. Stanbury's claims were time-barred. Second, Dr. Bacardi's statute of limitations argument with regard to Ms. Stanbury's unnecessary surgery claims is legally wrong. Third, Ms. Stanbury, as the appellee, is under no obligation to respond to arguments not made by the appellant.

We must deal with this issue head on because the jury's damage award is based on a general verdict that could have been based on its conclusion that Ms. Stanbury had not consented to all the surgery that Dr. Bacardi performed or that Dr. Bacardi had recommended and performed unnecessary surgery or both. Thus, even if Ms. Stanbury's informed consent claims are time-barred, she may still be entitled to recover on the unnecessary surgery claims unless they too are timebarred.

Disposing of the statute of limitations issue with regard to Ms. Stanbury's unnecessary surgery claims requires an understanding of the nature of the claims themselves. Ms. Stanbury claimed that Dr. Bacardi deviated from the standard of care for podiatrists by failing to follow a conservative treatment regime before recommending surgery on both her feet. Given that her chief complaint was pain associated solely with her right fifth toe, she presented expert testimony that Dr. Bacardi should have first attempted to alleviate her symptoms using conservative treatment measures such as shaving the corn, wearing wider shoes, or using shoe padding.

A doctor cannot be held responsible for choosing between two or more recognized courses of treatment. *McPeak v. Vanderbilt Univ. Hosp.*, 33 Tenn.App. 76, 79, 229 S.W.2d 150, 151 (1950). Presuming a careful diagnosis, a doctor's honest mistake in electing to perform surgery is a matter of judgment upon which a negligence action ordinarily cannot be predicated. *Burnett v. Layman*, 133 Tenn. 323, 328, 181 S.W. 157, 158 (1915). Both of Ms. Stanbury's experts testified, however, that performing surgery on Ms. Stanbury without first attempting more conservative treatments was not a recognized alternative treatment regime. Thus, electing to perform surgery without first attempting more conservative treatments was a deviation from the standard of care for podiatrists and was also prima facie evidence of Dr. Bacardi's malpractice.

The statute of limitations on Ms. Stanbury's unnecessary surgery claims could not have started to run until she discovered or reasonably should have discovered "the occasion, the manner, and the means by which a breach of duty occurred that produced [her] injuries." *Roe v. Jefferson*, 875 S.W.2d at 656. Thus, Ms. Stanbury would have had to discover that her surgery was unnecessary before her cause of action accrued. The fact that Ms. Stanbury was asymptomatic except for the corn on her right fifth toe is not, in and of itself, evidence that the surgery was unnecessary. Since Ms. Stanbury was a lay person, I would find that she did not discover that Dr. Bacardi had performed unnecessary surgery until another competent health care provider informed her that her surgery had been unnecessary.

***12** Thus, unlike the majority who are content to dismiss the entire case on statute of limitations grounds, I would hold that Ms. Stanbury's unnecessary surgery claims were timely. Prior to April 30, 1992-one year before the filing of the complaint-Ms. Stanbury knew that Dr. Bacardi had performed more surgery than she had consented to and that she had

experienced unanticipated complications. She had no reason to know that the surgery that Dr. Bacardi performed on her right fifth toe or elsewhere on either of her feet was unnecessary. Thus, even though the statute of limitations on her informed consent claim had started to run, the statute of limitations on her negligent surgery claims had not.

IV.

I would find that the trial court committed reversible error by submitting Ms. Stanbury's time-barred informed consent claims to the jury. Accordingly, I would vacate the judgment, but unlike the majority, I would not dismiss Ms. Stanbury's suit in its entirety. Since her unnecessary surgery claims are not timebarred, I would remand them for a new trial on these claims alone. She is not entitled to a second bite at the apple with regard to all the other theories of recovery that either were time-barred or were not proven during the first trial.

Tenn.App.,1996.
Stanbury v. Bacardi
Not Reported in S.W.2d, 1996 WL 200338 (Tenn.Ct.App.)

END OF DOCUMENT

69597

IN THE CIRCUIT COURT OF MADISON COUNTY TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK

Plaintiffs,

vs.

NO: C-11-87
JURY DEMANDED

WOMAN'S CLINIC, P.A. and
DR. RYAN ROY,

Defendants,

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants have filed a Motion for Summary Judgment contending that the Plaintiffs' claim is barred by the applicable statute of limitations. The Court conducted a hearing on the Defendants' Motion for Summary Judgment on April 12, 2012. After considering the Motion for Summary Judgment and the materials filed in support of the Motion, the response in opposition filed on behalf of the Plaintiffs, the arguments of counsel, and the entire record in this case, the Court, having considered the facts in the light most favorable to the Plaintiffs, has determined that the Defendants' Motion should be granted because the Plaintiffs' claim is barred by the applicable statute of limitations.

Because this is a medical malpractice case, the applicable statute of limitations is codified in Tenn. Code Ann. § 29-26-116(a)(1) and provides as follows: "The statute of limitations in malpractice actions shall be one (1) year as set forth in section 28-3-104." In addition, Tenn. Code Ann. § 29-26-116(a)(2) provides as follows: "If the alleged injury is not discovered within such one (1)

year period, the period of limitations shall be one (1) year from the date of such discovery." In discussing this statute, the Tennessee Supreme Court has stated that the statute of limitations "is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person is not put on inquiry." *Roe v. Jefferson*, 875 S.W.2d 653, 656-57 (quoting *Hoffman v. Hospital Affiliates*, 652 S.W.2d 341, 344 (Tenn. 1983)). Moreover, the Tennessee Supreme Court has directed: "[i]t is not required that the plaintiff actually know that the injury constitutes a breach of the appropriate legal standard in order to discover that he has a 'right of action'; the plaintiff is deemed to have discovered the right of action if he is aware of sufficient facts to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Roe*, 875 S.W.2d at 657. In *Sherrill v. Souder*, the Tennessee Supreme Court noted that "[n]either actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action." 325 S.W.3d 584, 595 (Tenn. 2010)

Because the case at bar is a wrongful pregnancy case, the alleged injury is pregnancy. Therefore, the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant.

The record before the Court demonstrates the following undisputed facts:

1. On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant.

2. Mrs. Speck had been pregnant four (4) times before the pregnancy at issue in this case.

3. Mrs. Speck had a history of regular and timely menstrual periods.

4. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009.

5. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant.

6. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results.

7. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time.

8. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate.

9. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs.

Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant.

10. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive.

Based upon Mrs. Speck's deposition testimony, she knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy.

Therefore, the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009.

Tenn. Code Ann. § 29-26-121(a)(1) requires any person to give written notice of a potential claim for medical malpractice at least sixty (60) days before the filing of a complaint based upon medical malpractice. Tenn. Code Ann. § 29-26-121(a)(3) states, "The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and the statutes of repose applicable to the provider, one of the following occurs, as established by the specific proof of service, which shall be filed with the complaint. . . ." The statute then proceeds to note that service of the written notice may be made by personal delivery or mailing of the notice. Therefore, the Court is required to determine

whether the Plaintiffs complied with Tenn. Code Ann. § 29-26-121 by giving written notice within the one year statute of limitations. Although the Court is aware of no case law that exists addressing the particular issue before the Court, the Court determines that the Plaintiffs did give timely pre-suit notice, because November 27, 2010 fell on a Saturday. Therefore, the Court concludes that the statute of limitations did not run until November 29, 2010, the following Monday. The Defendants contend that the statute does not provide additional time for serving the written pre-suit notice when the last day for doing so falls on a weekend or holiday. The Defendants note that the act required by the statute is not filing a complaint with the court; rather, the Defendants argue that the act is serving pre-suit notice one permissible method of which is by mail as the Plaintiffs did in this case. The Defendants argue that the Plaintiffs could have served written notice by mail, because the post office was open and operating on November 27, 2010. The Defendants argue that the notice was untimely, because the Plaintiffs failed to serve notice on November 27 by depositing notice in the mail. The Court rejects the Defendants' argument in this regard and determines that the Plaintiffs gave pre-suit notice within the statute of limitations.

The Court's analysis, however, does not end at this juncture, because Tenn. Code Ann. § 29-26-121(c) only extends the applicable statute of limitations for one hundred twenty (120) days from the date of the expiration of the statute of limitations assuming the plaintiff gives timely pre-suit notice. Therefore, the Court must determine whether the Plaintiffs' Complaint was filed within one hundred twenty days. As noted earlier, the statute of limitations ran, at the latest,

on November 29, 2010, and the Plaintiffs gave pre-suit notice on that day. One hundred twenty days from November 29, 2010 is March 29, 2011. Therefore, for the Plaintiffs to file their case within one hundred twenty days, the Complaint had to be filed, no later than March 29, 2011. The Plaintiffs' Complaint was filed on March 30, 2011. Thus, the Plaintiffs did not file their Complaint within one hundred twenty days. Thus, the claim was not timely as it was not filed within the statute of limitations or the period within which the statute of limitations was extended by operation of Tenn. Code Ann. § 29-26-121.

For the reasons noted above, the Court concludes that the Defendants' Motion for Summary Judgment should be granted, because the Plaintiffs' claim is barred by the one year statute of limitations.

It is hereby ordered that the Defendants' Motion for Summary Judgment is granted and that the Plaintiffs' case is dismissed with prejudice. The Court finds that there is no genuine issue as to any material fact and that the Defendants are entitled to a judgment as a matter of law. Finding no reason for delay, the Court expressly directs the entry of a final judgment in favor of the Defendants.

IT IS SO ORDERED.

JUDGE ROY MORGAN, JR.

April 27, 2012
Date

APPROVED FOR ENTRY:

MARTY R. PHILLIPS
MICHELLE GREENWAY SELLERS
Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Mr. Richard Glassman (#7815)
Glassman, Edwards, Wyatt, Tuttle & Cox, P.C.
26 N. Second Street
Memphis, TN 38103
(901) 527-4673 – phone
(901) 521-0940 – fax

Attorney for Plaintiffs

This the 24th day of April, 2012.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to

Mr. Richard Glassman
Attorney at Law
26 N. Second Street
Memphis, TN 38103

Mr. Marty R. Phillips
Attorney at Law
P.O. Box 1147
Jackson, TN 38302-1147

on this the 27 day of April, 2012.

Candice Wilson

Candice Wilson, Adm. Asst. to Judge Morgan

IN THE CIRCUIT COURT OF MADISON COUNTY TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK

Plaintiffs,

vs.

NO: C-11-87
JURY DEMANDED

WOMAN'S CLINIC, P.A. and
DR. RYAN ROY,

Defendants,

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On April 12, 2012, the Court heard arguments on the Defendants' Motion for Partial Summary Judgment, which seeks to dismiss the Plaintiffs' claims to the extent those claims seek damages not permitted by *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). Having considered the Defendants' Motion, the materials filed in support of the Motion, the arguments of counsel, and the entire record in this case, the Court determined that the Defendants' Motion should be granted and the damages of the plaintiffs should be limited in this case to those enumerated in Smith v Gore .

Therefore, the Court determines that there is no genuine issue as to any material fact and that the Defendants are entitled to a judgment as a matter of law to the extent the Plaintiffs' claims exceed those damages permitted by *Smith v. Gore*. The Court is not making a ruling that any damages are supported by the proof at this time, because the Court has heard no proof. The Court is merely

ruling that Tennessee law does not permit recovery of some of the damages the Plaintiffs seek in this case even if the proof supported those damages.

IT IS SO ORDERED.

JUDGE ROY MORGAN, JR.

April 27, 2012
Date

APPROVED AS TO FORM:

RICHARD GLASSMAN
Attorney for Plaintiffs

MARTY R. PHILLIPS
MICHELLE GREENWAY SELLERS
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to

Mr. Richard Glassman
Attorney at Law
26 N. Second Street
Memphis, TN 38103

Mr. Marty R. Phillips
Attorney at Law
P.O. Box 1147
Jackson, TN 38302-1147

on this the 27 day of April, 2012.

Candice Wilson

Candice Wilson, Adm. Asst. to Judge Morgan

IN THE CIRCUIT COURT OF MADISON COUNTY TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

FILED
AUG 09 2012
KATHY BLOUNT, CIRCUIT COURT CLERK
DEPUTY CLERK 3:15 P.M.
A.M.

JULIE SPECK and KEVIN SPECK

Plaintiffs,

vs.

NO: C-11-87
JURY DEMANDED

WOMAN'S CLINIC, P.A. and
DR. RYAN ROY,

Defendants,

ORDER DENYING PLAINTIFFS' MOTION TO ALTER AND/OR AMEND JUDGMENT/RECONSIDER GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On July 13, 2012, the Court conducted a hearing on the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment. After considering the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment, the Defendants' Reply in Opposition to Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the arguments of counsel, the deposition of Julie Speck, the deposition of Kevin Speck, the deposition of Ryan Roy, M.D., and the entire record in this case, the Court has determined that the Plaintiffs' Motion should be denied.

The Court considered Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment to be filed pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure. "The

purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). The Court considered the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure and finds that no errors as to law or facts have arisen as a result of the Court overlooking or failing to consider matters. The Court finds that a Rule 59.04 motion serves a limited purpose and should be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003). The Court finds that Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment fails to meet any of the Rule 59 grounds for overturning the Order Granting Defendants' Motion for Summary Judgment.

The Court finds that the Supplemental Affidavit of Julie Speck should not be considered. The Court finds that the Supplemental Affidavit of Julie Speck is not a clarification of Mrs. Speck's prior testimony. After comparing the Affidavit of Julie Speck which was filed in response to the Defendants' Motion for Summary Judgment with the Supplemental Affidavit of Julie Speck which was filed in support of the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment, the Court finds that the Supplemental Affidavit presents additional evidence that was clearly available to Plaintiffs prior to the hearing on Defendants' Motion for Summary Judgment. The

Supplemental Affidavit attempts to create an issue of material fact after an adverse ruling of this Court. The Court finds that the Supplemental Affidavit of Julie Speck is inconsistent with Mrs. Speck's prior testimony. The information contained in the Supplemental Affidavit of Julie Speck was not mentioned in Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs, the depositions of Mr. Speck, Mrs. Speck, or Ryan Roy, M.D., or the Affidavit of Julie Speck. Plaintiffs offer no plausible reason for failing to present the evidence contained in the Supplemental Affidavit of Julie Speck prior to the hearing on Defendants' Motion for Summary Judgment.

Notwithstanding the Court's findings that the Plaintiffs have failed to satisfy the purpose of Rule 59.04 of the Tennessee Rules of Civil Procedure, failed to meet the grounds of Rule 59.04 of the Tennessee Rules of Civil Procedure, and that the Supplemental Affidavit of Julie Speck should not be considered, the Court finds that even if the Supplemental Affidavit of Julie Speck was considered, Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting Defendants' Motion for Summary Judgment would be denied. Because the case at bar is a wrongful pregnancy case, the alleged injury is pregnancy. Therefore, the issue is when the Plaintiff was aware of sufficient facts to put her on inquiry notice that she was pregnant, not when she was certain that she was pregnant. The record before the Court demonstrates the following: On August 25, 2008, Dr. Ryan Roy performed an Essure sterilization procedure on Mrs. Julie Speck. The purpose of the procedure was to prevent Mrs. Speck from becoming pregnant. Mrs. Speck had been pregnant four (4) times before the pregnancy at

issue in this case. Mrs. Speck had a history of regular and timely menstrual periods. In her deposition, Mrs. Speck testified that she suspected she was pregnant on the day after Thanksgiving in 2009. The day after Thanksgiving in 2009 was November 27, 2009. Mrs. Speck testified that she believed she was pregnant, because her menstrual period was several days late and that was unusual for her. Having been pregnant before and having had regular and timely menstrual periods previously, she knew that her menstrual period being late likely meant that she was pregnant. To confirm her belief that she was pregnant, Mrs. Speck bought two (2) home pregnancy tests on November 27, 2009. By her own testimony, Mrs. Speck bought two home pregnancy tests, because she wanted to be "double sure" of the results. By November 27, 2009, she had informed her husband, Plaintiff Kevin Speck, that her menstrual period was late and the only thing she could think was that she was pregnant. Mr. Speck believed Mrs. Speck was pregnant at that time. The pregnancy tests that Mrs. Speck purchased indicated that they were 99% accurate. Mrs. Speck took the first pregnancy test on November 27, 2009, and it was positive. The positive result was clear, obvious, and immediate. Mrs. Speck told Mr. Speck about the results of the pregnancy test. The pregnancy test had confirmed that Mrs. Speck was pregnant, and that's what she had believed to be true even before she confirmed it with the pregnancy test. Mrs. Speck was upset that she was pregnant. Mrs. Speck took a second pregnancy test on November 27 or 28, 2009, and it was also positive. The Supplemental Affidavit of Julie Speck does

not dispute or change the ten (10) undisputed material facts set forth by the Court in the Order Granting Defendants' Motion for Summary Judgment.

The Court finds that Mrs. Speck knew or should have known that she was pregnant no later than November 27, 2009. By that date, she was aware of facts sufficient to put a reasonable person on notice that she was pregnant, and she actually undertook steps to investigate or inquire her belief that she was pregnant by taking a home pregnancy test, which confirmed her pregnancy within 99% accuracy. Reasonable minds could not disagree that Plaintiffs were aware of sufficient facts to put them on inquiry notice that Mrs. Speck was pregnant no later than November 27, 2009. Therefore, the undisputed proof before the Court demonstrates that Mrs. Speck discovered the alleged injury no later than November 27, 2009.

For the reasons noted above, the Court concludes that the Plaintiffs' Motion to Alter and/or Amend Judgment/Reconsider Granting of Defendants' Motion for Summary Judgment should be denied.

IT IS SO ORDERED.

JUDGE ROY MORGAN, JR.

August 9, 2012
Date

APPROVED FOR ENTRY:

Michelle Sellers

MARTY R. PHILLIPS (#14990)
MICHELLE GREENWAY SELLERS (#20769)
Rainey, Kizer, Reviere & Bell, P.L.C.
105 S. Highland Avenue
Jackson, TN 38301

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Mr. Richard Glassman (#7815)
Glassman, Edwards, Wyatt, Tuttle & Cox, P.C.
26 N. Second Street
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(901) 527-4673 – phone
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Attorney for Plaintiffs

This the 30th day of July, 2012.

Michelle Sellers

IN THE CIRCUIT COURT OF MADISON COUNTY, TENNESSEE
FOR THE TWENTY-SIXTH JUDICIAL DISTRICT AT JACKSON

JULIE SPECK and KEVIN SPECK,

Plaintiffs,

vs. No. **C-11-87**

WOMAN'S CLINIC P.A. and
DR. RYAN ROY,

Defendants.

PLAINTIFFS' ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFFS

COMES NOW Plaintiffs, by and through undersigned counsel, and for their Answers to Defendants' First Set of Interrogatories to Plaintiffs in accordance with Rules 26 and 33 of the Tennessee Rules of Civil Procedure, state as follows:

INTERROGATORY NO.1: Please state the following:

(a) full name,
(b) any nicknames or aliases,
(c) social security number,
(d) date of birth,
(e) driver's license number,
(f) home address,
(g) home telephone number, and
(h) marital history, including current marital status and spouse's name.

ANSWER:

(a) Julie Ann Speck
(b) None
(c) To be provided under separate correspondence.
(d) 12-14-77
(e) 085383418
(f) 119 Robin Circle. Middleton, TN 38052
(g) 731-376-1569
(h) Divorced, remarried to Kevin Speck

(a) Kevin Marshall Speck
(b) None
(c) To be provided under separate correspondence.
(d) 075233531
(e) 8/31/1975
(f) 119 Robin Circle. Middleton, TN 38052
(g) 731-376-1569
(h) Divorced, remarried to Julie Speck

INTERROGATORY NO. 2: Furnish the names, addresses and occupations of persons who have or purport to have knowledge or information pertaining to the circumstances surrounding or arising out of the allegations and incidents described in the complaint; and, insofar as you know, state the nature of such knowledge or information, giving reference to each person as that person's knowledge pertains to the subject matter that you describe (E.g., Jane Doe; 1 Main Street, Jackson, Tennessee; R.N. ! Ms. Doe is aware of the fact that she heard the defendant Jones tell the plaintiff that she would give her a written guarantee that she would fully recover).

ANSWER:

Dr. Lolly Eldridge
Dr. William Pierce
Dr. Christopher Welsch
2863 Highway 45 Bypass, Jackson, Tn 38305.
Treated Julie Speck during pregnancy for routine visits.

Dr. Donald Wilson
2863 Highway 45 Bypass, Jackson, Tn 38305.
Treated me during my pregnancy and delivered the baby. He also performed a tubal ligation and removed what was left of the ESSURE after the birth.

Dr. Jason Sammons, 11 medical Park Ct., Jackson, TN 38305
Dentist that removed a wisdom tooth during my pregnancy.

William Thornton, 100 Chickadee Avenue, Middleton, TN 38052
Licensed Practical Nurse. Mr. Thornton treated me during my pregnancy for minor medical problems.

Dr. Richard Wagner, 620 Skyline Drive, Jackson, TN 38301.
I was sent to see him by the doctors at the Jackson Clinic because I was taking Paxil before I knew I was pregnant.

Dr. Glynn Wittber, 2863 Hway 45 Bypass, Jackson, TN 38305
Treated me during my pregnancy for my first visit to the Jackson Clinic.

Also, all employees, representatives, and/or agents of the above named physicians and/or their offices.

Kevin Speck, 119 robin Circle, Middleton, TN 38052. My husand.
Julie's parents, Beverly & Carlton Davis, 740 Pulse Road, Middleton, TN 38052

Julie's brother and sister in law. 680 Pulse Rd, Middleton, TN 38052

Julie's mother and father in law, Thelbert and Gwen Speck, 285 Powers Rd, Middleton, TN 38052

INTERROGATORY NO.3: Identify each person whom you expect to call as an expert witness at the trial of this case, and as to each such expert witness, state:

I. His/her name, address and occupation or profession (if a specialist, then name the specialty);

II. The subject matter on which he/she is expected to testify;

III. The substance of the facts and opinions to which he/she is expected to testify;

IV. A summary of the grounds for each opinion;

V. The expert's qualifications, including but not limited, a list of all publications authored in the previous 10 years;

VI. A list of all other cases in which, during the previous four years, the witness testified as an expert in a hearing, deposition, trial, or administrative or arbitration proceeding, including as part of the list the case name, docket number, and jurisdiction for court or administrative proceedings and, for arbitrations, information sufficient to identify the counsel to the parties in the arbitration; and

VII. A statement of the compensation to be paid to the expert for the study and testimony in the case.

ANSWER: Counsel for Plaintiffs have not yet decided which evidence and/or what expert(s) will be used at trial; however, Counsel for Plaintiff reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to which evidence and/or expert(s) will be used at trial.

Plaintiffs do hereby cross-designate any and all experts designated by any other Party to this case ("Parties") and specifically notifies all other Parties that

Plaintiffs may rely upon the opinions of other Parties' experts with regard to any matters related to this cause. Plaintiffs hereby incorporate the expert designations, reports, and resumes provided or to be provided by the other parties to this litigation as if fully set forth at length and hereby incorporates same by reference as if copied verbatim.

Plaintiffs specifically advise all other Parties that, should any Party designate any expert(s) and should the same not be a Party to this cause at the time of trial, or should same choose not to call any such expert(s) that it designated in this cause at the time of trial, or should the other Party(s) de-designate or withdraw any such expert designation, Plaintiffs may call these witnesses to testify at the time of trial. Plaintiffs do no not by this designation recognize the qualifications of any such witnesses/experts to render expert opinions in this cause, nor do these Plaintiffs accept, recognize, adopt or otherwise validate any of those opinions. Through this designation, Plaintiffs are simply reserving their right to elicit expert opinion testimony from any of these witnesses at the time of trial. By designating these experts, Plaintiffs do not waive their right to challenge the qualifications or opinions of any parties' through appropriate motions, nor do Plaintiffs waive their right to seek exclusion of any such experts.

Plaintiffs reserve the right to elicit by way of cross-examination, opinion testimony from experts designated and called by other parties to this lawsuit, if any, and reserves the right to call as referenced above, as witnesses associated with adverse parties, any of the experts identified by other parties to this lawsuit, if any.

Plaintiffs also reserve the right to call undesignated rebuttal expert witnesses who testimony cannot be reasonably foreseen until the presentation of evidence at trial.

Plaintiffs reserve the right to withdraw the designation of any expert and aver positively that any such previously designated expert will not be called as a witness at trial, and to re-designate the same as a consulting expert.

Plaintiffs reserves the right to elicit any expert or lay opinion testimony at the time of trial which would be truthful, of benefit to the court and/or the jury to determine material issues of fact, and upon which would not violate any existing court order, or the Tennessee Rules of Civil Procedure, or the Tennessee Rules of Evidence.

INTERROGATORY NO. 4: List, identify by name, title, location, and describe the subject matter of the contents of each document, record, photograph, statute, ordinance, protocol, standard or code of which you are aware which is or may be relevant to this action, and furnish the name and present address of each person known to have custody of each document, record,

photograph, statute, ordinance, protocol, standard or code.

ANSWER: **Counsel for Plaintiffs have not yet decided which evidence and/or what expert(s) will be used at trial; however, Counsel for Plaintiffs reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to which evidence and/or expert(s) will be used at trial.**

INTERROGATORY NO. 5: If your claimed elements of damages have been paid, or are payable wholly or partially, by another person, corporation, or insurance company, furnish the following with respect to each:

a. The date of payment or date payment will be due;

b. The name and address of the person, corporation, insurance company, or entity making or due to make such payment;

c. If any payments were made by an insurance company, state whether *or* not the Plaintiffs paid any portion of the premium for such insurance policy, and if any other person or entity made any payment of the premium, furnish the name and address of the person or entity making such payment, her or her relationship to the Plaintiff, and provide adequate reference to the insurance company and payment involved; and

d. Have any expenses been forgiven or written off? If so, please describe.

ANSWER:

a. **Please see medical records/billings; will supplement as information becomes available.**
b. **Blue Cross Blue Shield & Medicaid**
c. **Insurance Premiums are taken out of Kevin Speck's checks;**
d. **Dr. Wagner's office wrote off approximately $130 due to the incorrect filing of it with the insurance company. Other than insurance adjustments, not that I am aware of**

INTERROGATORY NO. 6: Describe the injuries, symptoms and disabilities Plaintiffs claim to have received or suffered as a result of the acts or omissions of these Defendants and state when such injuries, illnesses or disabilities first manifested themselves.

ANSWER: Plaintiffs encountered an unwanted pregnancy that was confirmed by Dr. Roy on 12/1/2009. Baby was born July 21, 2010. Please also refer to the complaint filed herein.

INTERROGATORY NO. 7: With respect to each such claimed injury, symptoms, or disability, state whether or not Julie Speck has now fully recovered therefrom. If so, state the approximate date upon which recovery was complete and, if not, state when it is contemplated that recovery will be complete or whether it will be claimed that such injury, illness or disability will be permanent.

ANSWER: I was no longer pregnant after the baby was delivered on July 21, 2010, but the effects of an unwanted pregnancy will last the rest of our lives. Please also refer to the complaint filed herein.

INTERROGATORY NO. 8: With regard to the allegations of negligence in the complaint, please state:

a. The facts which forms the basis of each allegation and/or supports such allegation;

b. The identity of the person or persons with knowledge of those facts forming or supporting each such allegation furnishing the name and address of such persons for each allegation (E.g., Ms. Sue Doe saw Dr. Jones read her fetal monitor strip and heard her say I should have done a section six hours ago-- this testimony supports allegation in paragraph 5(b) of the complaint); and

c. The identity of any tangible evidence supporting each allegation by describing each item of tangible evidence and giving the name and address of its present custodian.

ANSWER:

a. Please refer to complaint and medical/billing records

b. Dr. Roy reported that in retrospect, he could see there was a problem; also see #2.

c. Please refer to the medical records.

INTERROGATORY NO. 9: If you were present or if someone else has told you that they were present during the course of a conversation with Dr. Ryan Roy or any other physician or employee at the Woman's Clinic, P.A., which is relevant to this litigation, state the date and place of each such conversation, the name and address of each person present during or participating in each conversation, and the substance of each statement made by each such person, identifying the person who made each such statement.

ANSWER: **Dr. Roy's Nurse (name unknown); Husband, Kevin Speck**

INTERROGATORY NO. 10: Furnish the names and addresses of the health care providers, including without limitation, each medical doctor, psychologist, psychiatrist, chiropractor, osteopath, hospital or clinic visited by Julie Speck as a patient or in which she was confined for the purpose of examination and treatment for ten (10) years prior to the date of the alleged malpractice.

ANSWER:

Dr. Ryan Roy
Dr. Brad Adkins
Dr. J. Michael Epps
Dr. Molly Rheney
Dr. Paul Gray
Dr. Jadhav Boyapati
Dr. David Soll
FNP Betsy Swindle
WHNP LaCinda Butler
The Woman's Clinic
244 Coatsland Drive, Jackson TN

Jackson Madison County General Hospital
620 Skyline Drive, Jackson, TN

Bolivar General Hospital
650 Nuckolls Road, Bolivar, TN

Dr. Pravin Patel
407 W. Lafayette St.
Bolivar, TN 38008

Dr. Steven Spring, Psychiatrist
118 S. Main Street
Bolivar, TN 38008

Dr. Karl Warren, Dentist
137 Main Street North
Middleton, TN 38502

Charlotte Montgomery, LPN
727 S. Main Street
Middleton, TN 38052

INTERROGATORY NO. 11: Furnish the name and address of the medical practitioners, hospitals, clinics or other institutions visited by Julie Speck since December 15, 2008, for examination, evaluation or treatment with respect to any injury, illness or disability which she claims to have sustained as a result of the incident alleged in the complaint, stating the diagnosis and prognosis made by each such practitioner or health care provider, and dates of each such visit. (A complete copy of the chart or office record of each such health care provider may be attached to your answers as a response to this interrogatory.)

ANSWER: Please see answer to #2 above and medical records.

INTERROGATORY NO. 12: If you contend that a document relevant to this lawsuit, including, but not limited to, the medical record of Julie Speck at the Woman's Clinic, has been altered or falsified in any way, then answer the following:

a. Identify the document;

b. Specifically identify every part of the document that you contend has been altered or falsified;

c. State the manner in which you contend the document has been altered or falsified; and

d. Identify the person you contend is responsible for the alteration or falsification.

ANSWER:

a. Defendants' Answer to the Complaint
b. Paragraph #12
c. Defendants admit that Dr. Timothy Crossett performed the surgery at West Tennessee Surgery Center. Dr. Roy performed the procedure at Jackson Madison County General Hospital.
d. n/a

INTERROGATORY NO. 13: If Julie Speck will be claiming lost earnings or lost earning capacity as the result of acts or omissions of these Defendants, furnish the following:

a. State the period of time during which Julie Speck claims she was unable to work as a result of the acts or omissions of these Defendants, the amount of earnings she claims

were lost as a result of her inability to work, and the manner in which such amount is computed.

b. If loss of earning capacity or permanent impairment is claimed, state what jobs or occupations she contends were lost, what efforts she made to return to work, and the name and address of each physician who has told her that she has sustained any permanent impairment.

ANSWER: Not applicable.

INTERROGATORY NO. 14: Please list the specific dollar amounts claimed by you as special damages for (a) medical, dental or related services; (b) hospital expenses; (c) loss of earnings; (d) all other items of special damages, naming each category and listing the dollar amount claimed for each and (e) for each expense claimed indicate (i) whether the expense has been paid; (ii) who paid the expense; (iii) the amount actually paid; (iv) whether a lien or right of subrogation exists; (v) the name and address of the entity who holds the lien or right of subrogation; and (vi) the exact amount of the lien or subrogation interest.

ANSWER: This answer will be supplemented as information becomes available.

INTERROGATORY NO. 15: If you have ever been arrested or indicted for a criminal offense that could have resulted in a jail sentence, give the date and place of each such arrest or indictment, the charge placed against you, and the disposition of the case or charge.

ANSWER: None.

INTERROGATORY NO. 16: If you or anyone acting on your behalf has obtained statements in any form from any persons regarding this litigation, furnish the name and address of the person from whom such statements were taken, the names and addresses of the persons having custody of such statements, and whether such statements were written, preserved by recording device, by court reporter, by stenographer, or otherwise.

ANSWER: None, other than statements contained in the medical records.

INTERROGATORY NO. 17: If you have ever filed any other suit or asserted any other claim for damages arising out of personal injury, illness, disability, or property damage suffered by you or any of your children, furnish the date and place such suit or claim was instituted or asserted, the names of all parties involved, and the nature of the injury, illness, disability, or property damage for which the suit or claim was filed or asserted.

ANSWER: None.

INTERROGATORY NO. 18: If you ever filed a claim with or applied to the United States Veterans Administration, the Social Security Administration, or any federal, state, municipal or other governmental agency for disability benefits, dental or orthodontic treatment, medical or dental expenses, medical treatment, hospitalization or related benefits, state when, where and with what agency the claim or application was filed and the nature of the injury, illness or disability for which the claim or application was filed.

ANSWER: Social Security Administration. Filed for disability for anxiety, panic attacks and depression. Claim was denied.

INTERROGATORY NO. 19: If you, your attorney, or any expert witness on your behalf intends to rely upon any text book, scientific journal, or treatise to support your claim, furnish the exact title, publisher, author and date of publication of each such work.

ANSWER: Counsel for Plaintiffs has not yet decided which, if any, text books, scientific journals, or treatises or what expert(s), if any, will be used at trial; however, Counsel for Plaintiffs reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to the above.

INTERROGATORY NO. 20: Please furnish the names, addresses and approximate ages of each of your relatives (by blood and marriage) who presently reside in Madison County.

ANSWER: None.

INTERROGATORY NO. 21: Describe the charts, models, diagrams and similar devices which the Plaintiffs or their attorney or any expert identified in your answers to these interrogatories expects or intends to use in this litigation and in the trial, if any.

ANSWER: Counsel for Plaintiffs has not yet decided which, if any, charts, models, diagrams and similar devices or what expert(s), if any, will be used at trial; however, Counsel for Plaintiffs reserves the right to amend this Response and further agrees to do so, as required, in the event a decision is made as to the above.

INTERROGATORY NO. 22: List the names and addresses of the pharmacies Plaintiffs used in the last ten (10) years.

ANSWER:

Fred's Pharmacy, 110 Chickadee Avenue, Middleton, TN 38052
Wal-Mart, 1604 W. Market Street, Bolivar, Tn 38008
Medical Arts Pharmacy, 407 W. Lafayette Street, Bolivar, TN 38008
Wal-mart, 2717 S. Highland, Jackson, TN 38301
Walgreens, 1405 S. Highland Drive, Jackson, TN 38301
Walgreens, 601 Skyline Drive, Jackson, TN 38301
Walgreens, 1332 N. Highland Avenue, Jackson, TN 38301
Walgreens, 3144 N. Highland Avenue, Jackson, TN 38305
Walgreens, 384 Oil Well Road, Jackson, TN 38305

INTERROGATORY NO. 23: Describe the extent of Julie Speck's education, including all schools attended, the dates of attendance at each school identified, and any and all degrees received.

ANSWER: Middleton Elementary School 1983-1990. Middleton High School 1990-1996. Graduated 1996.

INTERROGATORY NO. 24: State whether any medical treatment you received for injuries alleged in the Complaint was or is being paid for by Medicare or has been submitted to Medicare for payment.

ANSWER: Received Medicaid throughout pregnancy.

INTERROGATORY NO. 25: If Plaintiffs have applied for or received Medicare benefits, state your Medicare Health Insurance Claim Number (HICN) along with your current address and any address you have had in the past ten (10) years.

ANSWER: Recipient ID# 35501026789

INTERROGATORY NO. 26: If you are currently represented by or become represented by an attorney, guardian/conservator, or other representative during the course of this litigation, please state the representative's full name, mailing address, phone number, and Tax ID.

ANSWER: The undersigned is our attorney of record. TAX ID #62-0953325

INTERROGATORY NO. 27: For purposes of Medicare, please state whether the Plaintiffs have end stage renal disease.

ANSWER: None.

69597-MRP

ANSWERED BY:

STATE OF TENNESSEE

COUNTY OF ~~MADISON~~ Hardeman

I, JULIE SPECK, having been first duly sworn, make oath that the foregoing answers to interrogatories are true and correct.

This the 11th day of August, 2011.

Julie Speck
JULIE SPECK

Sworn to and subscribed before me this the 11th day of August, 2011.

Jo Doss
Notary Public

My commission expires: 1-22-2014

JO DOSS
STATE OF TENNESSEE NOTARY PUBLIC
HARDEMAN COUNTY, TN

STATE OF TENNESSEE

COUNTY OF ~~MADISON~~ Hardeman

I, KEVIN SPECK, having been first duly sworn, make oath that the foregoing answers to interrogatories are true and correct.

This the 11th day of August, 2011.

Kevin Speck
KEVIN SPECK

Sworn to and subscribed before me this the 11th day of August, 2011.

Jo Doss
Notary Public

My commission expires: 1-22-2014

JO DOSS
STATE OF TENNESSEE NOTARY PUBLIC
HARDEMAN COUNTY, TN

Respectfully submitted:

GLASSMAN, EDWARDS, WYATT,
TUTTLE & COX, P.C.

BY: _____

Richard Glassman (#7815)
Attorney for Plaintiffs
26 N. Second Street
Memphis, TN 38103
(901) 527-4673 – phone
(901) 521-0940 – fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on this 26 day of August, 2011, by Email or U.S. Mail, postage prepaid to:

Mr. Marty R. Phillips
Michelle Greenway Sellers
Rainey, Kizer, Reviere & Bell, PLC
105 S. Highland Avenue
PO BOX 1147
Jackson, TN 38302-1147

_____
Richard Glassman

IN THE COURT OF APPEALS
WESTERN DISTRICT AT JACKSON

CURTIS MYERS,

Plaintiff,

v.

No. W2010_____
SHELBY CO. NO. CT-004650-09 Div. VI
HONORABLE JERRY STOKES

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

APPLICATION FOR PERMISSION TO APPEAL

THOMASON, HENDRIX, HARVEY,
JOHNSON & MILLER, PLLC

By: _____
Joseph M. Clark (#18590)
Edd Peyton (#25635)
40 S. Main St. #2900
Memphis, TN 38103
(901) 525-8721
Attorneys for Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Order appealed from

Ex. 1. Order Denying Defendants' Collective Motion to Dismiss entered February 16, 2010.

The trial court's statement of reasons for its opinion that an appeal lies

Ex. 2. Order Granting Defendants' Motions for Interlocutory Appeal entered on April 8, 2010.

Other parts of the record necessary for determination of the application for permission to appeal (in order by date filed)

Ex. 3. Complaint for Medical Malpractice filed on January 5, 2007.

Ex. 4. First Amended Complaint for medical Malpractice filed on May 10, 2007.

Ex. 5. Order Granting Voluntary Non-Suit of Plaintiff, Lisa Myers, Only, as to All Defendants filed August 24, 2007.

Ex. 6. Order of Voluntary Nonsuit filed on October 21, 2008.

Ex. 7. Complaint for Medical Malpractice filed September 30, 2009.

Ex. 8. Answer of Defendants, Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC filed October 26, 2009.

Ex. 9. Defendant Tennessee EM-I Medical Services, P.C., Motion to Dismiss filed on November 5, 2009.

Ex. 10. Memorandum of Law in Support of Defendant Tennessee EM-I Medical Services, P.C., Motion to Dismiss filed on November 5, 2009.

Ex. 11. Joinder of Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC in Defendant Tennessee EM-I Medical Services, P.C., Motion to Dismiss filed on November 10, 2009.

Ex. 12. Joinder of Arsalan Shirwany, M.D. and East Memphis, P.C.'s in EM-I Medical Services, P.C., Memorandum in Support of Motion to Dismiss filed on November 10, 2009.

Ex. 13. Plaintiff's Response to Defendant's Collective Motion to Dismiss December 1, 2009.

Ex. 14. Defendant Tennessee EM-I Medical Services, P.C.'s Motion for Interlocutory Appeal filed March 10, 2010.

Ex. 15. Memorandum of Law in Support of Defendant Tennessee EM-I Medical Services, P.C.'s Motion for Interlocutory Appeal filed March 10, 2010.

Ex. 16. Notice of Hearing of Defendant EM-I Medical Services, P.C.'s Motion for Interlocutory Appeal filed March 10, 2010.

Ex. 17. Opposition to Defendants' Motion for Interlocutory Appeal titled in error "Plaintiff's Response to Defendants' Motion to Dismiss" filed March 24, 2010.

Ex. 18. Notice of filing transcript of motion for interlocutory appeal hearing held on March 26, 2010 and filed April _____, 2010. (not filed as of the date this application was bound).

Ex. 19. Transcript of hearing on March 26, 2010 on Defendants' Motion for Interlocutory Appeal filed April _____, 2010. (not filed as of the date this application was bound).

Ex. 20. TENN. CODE ANN. § 29-26-122.

Ex. 21. Excerpt from *Webster's New World College Dictionary,* 3rd Ed., 1997.

Ex. 22. *State v. Saunders*, No. COA03-1437, 2005 N.C. App. LEXIS 24, * 4-5 (N.C. Ct. App. Jan. 4, 2005)

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the Trial Court erred in denying Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC's Motion to Dismiss when Plaintiff failed to comply with the mandates of TENN. CODE ANN. § 29-26-121 and § 29-26-122 which require Plaintiff to give written notice of the potential claim for medical malpractice to each named Defendant at least sixty (60) days before the filing of the Complaint and to file a certificate of good faith with the complaint.

2. Whether the Trial Court erred in finding that the Plaintiff demonstrated "extraordinary cause" to excuse strict compliance with TENN. CODE ANN. § 29-26-121.

STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING OF WHY AN APPEAL BY PERMISSION LIES

This application for appeal arises out of a medical malpractice case in which the Plaintiff, Curtis Myers, filed a complaint in Case No. CT-004650-09 in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis on September 30, 2009. (Ex. 7) (hereinafter "New Complaint"). Plaintiff, along with Lisa Myers, previously filed a complaint in Case No. CT-000091-07 in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis on January 5, 2007. (Exhibit 3). The Complaint in Case No. CT-000091-07 was amended on May 17, 2007. (Exhibit 4) (hereinafter "Old Complaint"). Lisa Myers entered an order granting voluntary nonsuit as to the claims against all Defendants named in the Old Complaint on August 24, 2007. (Exhibit 5). On October 21, 2008, Curtis Myers entered an order of voluntary nonsuit as to the remaining Defendants named in the Old Complaint. (Exhibit 6).

Plaintiff did not provide Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC notice of his intent to file the New Complaint sixty (60) days before its filing as required by TENN. CODE ANN. § 29-26-121. Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC was not provided:

> A. The full name and date of birth of the patient whose treatment is at issue;
>
> B. The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
>
> C. The name and address of the attorney sending the notice, if applicable;

> D. A list of the name and address of all providers being sent a notice; and
>
> E. A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

TENNESSEE CODE ANNOTATED SECTION 29-26-122 provides that "[I]f the certificate is not filed with the Complaint, the Complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause." TENN. CODE ANN. § 29-26-122 (emphasis added). Plaintiff did not include with the New Complaint the Certificate of Good Faith mandated by TENNESSEE CODE ANNOTATED § 29-26-122. Plaintiff did not allege that any provider failed to timely provide copies of his records.

Plaintiff named some but not all of the Old Complaint Defendants in the New Complaint. The stated facts in the New Complaint were substantially the same as the facts in the Old Complaint. One obvious exception was Plaintiff's deletion of the reference to Dr. Larry K. Roberts as the Plaintiff's reading radiologist which appeared in the Old Complaint.

The Plaintiff's allegations of medical malpractice stated in the New Complaint were different than the allegations previously stated in the Old Complaint. The Old Complaint alleged:

> 29. Defendants ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., TENNESSEE EM-I MEDICAL SERVICES, P.A.; EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC; LARRY K. ROERTS, M.D.; MEMPHIS PHYSICIANS GROUP, P.C.; and

AMISUB (SFH), Inc., d/b/a ST. FRANCIS HOSPITAL, individually and/or vicariously by and through their agents, servants and employees, are guilty of one (1) or more of the following acts of negligence, each and every such act being a direct and proximate cause of the Plaintiffs' harms and losses:

(a) Negligently and carelessly failing to exercise that degree of care and skill required of a reasonable and prudent physician and/or nurse under the same or similar circumstances in cities such as Memphis, Shelby County, Tennessee in 2006;

(b) Negligently and carelessly deviating from the recognized standard of acceptable professional practice required and expected of Defendants under the circumstances that existed at all times relevant hereto; and,

(c) Negligently and carelessly failing to properly evaluate, diagnose and/or treat Patient's condition upon admission to SFH ED.

The New Complaint alleged:

36. Dr. Thomas and Dr. Shirwany's treatment of the Plaintiff fell below the applicable standard of care as follows:

a) By failing to engage in proper medical decision making, proper assessment and proper diagnostic processes, including initiating hospitalization and neurological consultation and continued evaluation, monitoring, and facilitation the stabilization of the Plaintiff's condition;

b) By failing to timely recognize the existence of a stroke or similar neurological syndrome such as a transient ischemic attach after the preliminary evaluation of the Plaintiff in the emergency department;

c) By failing to rapidly order a cranial CT scan and timely obtain an interpretation by a qualified radiologist said scan;

d) By failing to recognize the presence of abnormal vital signs, that is hypotension and bradycardia and the need for on-going blood pressure and cardiac monitoring;

e) By failing to form an appropriate preliminary diagnosis of "transient ischemic attack" rather than "dizziness/vertigo acute" which was not supported by the Plaintiff's presentation;

f) By failing to recognize the existence of multiple high risk factors for stroke in the Plaintiff;

g) By failing to recognize abnormal serial EKGs consistent with cardiac ischemia and an abnormal troponin in a patient with multiple risk factors for coronary ischemia and the significance of such with respect to patient disposition.

37. These breaches in the recognized standard of medical practice caused the Plaintiff's wrongful discharge from the SFH ED on July 23, 2006. This wrongful discharge was the reason that the Plaintiff suffered his subsequent cerebral vascular accident at home.

38. These breaches in the recognized standard of care deprived the Plaintiff of timely treatment with anti-platelet, anti-coagulant and/or thrombolytic agents, as well as general medical management of his hypertension and bradycardia in the hospital.

39. But for these breaches in the recognized standard of care, the Plaintiff would not have suffered damages from a cerebrovascular accident in July 2006.

40. TEMS is directly and vicariously liable for Dr. Thomas's [sic] negligent acts and/or omissions.

41. SFH is vicariously liable for Dr. Thomas's [sic] negligent acts and/or omissions.

42. EMCPP is directly and vicariously liable for Dr. Shirwany's negligent acts and/or omissions.

43. SFH is vicariously liable for Dr. Shirwany's negligent acts and/or omissions.

The Trial Court excused the Plaintiff's noncompliance with the requirements of TENN. CODE ANN. § 29-26-122 through a judicial determination of "demonstrated extraordinary cause." In the Order Denying Defendants' Collective Motion to Dismiss, the Trial Court found that "the Plaintiff substantially complied with the requirements of TENN. CODE ANN. §§ 29-26-122 and 29-26-122 because all Defendants had notice of the potential claims against them through the original filing of the Plaintiff's Complaint on January 5, 2007, and the subsequent litigation from that date until the filing of the Plaintiff's voluntary nonsuit on October 21, 2008 . . .." The trial court found "extraordinary cause to excuse strict compliance with the requirements of TENN. CODE ANN. § 29-26-121 . . ." The Trial Court's order did not address "demonstrated extraordinary cause" necessary to excuse compliance with TENN. CODE ANN. § 29-26-122.

The issue on appeal is whether Plaintiff's New Complaint should be dismissed for Plaintiff's failure to file the Certificate of Good Faith mandated by TENN. CODE ANN. § 29-26-122. The record lacks evidence to demonstrate extraordinary cause sufficient to excuse Plaintiff's failure to file a Certificate of Good Faith with his New Complaint.

STATEMENT OF REASONS SUPPORTING AN IMMEDIATE APPEAL

The Trial Court's February 16, 2010 order denying Defendants' Collective Motion to Dismiss is not a final judgment. (Exhibit 1). *See also* TENN. R. CIV. P. 54.01. Interlocutory appeals of such orders are governed by TENN. R. APP. P. 9. Rule 9(a) of the Tennessee Rules of Appellate Procedure provides for the following considerations to be taken into account when determining whether an interlocutory appeal should be granted:

> Except as provided in Rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

TENN. R. APP. P. 9(a).

Pursuant to Rule 9(d) of the TENNESSEE RULES OF APPELLATE PROCEDURE, Defendants Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC incorporate by reference the trial court's reasons for its opinion that an appeal lies.

A. Standard of Review

Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC's motion to dismiss the New Complaint is a motion to dismiss for failure to state a claim pursuant to Rule 12.02(6). "A Rule 12.02(6) motion to dismiss only seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof...." *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). The trial court's dismissal of a complaint pursuant to Rule 12.02(6) presents a question of law to be reviewed *de novo* without a presumption of correctness to the conclusions reached below. *Conley v. State*, 141 S.W.3d 591, 594-95 (Tenn. 2004).

Whether the Trial Court erred in finding that the Plaintiff demonstrated "extraordinary cause" to excuse Plaintiff's failure to comply with TENN. CODE ANN. § 29-26-121 and § 29-26-121 is a question of statutory construction. A question of statutory construction presents a question of law that is to be reviewed de novo without a presumption of correctness to the conclusions reached below. *Conley*, 141 S.W.3d at 595.

B. A Complaint which does not contain a Certificate of Good Faith shall be dismissed absent demonstrated extraordinary cause.

In a medical malpractice action, Tennessee law requires that the claimant file a Certificate of Good Faith with the Complaint. TENN. CODE ANN. § 29-26-122. The statute establishes that any expert in a medical malpractice action must meet certain requirements:

> (a) ... if the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection

> (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause.
>
> . . .
>
> (c) The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice.

TENN. CODE ANN. § 29-26-122.

Plaintiff did not file a Certificate of Good Faith with the New Complaint. (Ex. 7). Pursuant to the statute, the New Complaint shall be dismissed absent a showing that the failure to provide the certificate was due to the failure of the provider to timely provide copies of the Plaintiff's medical records or "demonstrated extraordinary cause." Plaintiff does not allege that any provider failed to timely provide records. Thus, Plaintiff may only save his New Complaint from dismissal by demonstrated extraordinary cause.

The Order Denying Defendants' Collective Motion to Dismiss does not contain any finding of demonstrated extraordinary cause as required by TENN. CODE ANN. § 29-26-122. (Ex. 1). The order stops short of this requirement by stating that "Plaintiff substantially complied with the requirements of TENN. CODE ANN. §§ 29-26-121 and § 29-26-122 ..." *Id.* The Trial Court's order solely found "extraordinary cause to excuse strict compliance with TENN. CODE ANN. §§ 29-26-121." *Id.*

Even if the Trial Court's order was interpreted to find demonstrated extraordinary cause with respect to the requirements of TENN. CODE ANN. § 29-26-122, the record would still support the dismissal of Plaintiff's New Complaint. Demonstrated extraordinary cause is not defined in TENN. CODE ANN. § 29-26-121, § 29-26-122 or any other statute with the Tennessee Code Annotated. Defendants have been unable to find

any Tennessee case law defining "demonstrated extraordinary cause" or addressing the claimant's burden to demonstrate extraordinary cause.

The interpretation of TENN. CODE ANN. § 29-29-122 is a question of law to be discerned under the rules governing statutory construction. Courts interpret statutes as follows:

> The primary rule governing our construction of any statute is to ascertain and give effect to the legislature's intent. To that end, we begin by examining the language of the statute. In our examination of statutory language, we must presume that the legislature intended that each word be given full effect. When the language of a statute is ambiguous in that it is subject to varied interpretations producing contrary results, we construe the statute's meaning by examining "the broader statutory scheme, the history of the legislation, or other sources." However, when the import of a statute is unambiguous, we discern legislative intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning."

In re Hogue, 286 S.W.3d 890, 894 (Tenn. 2009)(internal citations omitted).

TENNESSEE CODE ANNOTATED § 29-26-122 states:

> (a) ... if the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause.

TENN. CODE ANN. § 29-26-122. (Copy attached as Ex. 20). The language of TENN. CODE ANN. § 29-26-122 is unambiguous. Thus, the legislative meaning of the statute is to be determined from its "natural and ordinary meaning..." See *In re Hogue*, 286 S.W.3d at 894. The natural and ordinary meaning of "extraordinary" is 1) "not according

to the usual custom or regular plan," 2) "going far beyond the ordinary degree, measure, limit, etc.; very usual; exceptional; remarkable." *Webster's New World College Dictionary,* 3rd Ed., 1997. (Copy attached as Ex. 21). A North Carolina court defines "extraordinary cause" as "cause going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *State v. Saunders*, No. COA03-1437, 2005 N.C. App. LEXIS 24, * 4-5 (N.C. Ct. App. Jan. 4, 2005)(copy attached hereto as Ex. 22).

The record before this Court provides no basis upon which the Plaintiff can demonstrate a cause meeting the above definitions of extraordinary which would have prevented Plaintiff from filing the Certificate of Good Faith with his New Complaint. The reasons Plaintiff failed to file the Certificate of Good Faith are not explicitly documented in the record. Plaintiff argues in his response to motions to dismiss that he filed expert disclosures in the course of discovery related to the Old Complaint. (See Ex. 13). The record demonstrates that Plaintiff nonsuited his Old Complaint and substantially changed the allegations of medical malpractice in the New Complaint. With this occurrence, Plaintiff was required to comply with TENN. CODE ANN. § 29-26-122's requirements to certify his consultation with an expert competent to testify in accordance with TENN. CODE ANN. § 29-26-115 regarding the new allegations.

The Trial Court states that "the Plaintiff substantially complied with the requirements of TENN. CODE ANN. § 29-26-121 and 29-26-122 because the Defendants had notice of potential claims against them and the existence of Plaintiff's expert through the original filing of the Plaintiff's Complaint on January 5, 2007 and the subsequent

litigation . . . until the filing of Plaintiff's voluntary nonsuit on October 21, 2008 under docket number CT-000091-07." The previous discovery was premised on the allegations in the Old Complaint. Further Plaintiff presumably had available to him his medical records and the expert from the prior case when he filed the New Complaint. This record suggests no reason why Plaintiff could not comply with the plainly worded mandates of TENN. CODE ANN. § 29-26-122. The statute calls for full compliance absent delay in obtaining records or demonstrated extraordinary cause. Plaintiff's access to records was not delayed. Plaintiff did not meet his burden of demonstrating extraordinary cause.

CONCLUSION

Based upon the foregoing, and in the interest of judicial economy, Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC, respectfully requests that this Court grant their application for interlocutory appeal and reverse the Trial Court's denial of Defendants' Motion to Dismiss.

Respectfully submitted,

THOMASON, HENDRIX, HARVEY,
JOHNSON & MILLER, PLLC

By: _____

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Edd Peyton (#25635)
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Attorneys for Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following via U.S. Mail, postage prepaid, addressed as follows:

Mr. Bill M. Wade
THE COCHRAN FIRM – MEMPHIS
One Commerce Square, 26th Floor
Memphis, TN 38103

Mr. W. Timothy Hayes, Jr.
HARDISON FIRM
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Memphis, TN 38103

Mr. Marty R. Phillips
Ms. Michelle Greenway Sellers
RAINEY KIZER
105 S. Highland Ave.
Jackson, TN 38301

Dated this 15th day of APRIL, 2010.

Edd L. Peyton

4845-3831-7317, v. 1

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

FILED

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Div. 6

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL, et al.,

Defendants.

ORDER DENYING DEFENDANTS' COLLECTIVE MOTION TO DISMISS

This matter came before the Court pursuant to the Motion to Dismiss filed by Defendant Tennessee EM-I Medical Services, P.C. ("TEMS"), and later joined by all remaining Defendants. The Court found that the Plaintiff substantially complied with the requirements of TENN. CODE ANN. §§29-26-121 and 29-26-122 because all Defendants had notice of both the potential claims against them and the existence of the Plaintiff's medical expert through the original filing of the Plaintiff's Complaint on January 5, 2007, and the subsequent litigation from that date until the filing of the Plaintiff's voluntary nonsuit on October 21, 2008 under docket number CT-000091-07. Furthermore, given the unique circumstances of this case, it appears to the Court that it should exercise its discretion pursuant to TENN. CODE ANN. §29-26-121(b) and should find extraordinary cause to excuse strict compliance with TENN. CODE ANN. §29-26-121, to the extent such strict compliance is required.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Defendants' collective Motion to Dismiss is hereby denied.

Hon. Jerry Stokes, Division VI
Shelby County Circuit Court

Date: _____

AGREED AND APPROVED BY:

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Certificate of Service

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing motion was served upon all counsel to this matter in conformity with the Tennessee Rules of Civil Procedure on this _____ day of February 2010.

Bill M. Wade

62183-MRP

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs. **No. CT-004650-09, DIV. VI**

AMISUB (SFH), INC., d/b/a ST. FRANCIS HOSPITAL; SHEILA B. THOMAS, D.O.; ARSALAN SHIRWANY, M.D.; TENNESSEE EM-I MEDICAL SERVICES, P.C.; and EAST TENNESSEE CHEST PAIN PHYSICIANS, PLLC,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR INTERLOCUTORY APPEAL

This matter came before the Court upon Motions by Defendants, Tennessee EM-I Medical Services, P.C.; AMISUB (SFH), INC., d/b/a St. Francis Hospital; Arsalan Shirwany, M.D.; and East Tennessee Chest Pain Physicians, PLLC, to have Plaintiff's Complaint dismissed based on Plaintiff's failure to comply with Tennessee Code Annotated §§ 29-26-121 and 29-26-122. On December 10, 2009, the Court heard argument on Defendants' Motions to Dismiss. On February 16, 2010, the Court entered an Order Denying Defendants' Collective Motion to Dismiss. Defendant Tennessee EM-I Medical Services, P.C. subsequently filed a Motion for Interlocutory Appeal on March 10, 2010. Defendants Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC filed a Motion for Interlocutory Appeal on March 15, 2010. Defendant AMISUB (SFH), INC., d/b/a St. Francis Hospital filed a Joinder in the Motion for Interlocutory Appeal on March 18, 2010.

On March 26, 2010, the Court heard argument on Defendants' Motions for Interlocutory Appeal of the Order Denying Defendants' Collective Motion to Dismiss. After carefully considering the arguments of counsel and the entire record in this case, the Court finds that Defendants' Motions for Interlocutory Appeal are well-taken and should be granted for the reasons set forth herein. Specifically, the Court finds that all three of the criteria that courts are instructed to consider when determining whether to grant permission to appeal, as set forth in Rule 9 of the *Tennessee Rules of Appellate Procedure*, are present in this case.

The primary reason supporting an interlocutory appeal in this case is the need to prevent needless, expensive, and protracted litigation, where immediate appellate review will undoubtedly save the parties a vast amount of time and expense, and will conserve a significant amount of judicial resources, if the challenged order is reversed. It is undisputed that the issue raised by Defendants' Motions to Dismiss is a legal issue which is fully ripe for adjudication. Certainly, the challenged order would be a clear basis for reversal upon entry of a final judgment if Defendants' position is correct.

This is a medical malpractice action in which the Plaintiff seeks an unspecified amount in compensatory damages. At the present time this case is not set for trial. A considerable amount of discovery, pre-trial preparation, and trial work remains to be completed. If the Defendants are required to complete all discovery, draft and argue pre-trial motions, confer with experts, prepare witnesses for trial, endure a lengthy trial and draft and argue post-trial motions before Defendants present the issue raised for appellate review, a tremendous amount of time, money, and judicial resources will have been wasted if this Court's ruling is subsequently reversed by the Court of Appeals.

Moreover, based upon the specific facts of this case and the issues presented, this Court recognizes how the Court of Appeals could find that reversal is appropriate. The Court recognizes that Tennessee Code Annotated §§ 29-26-121 and 122 took effect on July 1, 2009 and Plaintiff's Complaint was filed on September 30, 2009, over 90 days after the effective date of the statutes at issue in this matter. The Court recognizes that "demonstrated extraordinary cause" is not defined in Tennessee Code Annotated § 29-26-122.

Another very important reason supporting an interlocutory appeal in this case is the need to develop a uniform body of law. It is also readily apparent that a uniform body of law does not presently exist in this State regarding what constitutes "demonstrated extraordinary cause" as set forth in Tennessee Code Annotated §§ 29-26-121(a). It is also readily apparent that a uniform body of law does not exist in this State regarding whether Tennessee Code Annotated §§ 29-26-121 and 122 apply to medical malpractice cases filed more than sixty (60) days after the effective date of the statutes to a case that was previously filed, especially where the parties and the allegations contained in the Complaints are not the same.

Finally, if Defendants' position is correct, the Defendants would certainly suffer an irreparable injury by having to go through an expensive, stressful, and unnecessary trial. Having the Court of Appeals review this issue after a final judgment would be completely ineffective and inefficient, taking into account the need to conserve judicial resources, the interests of judicial economy, and the interest of protecting the parties from irreparable injuries. The Court also notes that the Plaintiff would be forced to needlessly expend

substantial money and time as well to pursue this case if the Defendants' position is correct.

Accordingly, the Court has determined that an interlocutory appeal would serve the interest of judicial economy, the preservation of judicial resources, and the resources of the parties to the litigation. The Court further concludes that this challenged order involves a narrow issue which is fully ripe for adjudication and which would lead to the dismissal of this entire claim if the Defendants' position is correct. Consequently, this Court grants the Defendants' Motions for an Interlocutory Appeal and respectfully requests the Tennessee Court of Appeals to accept this appeal and decide this important issue.

IT IS SO ORDERED.

Jerry Stokes

HON. JERRY STOKES, Division VI
Shelby County Circuit Court

4-8-10
Date

A TRUE COPY ATTEST
JIMMY MOORE, Clerk
By _____ D.C.

AGREED TO AND APPROVED FOR ENTRY:

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and East Memphis Chest Pain Physicians, PLLC

S1900/149813

JAN 16 2007

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

JAN 05 2007

CIRCUIT COURT CLERK
BY D.C.

CURTIS MYERS and
LISA MYERS,

Plaintiffs,

v.

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
UT MEDICAL GROUP, INC.;
LARRY K. ROBERTS, M.D.; and
MEMPHIS PHYSICIANS
RADIOLOGICAL GROUP, P.C.,

Defendants.

CASE NO. CT-006091-07
JURY DEMANDED
DIV VI

COMPLAINT FOR MEDICAL MALPRACTICE

COME NOW the plaintiffs, CURTIS MYERS (the "Patient") and LISA MYERS, and state as follows for their cause of action against the defendants, ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., UT MEDICAL GROUP, INC.; LARRY K. ROBERTS, M.D.; MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.; and AMISUB ("SFH"), INC. d/b/a ST. FRANCIS HOSPITAL, (collectively "Defendants"):

PARTIES AND JURISDICTION

1. Plaintiff CURTIS MYERS is an adult resident citizen of Memphis, Shelby County, Tennessee.

2. Plaintiff LISA MYERS is an adult resident citizen of Memphis, Shelby County, Tennessee. LISA MYERS was lawfully married to CURTIS MYERS at all

times relevant hereto.

3. Upon information and belief, Defendant ARSALAN SHIRWANY, M.D. ("Dr. SHIRWANY") was employed by Defendant UT MEDICAL GROUP, INC. ("UTMG") at all times relevant hereto and provided medical care and treatment to Patient as alleged herein. According to Patient's medical records from Saint Francis Hospital – Memphis ("SFH"), Dr. SHIRWANY was Patient's emergency room physician on July 23, 2006.

4. Upon information and belief, Defendant SHEILA B. THOMAS, D.O. ("Dr. THOMAS"), was employed by Defendant UTMG, and at all times relevant hereto provided medical care and treatment to Patient as alleged herein. According to Patient's medical records from SFH, Dr. THOMAS was Patient's emergency room physician on July 23, 2006. In the alternative, Defendant Dr. THOMAS was employed by The University of Tennessee Health Sciences Center.

5. Upon information and belief, Defendant UTMG is a Tennessee corporation. Defendant UTMG is and was at all times relevant hereto a for profit corporation licensed and doing business in the State of Tennessee, with its principal place of business located in Memphis, Shelby County. Upon information and belief and at all times relevant hereto, Defendant UTMG staffed the Emergency Department ("ED") at SFH. Defendant UTMG is liable for the acts and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided medical care and/or treatment to Patient including, but not limited to, Defendant Dr. SHIRWANY and Dr. THOMAS.

6. Upon information and belief, Defendant LARRY K. ROBERTS, M.D. ("Dr. ROBERTS") was employed by Defendant MEMPHIS PHYSICIANS

RADIOLOGICAL GROUP, P.C. at all times relevant hereto and provided medical care and treatment to Patient as alleged herein. According to Patient's medical records from SFH, Dr. ROBERTS was Patient's reading radiologist on July 23, 2006.

7. Upon information and belief, Defendant MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C. ("MPRG") is a Tennessee professional corporation. Defendant MPRG is and was at all times relevant hereto a for profit professional corporation licensed and doing business in the State of Tennessee, with its principal place of business located in Memphis, Shelby County. At all times relevant hereto, Defendant MPRG provided radiology services to the SFH ED. Defendant MPRG is liable for the acts and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided radiological services to Patient including, but not limited to, Defendants Dr. ROBERTS.

8. Upon information and belief, Defendant AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL ("SFH") is and was at all times relevant hereto a hospital facility licensed in and by the state of Tennessee, and provided services to Patient within the Memphis, Shelby County area on July 23, 2006. Defendant SFH is vicariously, or otherwise liable, for the acts and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided care and/or treatment to Patient including, but not limited to, Defendants Dr. SHIRWANY, Dr. THOMAS, Dr. ROBERTS, and the nursing staff at SFH.

9. This cause of action arises in tort and as a result of injuries and damages proximately caused by the negligence of Defendants in Memphis, Shelby County, Tennessee.

10. This is a proper venue for litigation of all issues in controversy, and this Court has jurisdiction over the parties and subject matter involved.

FACTS

11. Patient was 45 years old when he arrived at Defendant SFH's ED on July 23, 2006 at 12:08 p.m. His initial complaints were noted to be "left eye pain, dizziness, slurred speech, and difficult walking."

12. Patient's records indicate that his triage was completed at 12:09 p.m. Patient's blood glucose was noted to be 127 at 12:14 p.m. Patient had an "acuity level" of 3.

13. Patient was moved to "CP2" at 12:40 p.m. Defendant Dr. SHIRWANY is noted as Patient's "[a]ttending physician" at 12:49 p.m. Defendant Dr. SHIRWANY visited Patient at 12:50 p.m.

14. Defendant Dr. ROBERTS is noted as Patient's "reading radiologist" on an "Unenhanced Cranial CT Scan" report with a time noted as 1:43 p.m. Defendant Dr. ROBERTS read Patient's CT as a "negative study." He noted a clinical history of "dizziness, left eye pain," as well as a diagnosis of "slurred speech, dizziness."

15. The "CPEC/Stroke Center Nurses Notes" indicate that Defendant Dr. SHIRWANY requested Patient to be sent to Defendant SFH's ED at 1:45 p.m.

16. Defendant Dr. SHIRWANY "handed off" Patient to Defendant Dr. THOMAS at 1:32 p.m.

17. Patient's "Emergency Physician Record" was filled out at 1:45 p.m. and noted a past medical history of diabetes, high blood pressure, elevated cholesterol, and heart disease. He was noted to have a burning left eye, dizziness, and difficulty walking.

18. Defendant Dr. THOMAS diagnosed Patient with unspecified vertigo on July 23, 2006, and prescribed him Antivert (25 mg) and Phenergan (25 mg).

19. Patient was discharged from SFH at 5:28 p.m.

20. Patient presented to Defendant SFH's ED the following day, July 24, 2006, at 10:38 a.m. The "Triage Note" relates that Patient was seen in the office of his primary care physician, Dr. Phillip Mintz, earlier that day and Dr. Mintz referred him to the emergency room for further evaluation. Patient's admitting physician was Dr. David M. Sharfman.

21. Patient's "acuity level" was noted as 2. Patient related complaints of slurred speech, general facial numbness, blurred vision, and right side weakness. He was also noted to have diplopia and difficulty coordinating his eye movements.

22. The ED "Flow Sheet" notes that Patient underwent a CT scan to the head at 10:55 a.m. However, the "Nurse's Notes" relate that Patient was moved to CT scan at 11:24 a.m.

23. The records reflect that Patient's CT scan was interpreted by his reading radiologist, Dr. Loi T. Vu, at 11:13 a.m. Patient's ED "Flow Sheet" notes that his CT scan results were "still pending" at 11:55 a.m. The "Flow Sheet" indicates that the CT scan results were "obtained" at 12:15 p.m.

24. Dr. Vu read Patient's July 24, 2006 CT scan and found that it was not "significantly" changed from the July 23, 2006 CT scan that was read by Defendant Dr. ROBERTS. Dr. Vu read this CT scan as showing a lacunar infarct versus small vessel disease.

25. Dr. Sharfman's "Discharge Summary" relates that Patient was seen by Dr.

Juan Rivera from neurology, and Dr. Ken Dempsey from cardiology.

26. Dr. Rivera noted that Patient's July 24, 2006 CT scan was positive for a left caudate lacunar infarct. His impression was that Patient had experienced a "left lacunar stroke, with resultant right-sided incoordination and dysarthria – often known as clumsy band dysarthric syndrome."

27. During Patient's July 24, 2006 hospitalization, he received anticoagulation therapy with heparin, as well as aspirin. Patient was discharged from Defendant SFH on July 27, 2006.

ACTS OF NEGLIGENCE, MEDICAL MALPRACTICE AND DEVIATIONS FROM THE STANDARD OF CARE

28. Defendants ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., UT MEDICAL GROUP, INC.; LARRY K. ROBERTS, M.D.; MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.; and AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL, individually and/or vicariously, by or through their agents, servants and employees, are guilty of one (1) or more of the following acts of negligence, each and every such act being a direct and proximate cause of the Plaintiffs' harms and losses:

(a) Negligently and carelessly failing to exercise that degree of care and skill required of a reasonable and prudent physician and/or nurse under the same or similar circumstances in cities such as Memphis, Shelby County, Tennessee in 2006;

(b) Negligently and carelessly deviating from the recognized standard of acceptable professional practice required and expected of Defendants under the circumstances that existed at all times

relevant hereto; and

(c) Negligently and carelessly failing to properly evaluate, diagnose and/or treat Patient's condition upon admission to SFH ED.

INJURIES AND DAMAGES

29. As the sole, direct and proximate result of Defendants' negligence, Patient suffered injuries that would not otherwise have occurred. Patient's injuries include, but are not necessarily limited to, permanent physical injury, lost income (past and future), pain and suffering (past, present and future), loss of enjoyment of life (past, present and future), and other damages allowed by law.

30. As the direct result of Defendants' negligent conduct, Plaintiff LISA MYERS, as the wife of Plaintiff CURTIS MYERS, has endured the loss of affection, companionship, care, assistance, attention, protection, support, advice, guidance, and counsel of her husband, and has suffered great mental anguish, for which she is entitled to recover damages.

TRIAL BY JURY

31. Patient respectfully demands a jury to try this cause.

WHEREFORE, Patient sues the defendants, ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., UT MEDICAL GROUP, INC.; LARRY K. ROBERTS, M.D.; MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.; and AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL, for the following:

(1) Compensatory damages in an amount up to and including Three Million Five Hundred Thousand Dollars ($3,500,000.00);

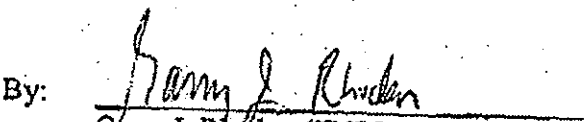
(2) An award of post-judgment interest as allowed by law;

(3) An award of costs herein; and

(4) For all such other and further relief, general and specific, legal and equitable, to which Patient is entitled.

Respectfully submitted:

THE COCHRAN FIRM – MEMPHIS
One Commerce Square, Suite 2600
Memphis, Tennessee 38103
(901)523-1222 – telephone
(901)523-1999 – facsimile

By: 
Garry J. Rhoden (TNBPR No. 024815)

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

CURTIS MYERS and
LISA MYERS,

Plaintiffs,

v.

CASE NO. CT-00000091-07 Div. VI
JURY DEMANDED

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.A.;
EAST MEMPHIS CHEST
PAIN PHYSICIANS, PLLC;
LARRY K. ROBERTS, M.D.; and
MEMPHIS PHYSICIANS
RADIOLOGICAL GROUP, P.C.,

Defendants.

FIRST AMENDED COMPLAINT FOR MEDICAL MALPRACTICE

COME NOW the plaintiffs, CURTIS MYERS (the "Patient") and LISA MYERS, and state as follows for their cause of action against the defendants, ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., LARRY K. ROBERTS, M.D.; TENNESSEE EM-I MEDICAL SERVICES, P.A.; EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC; MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.; and AMISUB ("SFH"), INC. d/b/a ST. FRANCIS HOSPITAL, (collectively "Defendants"):

PARTIES AND JURISDICTION

1. Plaintiff CURTIS MYERS is an adult resident citizen of Memphis, Shelby County, Tennessee.

2. Plaintiff LISA MYERS is an adult resident citizen of Memphis, Shelby County, Tennessee. LISA MYERS was lawfully married to CURTIS MYERS at all times relevant hereto.

3. Upon information and belief, Defendant EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC ("EMCPP") is a Tennessee professional corporation. Defendant ETCPP is and was at all times relevant hereto a for profit professional corporation licensed and doing business in the State of Tennessee, with its principal place of business located in Memphis, Shelby County. At all times relevant hereto, Defendant ETCPP provided medical staffing to the SFH ED. Defendant EMCPP is liable for the acts and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided radiological services to Patient including, but not limited to, Defendants Dr. SHIRWANY.

4. Upon information and belief, Defendant ARSALAN SHIRWANY, M.D. ("Dr. SHIRWANY") was employed by Defendant ETCPP at all times relevant hereto and provided medical care and treatment to Patient as alleged herein. According to Patient's medical records from Saint Francis Hospital – Memphis ("SFH"), Dr. SHIRWANY was Patient's emergency room physician on July 23, 2006.

5. Upon information and belief, Defendant TENNESSEE EM-I MEDICAL SERVICES, P.A. ("EM-I") is a Tennessee professional corporation. Defendant EM-I is and was at all times relevant hereto a for profit professional corporation licensed and doing business in the State of Tennessee, with its principal place of business located in Memphis, Shelby County. At all times relevant hereto, Defendant EM-I provided medical staffing to the SFH ED. Defendant EM-I is liable for the acts and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided radiological services to Patient including, but not limited to, Defendants Dr. THOMAS.

6. Upon information and belief, Defendant SHEILA B. THOMAS, D.O. ("Dr. THOMAS"), was employed by Defendant EM-I, and at all times relevant hereto provided medical care and treatment to Patient as alleged herein. According to Patient's medical records from SFH, Dr. THOMAS was Patient's emergency room physician on July 23, 2006. In the alternative, Defendant Dr. THOMAS was employed by The University of Tennessee Health Sciences Center.

7. Upon information and belief, Defendant MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C. ("MPRG") is a Tennessee professional corporation. Defendant MPRG is and was at all times relevant hereto a for profit professional corporation licensed and doing business in the State of Tennessee, with its principal place of business located in Memphis, Shelby County. At all times relevant hereto, Defendant MPRG provided radiology services to the SFH ED. Defendant MPRG is liable for the acts and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided radiological services to Patient including, but not limited to, Defendants Dr. ROBERTS.

8. Upon information and belief, Defendant LARRY K. ROBERTS, M.D. ("Dr. ROBERTS") was employed by Defendant MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C. at all times relevant hereto and provided medical care and treatment to Patient as alleged herein. According to Patient's medical records from SFH, Dr. ROBERTS was Patient's reading radiologist on July 23, 2006.

9. Upon information and belief, Defendant AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL ("SFH") is and was at all times relevant hereto a hospital facility licensed in and by the state of Tennessee, and provided services to Patient within the Memphis, Shelby County area on July 23, 2006. Defendant SFH is vicariously, or otherwise liable, for the acts

and/or omissions of its employees, agents and/or servants, ostensible or otherwise, who provided care and/or treatment to Patient including, but not limited to, Defendants Dr. SHIRWANY, Dr. THOMAS, Dr. ROBERTS, and the nursing staff at SFH.

10. This cause of action arises in tort and as a result of injuries and damages proximately caused by the negligence of Defendants in Memphis, Shelby County, Tennessee.

11. This is a proper venue for litigation of all issues in controversy, and this Court has jurisdiction over the parties and subject matter involved.

FACTS

12. Curtis Myers was 45 years old when he arrived at St. Francis Hospital's Emergency Department ("SFH ED") on July 23, 2006, at 12:08 p.m. His initial complaints were noted to be "left eye pain, dizziness, slurred speech, and difficulty walking."

13. Patient's records indicate that his triage was completed at 12:09 p.m. Patient's blood glucose was noted to be 127 at 12:14 p.m. Patient had an "acuity level" of 3.

14. Patient was moved to "CP2" at 12:40 p.m. Defendant Dr. SHIRWANY is noted as Patient's "[a]ttending physician" at 12:49 p.m. Defendant Dr. SHIRWANY visited Patient at 12:50 p.m.

15. Defendant Dr. ROBERTS is noted as Patient's "reading radiologist" on an "Unenhanced Cranial CT Scan" report with a time noted as 1:43 p.m. Defendant Dr. ROBERTS read Patient's CT as a "negative study." He noted a clinical history of "dizziness, left eye pain," as well as a diagnosis of "slurred speech, dizziness."

16. The "CPEC/Stroke Center Nurses Notes" indicate that Defendant Dr. SHIRWANY requested Patient to be sent to Defendant SFH's ED at 1:45 p.m.

17. Defendant Dr. SHIRWANY "handed off" Patient to Defendant Dr. THOMAS at 1:32 p.m.

18. Patient's "Emergency Physician Record" was filled out at 1:45 p.m. and noted a past medical history of diabetes, high blood pressure, elevated cholesterol, and heart disease. He was noted to have a burning left eye, dizziness, and difficulty walking.

19. Defendant Dr. THOMAS diagnosed Patient with unspecified vertigo on July 23, 2006, and prescribed him Antivert (25 mg) and Phenergan (25 mg).

20. Patient was discharged from SFH at 5:28 p.m.

21. Patient presented to Defendant SFH's ED the following day, July 24, 2006, at 10:38 a.m. The "Triage Note" relates that Patient was seen in the office of his primary care physician, Dr. Phillip Mintz, earlier that day and Dr. Mintz referred him to the emergency room for further evaluation. Patient's admitting physician was Dr. David M. Sharfman.

22. Patient's "acuity level" was noted as 2. Patient related complaints of slurred speech, general facial numbness, blurred vision, and right side weakness. He was also noted to have diplopia and difficulty coordinating his eye movements.

23. The ED "Flow Sheet" notes that Patient underwent a CT scan to the head at 10:55 a.m. However, the "Nurse's Notes" relate that Patient was moved to CT scan at 11:24 a.m.

24. The records reflect that Patient's CT scan was interpreted by his reading radiologist, Dr. Loi T. Vu, at 11:13 a.m. Patient's ED "Flow Sheet" notes that his CT scan results were "still pending" at 11:55 a.m. The "Flow Sheet" indicates that the CT scan results were "obtained" at 12:15 p.m.

25. Dr. Vu read Patient's July 24, 2006 CT scan and found that it was not "significantly" changed from the July 23, 2006 CT scan that was read by Defendant Dr. ROBERTS. Dr. Vu read this CT scan as showing a lacunar infarct versus small vessel disease.

26. Dr. Sharfman's "Discharge Summary" relates that Patient was seen by Dr. Juan Rivera from neurology, and Dr. Ken Dempsey from cardiology.

27. Dr. Rivera noted that Patient's July 24, 2006 CT scan was positive for a left caudate lacunar infarct. His impression was that Patient had experienced a "left lacunar stroke, with resultant right-sided incoordination and dysarthria – often known as clumsy band dysarthric syndrome."

28. During Patient's July 24, 2006 hospitalization, he received anticoagulation therapy with heparin, as well as aspirin. Patient was discharged from Defendant SFH on July 27, 2006.

ACTS OF NEGLIGENCE, MEDICAL MALPRACTICE AND DEVIATIONS FROM THE STANDARD OF CARE

29. Defendants ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., TENNESSEE EM-I MEDICAL SERVICES, P.A.; EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC; LARRY K. ROBERTS, M.D.; MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.; and AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL, individually and/or vicariously, by or through their agents, servants and employees, are guilty of one (1) or more of the following acts of negligence, each and every such act being a direct and proximate cause of the Plaintiffs' harms and losses:

(a) Negligently and carelessly failing to exercise that degree of care and skill required of a reasonable and prudent physician and/or nurse under the same or similar circumstances in cities such as Memphis, Shelby County, Tennessee in 2006;

(b) Negligently and carelessly deviating from the recognized standard of acceptable professional practice required and expected of Defendants under the circumstances that existed at all times relevant hereto; and

(c) Negligently and carelessly failing to properly evaluate, diagnose and/or treat Patient's condition upon admission to SFH ED.

INJURIES AND DAMAGES

30. As the sole, direct and proximate result of Defendants' negligence, Patient suffered injuries that would not otherwise have occurred. Patient's injuries include, but are not necessarily limited to, permanent physical injury, lost income (past and future), pain and suffering (past, present and future), loss of enjoyment of life (past, present and future), and other damages allowed by law.

31. As the direct result of Defendants' negligent conduct, Plaintiff LISA MYERS, as the wife of Plaintiff CURTIS MYERS, has endured the loss of affection, companionship, care, assistance, attention, protection, support, advice, guidance, and counsel of her husband, and has suffered great mental anguish, for which she is entitled to recover damages.

TRIAL BY JURY

32. Patient respectfully demands a jury to try this cause.

WHEREFORE, Patient sues the defendants, ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., TENNESSEE EM-I MEDICAL SERVICES, P.A.; EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC; LARRY K. ROBERTS, M.D.; MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.; and AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL, for the following:

(1) Compensatory damages in an amount up to and including Three Million Five Hundred Thousand Dollars ($3,500,000.00);

(2) An award of post-judgment interest as allowed by law;

(3) An award of costs herein; and

(4) For all such other and further relief, general and specific, legal and equitable, to which Patient is entitled.

Respectfully submitted:

THE COCHRAN FIRM – MEMPHIS
One Commerce Square, Suite 2600
Memphis, Tennessee 38103
(901)523-1222 – telephone
(901)523-1999 – facsimile

By: _____
Garry J. Rhoden (TNBPR No. 024815)

FILED

AUG 24 2007

CIRCUIT COURT CLERK
BY _____ D.C.

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

CURTIS MYERS
and LISA MYERS,

Plaintiffs,

v.

CASE NO. CT-00009407 Div. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
UT MEDICAL GROUP, INC.;
LARRY K. ROBERTS, M.D.; and
MEMPHIS PHYSICIANS
RADIOLOGICAL GROUP, P.C.,

Defendants.

**ORDER GRANTING VOLUNTARY NON-SUIT
OF PLAINTIFF, LISA MYERS, ONLY, AS TO ALL DEFENDANTS**

Upon notice of voluntary non-suit as to the claims against all Defendants, filed by the plaintiff, LISA MYERS, pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure, it is,

ORDERED, ADJUDGED AND DECREED that a voluntary non-suit without prejudice is granted on behalf of Plaintiff, LISA MYERS, only, as to the claims against all Defendants.

Entered this 24th day of August, 2007.

JUDGE

APPROVED AS TO FORM:

Garry J. Rhoden w/permission WBS (#018730)

GARRY J. RHODEN (#24815)
Attorney for Plaintiff
One Commerce Square, 26th Floor
Memphis, Tennessee 38103
(901) 523-1222

Darrell Baker w/permission WBS (#018730)

DARRELL BAKER (#16388)
Attorney for Defendants, Memphis Physicians
Radiological Group, P.C. and Larry K. Roberts, M.D.
6800 Poplar Avenue, Suite 205
Memphis, TN 38138

Marty R. Phillips w/permission WBS (#018730)

MARTY R. PHILLIPS (#14990)
Attorney for Defendant Sheila B. Thomas, D.O.
65 Germantown Court, Suite 209
Cordova, TN 38018

Bruce McMullen w/permission WBS (#018730)

BRUCE MCMULLEN (#18126)
Attorney for Defendant, Arsalan Shirwany, M.D.
One Commerce Square, 29th Floor
Memphis, TN 38103

W. Timothy Hayes, Jr. w/permission WBS (#018730)

W. TIMOTHY HAYES, JR. (#13821)
Kimberly C. Shields, Esq. (#
Attorney for Defendant, AMISUB (SFH), Inc.
119 South Main Street, Suite 800
Memphis, Tennessee 38103

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS,

PLAINTIFF,

VERSUS NUMBER: CT-00~~1226~~0091-07-07-VI

AMISUB (SFH), INC., d/b/a
ST. FRANCIS HOSPITAL,
SHEILA B. THOMAS, D.O.,
ARSALAN SHIRWANY, M.D., and
EAST MEMPHIS CHEST PAIN
PHYSICIANS, PLLC,

DEFENDANTS.

ORDER OF NON-SUIT

Come now Plaintiff and all Defendants and state to the Court that they are in agreement that Plaintiff take a voluntary non-suit as to all Defendants.

IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED that this Order of Voluntary Non-Suit, without prejudice, be and is hereby entered as to all Defendants. Costs are hereby assessed against Plaintiffs.

IT IS SO ORDERED.

Jerry Stokes

JUDGE

DATE: 10-21-08

A TRUE COPY ATTEST
JIMMY MOORE, Clerk
C Jewels D.C.

AGREED AND APPROVED BY:

W. TIMOTHY HAYES, JR., #13821
KIMBERLY CROSS SHIELDS, #17560
Attorneys for St. Francis Hospital
119 South Main Street, Suite 800
Memphis, Tennessee 38103
(901) 525-8776

BILL M. WADE, #21056
Attorney for Plaintiffs
2600 One Commerce Square
Memphis, Tennessee 38103
(901) 523-1222

MARTY R. PHILLIPS, #14990
Attorney for Sheila B. Thomas, D.O.
105 South Highland
Post Office Box 1147
Jackson, TN 38302-1147
(731) 426-8128

JOSEPH M. CLARK, #18590
Attorney for Arsalan Shirwany, M.D. and
East Memphis Chest Pain Physicians, PLLC
One Commerce Square, 29th Floor
Memphis, TN 38103
(901) 525-8721

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Jury Demanded Division VI

AMISUB (SFH), INC. d/b/a ST. FRANCIS HOSPITAL; SHEILA B. THOMAS, D.O.; ARSALAN SHIRWANY, M.D.; TENNESSEE EM-I MEDICAL SERVICES, P.C., and EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

FILED
SEP 30 2009
CIRCUIT COURT CLERK
BY D.C.

COMPLAINT FOR MEDICAL MALPRACTICE

COMES NOW the Plaintiff, Curtis Myers ("the Plaintiff"), and, by and through undersigned counsel, brings the following complaint for medical malpractice against Defendants Amisub (SFH), Inc., d/b/a St. Francis Hospital ("SFH"), Sheila Thomas, D.O. ("Dr. Thomas"), Arsalan Shirwany, M.D. ("Dr. Shirwany"), Tennessee EM-I Medical Services, P.C. ("TEMS") and East Memphis Chest Pain Physicians, PLLC ("EMCPP"), and respectfully states as follows:

I. PROCEDURAL HISTORY

1. The Plaintiff originally filed this matter on January 5, 2007 under Case ID CT-000091-07. The Circuit Clerk assigned the original case to Judge Jerry Stokes in Division Six.

2. Pursuant to TENN. R. CIV. P. 41 .01, the Plaintiff took a voluntary nonsuit of the original claim by court order dated October 21, 2008.

II. PARTIES AND JURISDICTION

3. The Plaintiff is an adult resident citizen of Memphis, Shelby County, Tennessee.

4. Defendant SFH is a for profit Tennessee corporation that operates St. Francis Hospital at 5959 Park Avenue, Memphis, Tennessee 38119. SFH may be served with process through its registered agent The CT Corporation System at 800 South Gay Street in Knoxville, Tennessee 37929.

5. Defendant Dr. Thomas is a Tennessee-licensed physician who currently practices at 409 Ayers, Memphis, Tennessee 38105, and may be served with process at that address.

6. Defendant Dr. Shirwany is a Tennessee-licensed physician, board certified in internal medicine, who currently practices at 1030 Jefferson Avenue, Memphis, Tennessee 38104, and may be served with process at that address.

7. Defendant TEMS is a for profit Tennessee corporation that provided physicians for the SFH emergency department, including Dr. Thomas, at all times relevant to this complaint. TEMS may be served with process through its registered agent, the Corporation Service Company at 2908 Poston Avenue, Nashville, Tennessee 37203.

8. Defendant EMCPP is a for profit Tennessee corporation that provided physicians for the SFH emergency department, including Dr. Shirwany, at all times relevant to this complaint. EMCPP may be served with process through its registered

agent, EMCPP, or any officer or managing agent thereof, at 2261 Kirby Parkway, Memphis, Tennessee 38119.

9. At all times pertinent to this complaint, all Defendants held themselves out to the public in general and the Plaintiff in particular as possessing the necessary medical skill, knowledge and expertise to diagnose certain medical conditions, such as those experienced by the Plaintiff, as described more thoroughly below.

10. At all times pertinent to this complaint, all Defendants held themselves out to the public in general and the Plaintiff in particular as possessing the necessary medical skill, knowledge and expertise to treat certain medical conditions, such as those experienced by the Plaintiff, as described more thoroughly below.

11. At all times relevant hereto, both Dr. Thomas and Dr. Shirwany owed duties to provide professional medical services to the Plaintiff in accordance with the recognized standard of acceptable professional practice applicable to physicians in the Memphis Metropolitan Statistical Area ("MMSA"), and similar communities.

12. SFH and TEMS provided professional services to the Plaintiff through their agents, apparent and actual, including Dr. Thomas.

13. SFH and EMCPP provided professional services to the Plaintiff through its agents, apparent and actual, including Dr. Shirwany.

14. At all times relevant hereto, SFH, TEMS and EMCPP owed duties to provide professional services to the Plaintiff in accordance with the recognized standard of acceptable professional practice applicable to those health care providers who provided care and treatment to the Plaintiff in the MMSA, and similar communities.

III. JURISDICTION AND VENUE

15. All events that form the basis of this Complaint occurred in Shelby County, Tennessee.

16. Venue is properly situated in Shelby County, Tennessee pursuant to TENN. CODE ANN. § 20-4-102.

17. This Court has jurisdiction over the subject matter of this litigation pursuant to TENN. CODE ANN. § 16-10-101.

18. This Court has personal jurisdiction over the parties to this action pursuant to TENN. CODE ANN. §§ 20-2-222, 20-2-223.

IV. FACTS

19. The Plaintiff was 45 years old when he arrived at SFH's emergency department ("ED") on July 23, 2006 at 12:08 p.m. His initial complaints were noted to be "left eye pain, dizziness, slurred speech, and difficult walking."

20. The Plaintiff's records indicate that his triage was completed at 12:09 p.m. His blood glucose was noted to be 127 at 12:14 p.m. He had an "acuity level" of 3.

21. The Plaintiff was moved to "CP2" at 12:40 p.m. Dr. Shirwany is noted as his "[a]ttending physician" at 12:49 p.m. Dr. Shirwany visited him at 12:50 p.m.

22. The Defendants performed a cranial CT scan on the Plaintiff and read it as a "negative study." The Defendants noted a clinical history of "dizziness, left eye pain," as well as a diagnosis of "slurred speech, dizziness."

23. The "CPEC/Stroke Center Nurses Notes" indicate that Dr. Shirwany requested that the Plaintiff be sent to the ED at 1:45 p.m.

24. Dr. Shirwany "handed off" the Plaintiff to Dr. Thomas at 1:32 p.m.

25. The Plaintiff's "Emergency Physician Record" was filled out at 1:45 p.m. and noted a past medical history of diabetes, high blood pressure, elevated cholesterol, and heart disease. He was noted to have a burning left eye, dizziness, and difficulty walking.

26. Dr. Thomas diagnosed Patient with unspecified vertigo on July 23, 2006, and prescribed him with Antivert (25 mg) and Phenergan (25 mg).

27. The Plaintiff was discharged from SFH at 5:28 p.m.

28. The Plaintiff presented to SFH's ED the following day, July 24, 2006, at 10:38 a.m. The "Triage Note" relates that the Plaintiff was seen in the office of his primary care physician, Dr. Phillip Mintz, earlier that day and Dr. Mintz referred him to the emergency room for further evaluation. The Plaintiff's admitting physician was Dr. David M. Sharfman.

29. The Plaintiff's "acuity level" was noted as 2. The Plaintiff related complaints of slurred speech, general facial numbness, blurred vision, and right side weakness. He was also noted to have diplopia and difficulty coordinating his eye movements.

30. The ED "Flow Sheet" notes that the Plaintiff underwent a CT scan to the head at 10:55 a.m. However, the "Nurse's Notes" relate that the Plaintiff was moved to CT scan at 11:24 a.m.

31. The records reflect that the Plaintiff's CT scan was interpreted by his reading radiologist, Dr. Loi T. Vu, at 11:13 a.m. The Plaintiff's ED "Flow Sheet" notes that his CT scan results were "still pending" at 11:55 a.m. The "Flow Sheet" indicates that the CT scan results were "obtained" at 12:15 p.m.

32. Dr. Vu read the Plaintiff's July 24, 2006 CT scan and found that it was not "significantly" changed from the July 23, 2006 CT scan. Dr. Vu read this CT scan as showing a lacunar infarct versus small vessel disease.

33. Dr. Sharfman's "Discharge Summary" relates that the Plaintiff was seen by Dr. Juan Rivera from neurology, and Dr. Ken Dempsey from cardiology.

34. Dr. Rivera noted that the Plaintiff's July 24, 2006 CT scan was positive for a left caudate lacunar infarct. His impression was that the Plaintiff had experienced a "left lacunar stroke, with resultant right-sided incoordination and dysarthria – often known as clumsy band dysarthric syndrome."

35. During the Plaintiff's July 24, 2006 hospitalization, he received anticoagulation therapy with heparin, as well as aspirin. Patient was discharged from Defendant SFH on July 27, 2006.

V. MEDICAL MALPRACTICE

36. Dr. Thomas and Dr. Shirwany's treatment of the Plaintiff fell below the applicable standard of care as follows:

a) By failing to engage in proper medical decision making, proper assessment and proper diagnostic processes, including initiating hospitalization and neurological consultation and continued evaluation, monitoring, and facilitation the stabilization of the Plaintiff's condition;

b) By failing to timely recognize the existence of a stroke or similar neurological syndrome such as a transient ischemic attack after the preliminary evaluation of the Plaintiff in the emergency department;

c) By failing to rapidly order a cranial CT scan and timely obtain an interpretation by a qualified radiologist said scan;

d) By failing to recognize the presence of abnormal vital signs, that is hypotension and bradycardia and the need for on-going blood pressure and cardiac monitoring;

e) By failing to form an appropriate preliminary diagnosis of "transient ischemic attack" rather than "dizziness/vertigo acute" which was not supported by the Plaintiff's presentation;

f) By failing to recognize the existence of multiple high risk factors for stroke in the Plaintiff;

g) By failing to recognize abnormal serial EKGs consistent with cardiac ischemia and an abnormal troponin in a patient with multiple risk factors for coronary ischemia and the significance of such with respect to patient disposition.

37. These breaches in the recognized standard of medical practice caused the Plaintiff's wrongful discharge from the SFH ED on July 23, 2006. This wrongful discharge was the reason that the Plaintiff suffered his subsequent cerebral vascular accident at home.

38. These breaches in the recognized standard of care deprived the Plaintiff of timely treatment with anti-platelet, anti-coagulant and/or thrombolytic agents, as well as, general medical management of his hypertension and bradycardia in the hospital.

39. But for these breaches in the recognized standard of care, the Plaintiff would not have suffered damages from a cerebrovascular accident in July 2006.

40. TEMS is directly and vicariously liable for Dr. Thomas's negligent acts and/or omissions.

41. SFH is vicariously liable for Dr. Thomas's negligent acts and/or omissions.

42. EMCPP is directly and vicariously liable for Dr. Shirwany's negligent acts and/or omissions.

43. SFH is vicariously liable for Dr. Shirwany's negligent acts and/or omissions.

VI. COMPENSATORY DAMAGES

44. As the sole, direct, and proximate result of Defendants' negligence, The Plaintiff has suffered physical and mental pain and suffering, significant memory loss, unnecessary medical expenses, loss of future earnings, loss of future earning capacity, permanent disability and other harms and losses as recognized by Tennessee law.

VII. RELIEF SOUGHT

WHEREFORE, Plaintiff respectfully prays for judgment as follows:

1. Compensatory damages in an amount to be determined by the jury;
2. That the Plaintiff be awarded interest as allowed by law;
3. For costs herein;
4. That a jury of twelve (12) be empanelled to try the issues when joined; and
5. Such other and further relief, both general and specific, as the Court may deem just and equitable.

Respectfully submitted,

BILL M. WADE #21056
THE COCHRAN FIRM – MEMPHIS
One Commerce Square, 26th Floor
Memphis, Tennessee 38103
Phone (901) 523-1222
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH DISTRICT AT MEMPHIS, SHELBY COUNTY

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Division VI
JURY DEMANDED

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

ANSWER OF DEFENDANTS, ARSALAN SHIRWANY, M.D. AND EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC

Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC ("EMCPP"), by and through their counsel of record, and in response to Plaintiff's complaint, state as follows:

1. Defendants admit the allegations in Paragraph 1 of the Complaint.

2. Defendants admit the allegations in Paragraph 2 of the Complaint.

3. These Defendants neither admit nor deny the allegations in Paragraph 3 of the Complaint, these Defendants lacking personal knowledge and demanding strict proof if their interests are to be affected.

4. The allegations in Paragraph 4 of the Plaintiff's Complaint are not directed to these Defendants, so no response is required.

5. The allegations in Paragraph 5 of the Plaintiff's Complaint are not directed to these Defendants, so no response is required.

6. The allegations in Paragraph 6 of the Plaintiff's Complaint are denied as stated. Dr. Shirwany is a Tennessee-licensed physician, and he is board certified in cardiology. The remaining allegations in Paragraph 6 of the Plaintiff's Complaint are denied.

7. The allegations in Paragraph 7 of the Plaintiff's Complaint are not directed to these Defendants, so no response is required.

8. The allegations in Paragraph 8 of the Plaintiff's Complaint are denied as stated. Defendants admit that EMCPP is a for-profit Tennessee corporation, and that, when Dr. Shirwany treated the plaintiff, Dr. Shirwany was an independent contractor for EMCPP.

9. The allegations in Paragraph 9 of the Complaint are denied as stated. Defendants admit that Dr. Shirwany possesses the necessary medical skill, knowledge and expertise to diagnose various medical conditions, including certain medical conditions experienced by the Plaintiff.

10. The allegations in Paragraph 10 of the Complaint are denied as stated. Defendants admit that Dr. Shirwany possesses the necessary medical skill, knowledge and expertise to treat various medical conditions, including certain medical conditions experienced by the Plaintiff.

11. With respect to Dr. Shirwany, Defendants admit that Dr. Shirwany had a duty to provide professional medical services to the Plaintiff in accordance with the recognized standard of acceptable professional practice applicable to physicians in Dr.

Shirwany's specialty in the Memphis metropolitan area, and these Defendants affirmatively state that Dr. Shirwany acted in accordance with that duty.

12. The allegations in Paragraph 12 of the Plaintiff's Complaint are not directed to these Defendants, so no response is required.

13. The allegations in Paragraph 13 of the Complaint are denied as stated. Defendants admit that Dr. Shirwany provided professional services to the Plaintiff while Dr. Shirwany was an independent contractor with EMCPP.

14. The allegations in Paragraph 14 of the Complaint are denied as stated. Defendants admit that Dr. Shirwany had a duty to provide professional services to the Plaintiff in accordance with the recognized standard of acceptable professional practice applicable to physicians in Dr. Shirwany's specialty in the Memphis metropolitan area, and these Defendants affirmatively state that Dr. Shirwany acted in accordance with that duty. Dr. Shirwany provided medical services to the Plaintiff while Dr. Shirwany was an independent contractor of EMCPP.

15. Defendants admit that Dr. Shirwany provided medical treatment to the Plaintiff in Shelby County.

16. Defendants admit the allegations in Paragraph 16 of the Complaint.

17. Defendants deny the allegations in Paragraph 17 of the Complaint because the Plaintiff failed to provide proper notice to Defendants pursuant to Tenn. Code Ann. § 29-26-121(a)(1) and (a)(2) before filing the Complaint.

18. Defendants deny the allegations in Paragraph 18 of the Complaint because the Plaintiff failed to provide proper notice to Defendants pursuant to Tenn. Code Ann. § 29-26-121(a)(1) and (a)(2) before filing the Complaint.

19. . The allegations in Paragraph 19 of the Complaint are denied as stated. These Defendants state that the medical records speak for themselves.

20. In response to the allegations in Paragraph 20 of the Complaint, Defendants state that the medical records speak for themselves. With respect to the specific times recorded by the nurses, those times may not be accurate.

21. In response to the allegations in Paragraph 21 of the Complaint, Defendants state that the medical records speak for themselves. With respect to the specific times recorded by the nurses, those times may not be accurate.

22. Defendants deny the allegations in Paragraph 22 of the Complaint.

23. In response to the allegations in Paragraph 23 of the Complaint, these Defendants state that the medical records speak for themselves. With respect to the specific times recorded by the nurses, those times may not be accurate.

24. In response to the allegations in Paragraph 24 of the Complaint, these Defendants state that the medical records speak for themselves. With respect to the specific times recorded by the nurses, those times may not be accurate.

25. In response to the allegations in Paragraph 25 of the Complaint, these Defendants state that the medical records speak for themselves.

26. In response to the allegations in Paragraph 26 of the Complaint, these Defendants state that the medical records speak for themselves.

27. The allegations in Paragraph 27 of the Complaint are denied as stated. These Defendants state that the medical records speak for themselves.

28. In response to the allegations in Paragraph 28 of the Complaint, these Defendants state that the medical records speak for themselves.

29. In response to the allegations in Paragraph 29 of the Complaint, these Defendants state that the medical records speak for themselves.

30. In response to the allegations in Paragraph 30 of the Complaint, these Defendants state that the medical records speak for themselves.

31. In response to the allegations in Paragraph 31 of the Complaint, these Defendants state that the medical records speak for themselves.

32. In response to the allegations in Paragraph 32 of the Complaint, these Defendants state that the medical records speak for themselves.

33. In response to the allegations in Paragraph 33 of the Complaint, these Defendants state that the medical records speak for themselves.

34. In response to the allegations in Paragraph 34 of the Complaint, these Defendants state that the medical records speak for themselves.

35. In response to the allegations in Paragraph 35 of the Complaint, these Defendants state that the medical records speak for themselves.

36. The allegations in Paragraph 36 of the Complaint directed to Dr. Shirwany, including sub-parts, are denied.

37. The allegations in Paragraph 37 of the Complaint directed to Dr. Shirwany are denied.

38. The allegations in Paragraph 38 of the Complaint directed to Dr. Shirwany are denied.

39. The allegations in Paragraph 39 of the Complaint directed to Dr. Shirwany are denied.

40. The allegations in Paragraph 40 of the Plaintiff's Complaint are not directed to these Defendants, so no response is required.

41. The allegations in Paragraph 41 of the Plaintiff's Complaint are not directed to these Defendants, so no response is required.

42. Defendants deny that Dr. Shirwany was negligent in any respect with regard to his treatment of the Plaintiff. Defendants deny the allegations in Paragraph 42 of the Plaintiff's Complaint. Further, EMCPP would not be liable for Dr. Shirwany under any circumstances because he was an independent contractor.

43. Defendants deny that Dr. Shirwany was negligent in any respect with regard to his treatment of the Plaintiff. Defendants deny the allegations in Paragraph 43 of the Plaintiff's Complaint.

44. The allegations in Paragraph 44 of the Complaint directed to Dr. Shirwany are denied.

45. These Defendants deny that they are liable to the Plaintiff in any amount and deny that they are responsible for the damages set forth in the Complaint, including the *ad damnum* clause.

46. All allegations of the Plaintiff's Complaint not hereinabove admitted, explained or denied are here and now specifically and categorically denied.

47. For further answer, these Defendants say that in all of the medical attention, treatment and procedures performed by Dr. Shirwany, he used, possessed and exercised that degree of skill and learning ordinarily used, possessed and exercised by

members of his profession who are in good standing and in similar practice in this community, and that at all times he used reasonable care and diligence in the exercise of his skill and in the application of his learning.

48. Further, these Defendants aver that the physical condition of the patient at the time he presented himself to Dr. Shirwany was such that there was a risk involved in any treatment or lack of treatment which might be administered or not administered by Dr. Shirwany or by any other physician to whom Plaintiff might have gone or from whom treatment might have been received, and that if the Plaintiff incurred any injury or damage, such injury or damage was the result of and caused by such risk or reaction in and to the physical condition of the patient at the time, and was not caused by or due to any negligent act on the part of Dr. Shirwany. On the contrary, such risks are involved in any treatment or lack of treatment under the facts and circumstances in this case.

49. While denying any negligence or malpractice on the part of these Defendants, Defendants allege, in the alternative only, that the doctrine of comparative fault applies to all other Defendants, and for this purpose only, the allegations of the Plaintiff's Complaint in that regard are adopted herein.

50. Additionally, Dr. Shirwany says that all of the medical practices, treatments and procedures administered by him were acceptable and were appropriate for the physical condition of the Plaintiff, and that at no time was he guilty of any medical negligence or malpractice. On the contrary, Dr. Shirwany performed each and every act of medical practice, treatment and attention in a proper and efficient manner and in a recognized and approved form accepted and followed by a substantial segment of the

medical profession under the facts, circumstances and conditions as existed in the case of this patient.

51. The Defendants specifically raise the statute of limitations and assert that the Plaintiff's claims are barred by the applicable statute of limitations set forth in §§28-3-104 and 29-26-116. The Plaintiff failed to provide proper notice to Defendants pursuant to Tenn. Code Ann. §29-26-121(a)(1) and (a)(2) before filing the Complaint.

52. Lastly, these Defendants say further that in all of the medical attention, treatment and procedures performed by Dr. Shirwany, he acted according to his best medical judgment.

AND NOW, HAVING FULLY ANSWERED THE PLAINTIFF'S COMPLAINT, these Defendants pray that they may be hence dismissed and that the costs hereof be adjudged against the Plaintiff. In the event that a trial is necessary, however, these defendants pray for a trial by a jury of 12 persons.

Respectfully submitted,

THOMASON, HENDRIX, HARVEY, JOHNSON & MILLER

Joseph M. Clark (#18590)
Edd Peyton (#25645)
Attorneys for Defendants Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC
2900 One Commerce Square
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(901) 525-8721

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following via U.S. Mail, postage prepaid, this 23rd day of October, 2009:

Mr. Bill M. Wade
Attorney for Plaintiff
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Mr. W. Timothy Hayes, Jr.
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Memphis, TN 38103

Mr. Marty R. Phillips
RAINEY KIZER
105 S. Highland Ave.
Jackson, TN 38301

Joseph M. Clark

4848-8237-2100, v. 1

62813-MRP

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs. No. CT-004650-09, DIV. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C.; and
EAST TENNESSEE CHEST
PAIN PHYSICIANS, PLLC,

Defendants.

DEFENDANT TENNESSEE EM-I MEDICAL SERVICES, P.C.'S MOTION TO DISMISS

Comes now, the Defendant, Tennessee EM-I Medical Services, P.C., and moves the Court to dismiss this case in its entirety for failure to comply with the provisions of section 29-26-121 and 29-26-122 of the Tennessee Code Annotated. The Plaintiff did not provide statutory notice prior to filing the Complaint for medical malpractice in this matter, nor did he file with the Complaint a Certificate of Good Faith.

In further support of this Motion, the Defendant relies upon the Memorandum of Law filed contemporaneously herewith, and the entire record in this case.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

Michelle Greenway Sellers by EMS

BY: MARTY R. PHILLIPS (BPR #14990)
MICHELLE GREENWAY SELLERS (BPR# 20769)
Attorneys for Defendant Tennessee EM-I Medical Services, P.C.
50 N. Front St., Suite 610
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(901) 333-8101

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

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Attorney for Plaintiff

Timothy Hayes (BPR #13821)
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Attorney for Defendant St. Francis Hospital

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Attorney for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

This the 5 day of November, 2009.

Michelle Greenway Sellers by EMS

62813-MRP

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs. No. CT-004650-09, DIV. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C.; and
EAST TENNESSEE CHEST
PAIN PHYSICIANS, PLLC,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT TENNESSEE EM-I MEDICAL SERVICES, P.C.'S MOTION TO DISMISS

I. FACTS AND PROCEDURAL HISTORY

The Plaintiff, Curtis Myers, filed a Complaint in the Circuit Court of Shelby County, Tennessee, on September 30, 2009, alleging that the Defendants committed medical malpractice.

Despite the clear mandates of section 29-26-121 of the Tennessee Code Annotated, the Plaintiff did not provide Defendant with the requisite statutory notice of this malpractice suit. The Plaintiff also failed to attach to the Complaint a Certificate of Good Faith, as is required by section 29-26-122 of the Tennessee Code Annotated.

Accordingly, the Defendant submits that this medical malpractice action should be dismissed with prejudice.

II. LAW AND DISCUSSION

The Complaint in the instant case fails to state a claim upon which relief can be granted because the Plaintiff failed to comply with the provisions of sections 29-26-121 and 29-26-122 of the Tennessee Code Annotated.

A. The Plaintiff's claims should be dismissed for failure to comply with the clear mandates of Tenn. Code Ann. § 29-26-121.

Pursuant to section 29-26-121 of the Tennessee Code Annotated, "[a]ny person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider who will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state." Tenn. Code Ann. § 29-26-121(a)(1).

> The notice "shall" contain specific information to include:
>
> (A) The full name and date of birth of the patient whose treatment is at issue;
>
> (B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
>
> (C) The name and address of the attorney sending the notice, if applicable;
>
> (D) A list of the name and address of all providers being sent a notice; and
>
> (E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

Tenn. Code. Ann. § 29-26-121(a)(2). Pursuant to Tennessee Code Annotated § 29-26-121(b) "[i]f a complaint is filed in any court alleging a claim for medical malpractice, the pleadings *shall* state whether [the] party has complied with subsection (a) and *shall* provide the documentation specified in subdivision (a)(2) . . . The court has discretion to excuse

compliance with this section *only for extraordinary cause shown.*" Tenn. Code. Ann. § 29-26-121(b) (emphasis added).

In the instant case, the Plaintiff did not comply with the above statutory provisions. No statutory notice was given to Defendant at least sixty (60) days of the filing of the September 30, 2009 Complaint. This deficiency cannot be cured. Because the Plaintiff cannot show any extraordinary cause to excuse compliance with section 29-26-121, this case should be dismissed with prejudice.

B. **The Plaintiff's claims should be dismissed for failure to comply with the clear mandates of Tenn. Code Ann. § 29-26-122.**

Pursuant to section 29-26-122 of the Tennessee Code Annotated, "in *any* medical malpractice action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel *shall* file a certificate of good faith with the complaint." Tenn. Code. Ann. § 29-26-122(a) (emphasis added).

> The certificate of good faith, filed with the Complaint, shall state that:
>
> (1) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:
>
> > (A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and
> >
> > (B) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115; or
>
> (2) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:
>
> > (A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

> (B) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue and, as appropriate, information from the plaintiff or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the plaintiff or plaintiffs counsel; and that, despite the absence of this information, there is a good faith basis for maintaining the action as to each defendant consistent with the requirements of § 29-26-115. Refusal of the defendant to release the medical records in a timely fashion or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical record prior to expert certification.

Tenn. Code. Ann. § 29-26-122(a)(1)-(2). "*If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent . . . extraordinary cause*." Tenn. Code. Ann. § 29-26-122(a) (emphasis added). "The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal *with prejudice*." Tenn. Code Ann. § 29-26-122(c) (emphasis added).

In the instant case, the Plaintiff did not comply with the above statutory provisions. No certificate of good faith was attached to the Complaint filed against Defendant Tennessee EM-I Medical Services, P.C. This deficiency cannot be cured. Because the Plaintiff cannot show any extraordinary cause to excuse compliance with section 29-26-122, this case should be dismissed with prejudice.

III. CONCLUSION

In light of the foregoing, this Court should grant Defendant Tennessee EM-I Medical Services P.C.'s Motion to Dismiss.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

Michelle Greenway Sellers by EMS

BY: MARTY R. PHILLIPS (BPR #14990)
MICHELLE GREENWAY SELLERS (BPR# 20769)
Attorneys for Defendant Tennessee EM-I Medical Services, P.C.
50 N. Front St., Suite 610
Memphis, TN 38103
(901) 333-8101

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

Bill M. Wade (BPR #21056)
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Attorney for Plaintiff

Timothy Hayes (BPR #13821)
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Attorney for Defendant St. Francis Hospital

Joseph M. Clark (BPR #18590)
2900 One Commerce Square
Memphis, Tennessee 38103
(901) 525-8721

Attorney for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

This the 5 day of November, 2009.

Michelle Greenway Sellers by EMS

FILED
NOV 05 2009
CIRCUIT COURT CLERK
BY D.C

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs. No. CT-004650-09, DIV. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C.; and
EAST TENNESSEE CHEST
PAIN PHYSICIANS, PLLC,

Defendants.

NOTICE OF HEARING

TO: Bill M. Wade (BPR #21056)
The Cochran Firm
One Commerce Square, Suite 2600
Memphis, TN 38103
(901) 523-1222
Attorney for Plaintiff

Please take notice that a hearing on Defendant Tennessee EM-I Medical Services, P.C.'s Motion to Dismiss filed in this cause will be set for December 10, 2009 at 9:00 a.m. before the Honorable Jerry Stokes, Judge of Division VI of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. You may attend and be heard if you wish.

Dated this the 5 day of November, 2009.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

Michelle Greenway Sellers by EMS

BY: MARTY R. PHILLIPS (BPR #14090)
MICHELLE G. SELLERS (BPR# 20769)
Attorneys for Defendant Tennessee EM-I Medical Services, P.C.
50 N. Front St., Suite 610
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(901) 333-8101

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

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Attorney for Plaintiff

Timothy Hayes (BPR #13821)
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Attorney for Defendant St. Francis Hospital

Joseph M. Clark (BPR #18590)
2900 One Commerce Square
Memphis, Tennessee 38103
(901) 525-8721
Attorney for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

This the 5 day of November, 2009.

Michelle Greenway Sellers by EMS

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH DISTRICT AT MEMPHIS, SHELBY COUNTY

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Division VI
JURY DEMANDED

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

JOINDER OF ARSALAN SHIRWANY, M.D., AND EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC IN TENNESSEE EM-I MEDICAL SERVICES, P.C.'S MOTION TO DISMISS

Pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure and Rule 6 of the Local Rules of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Shelby County, Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC, hereby join in Defendant Tennessee EM-I Medical Services, P.C.'s Motion to Dismiss and herein and hereby incorporate by reference the arguments made in that Motion and Memorandum of Law in Support of Defendant Tennessee EM-I Medical Services, P.C.'s Motion to Dismiss.

WHEREFORE, premises considered, Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC, pray that they be dismissed from this action with prejudice.

Respectfully submitted,

THOMASON, HENDRIX, HARVEY,
JOHNSON & MILLER, PLLC

By: _____

Joseph M. Clark (#18590)
Edd Peyton (#25635)
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Attorneys for Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following via U.S. Mail, postage prepaid, this 6th day of November, 2009:

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Mr. W. Timothy Hayes, Jr.
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Mr. Marty R. Phillips
Ms. Michelle Greenway Sellers
RAINEY KIZER
105 S. Highland Ave.
Jackson, TN 38301

_____
Edd L. Peyton

4833-3922-9189, v. 1

62183-MRP

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs. **No. CT-004650-09, DIV. VI**

AMISUB (SFH), INC., d/b/a ST. FRANCIS HOSPITAL; SHEILA B. THOMAS, D.O.; ARSALAN SHIRWANY, M.D.; TENNESSEE EM-I MEDICAL SERVICES, P.C.; and EAST TENNESSEE CHEST PAIN PHYSICIANS, PLLC,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR INTERLOCUTORY APPEAL

This matter came before the Court upon Motions by Defendants, Tennessee EM-I Medical Services, P.C.; AMISUB (SFH), INC., d/b/a St. Francis Hospital; Arsalan Shirwany, M.D.; and East Tennessee Chest Pain Physicians, PLLC, to have Plaintiff's Complaint dismissed based on Plaintiff's failure to comply with Tennessee Code Annotated §§ 29-26-121 and 29-26-122. On December 10, 2009, the Court heard argument on Defendants' Motions to Dismiss. On February 16, 2010, the Court entered an Order Denying Defendants' Collective Motion to Dismiss. Defendant Tennessee EM-I Medical Services, P.C. subsequently filed a Motion for Interlocutory Appeal on March 10, 2010. Defendants Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC filed a Motion for Interlocutory Appeal on March 15, 2010. Defendant AMISUB (SFH), INC., d/b/a St. Francis Hospital filed a Joinder in the Motion for Interlocutory Appeal on March 18, 2010.

On March 26, 2010, the Court heard argument on Defendants' Motions for Interlocutory Appeal of the Order Denying Defendants' Collective Motion to Dismiss. After carefully considering the arguments of counsel and the entire record in this case, the Court finds that Defendants' Motions for Interlocutory Appeal are well-taken and should be granted for the reasons set forth herein. Specifically, the Court finds that all three of the criteria that courts are instructed to consider when determining whether to grant permission to appeal, as set forth in Rule 9 of the *Tennessee Rules of Appellate Procedure*, are present in this case.

The primary reason supporting an interlocutory appeal in this case is the need to prevent needless, expensive, and protracted litigation, where immediate appellate review will undoubtedly save the parties a vast amount of time and expense, and will conserve a significant amount of judicial resources, if the challenged order is reversed. It is undisputed that the issue raised by Defendants' Motions to Dismiss is a legal issue which is fully ripe for adjudication. Certainly, the challenged order would be a clear basis for reversal upon entry of a final judgment if Defendants' position is correct.

This is a medical malpractice action in which the Plaintiff seeks an unspecified amount in compensatory damages. At the present time this case is not set for trial. A considerable amount of discovery, pre-trial preparation, and trial work remains to be completed. If the Defendants are required to complete all discovery, draft and argue pre-trial motions, confer with experts, prepare witnesses for trial, endure a lengthy trial and draft and argue post-trial motions before Defendants present the issue raised for appellate review, a tremendous amount of time, money, and judicial resources will have been wasted if this Court's ruling is subsequently reversed by the Court of Appeals.

Moreover, based upon the specific facts of this case and the issues presented, this Court recognizes how the Court of Appeals could find that reversal is appropriate. The Court recognizes that Tennessee Code Annotated §§ 29-26-121 and 122 took effect on July 1, 2009 and Plaintiff's Complaint was filed on September 30, 2009, over 90 days after the effective date of the statutes at issue in this matter. The Court recognizes that "demonstrated extraordinary cause" is not defined in Tennessee Code Annotated § 29-26-122.

Another very important reason supporting an interlocutory appeal in this case is the need to develop a uniform body of law. It is also readily apparent that a uniform body of law does not presently exist in this State regarding what constitutes "demonstrated extraordinary cause" as set forth in Tennessee Code Annotated §§ 29-26-121(a). It is also readily apparent that a uniform body of law does not exist in this State regarding whether Tennessee Code Annotated §§ 29-26-121 and 122 apply to medical malpractice cases filed more than sixty (60) days after the effective date of the statutes to a case that was previously filed, especially where the parties and the allegations contained in the Complaints are not the same.

Finally, if Defendants' position is correct, the Defendants would certainly suffer an irreparable injury by having to go through an expensive, stressful, and unnecessary trial. Having the Court of Appeals review this issue after a final judgment would be completely ineffective and inefficient, taking into account the need to conserve judicial resources, the interests of judicial economy, and the interest of protecting the parties from irreparable injuries. The Court also notes that the Plaintiff would be forced to needlessly expend

substantial money and time as well to pursue this case if the Defendants' position is correct.

Accordingly, the Court has determined that an interlocutory appeal would serve the interest of judicial economy, the preservation of judicial resources, and the resources of the parties to the litigation. The Court further concludes that this challenged order involves a narrow issue which is fully ripe for adjudication and which would lead to the dismissal of this entire claim if the Defendants' position is correct. Consequently, this Court grants the Defendants' Motions for an Interlocutory Appeal and respectfully requests the Tennessee Court of Appeals to accept this appeal and decide this important issue.

IT IS SO ORDERED.

Jerry Stokes

HON. JERRY STOKES, Division VI
Shelby County Circuit Court

4-8-10
Date

A TRUE COPY ATTEST
JIMMY MOORE, Clerk
By _____ D.C.

AGREED TO AND APPROVED FOR ENTRY:

Bill Wade by Michelle Sellers with permission

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(901) 523-1222

Attorney for Plaintiff

Michelle Sellers

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Attorneys for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

49813

FILED

MAR 18 2010

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS,

PLAINTIFFS

VERSUS

Docket No.: CT-004650-09-VI

AMISUB (SFH), INC., d/b/a
ST. FRANCIS HOSPITAL,
SHEILA B. THOMAS, D.O.,
ARSALAN SHIRWANY, M.D.,
TENNESSEE EM-I MEDICAL
SERVICES, P.C., AND EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

DEFENDANTS

JOINDER OF DEFENDANTS, AMISUB (SFH), INC., d/b/a ST. FRANCIS HOSPITAL, IN MOTION FOR INTERLOCUTORY APPEAL

Pursuant to Rule 12.02 (6) of the Tennessee Rules of Civil Procedure and Rule 6 of the Local Rules of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Shelby County, Defendants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, hereby join in Defendants, Tennessee EM-I Medical Services, P.C.'s Motion for Interlocutory Appeal herein and hereby incorporate by reference the arguments made in that Motion and Memorandum of Law in Support of Defendants, Tennessee EM-I Medical Services, P.C.'s Motion for Interlocutory Appeal.

WHEREFORE, premises considered, Defendants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, pray that they be joined in this motion.

Respectfully submitted,

THE HARDISON LAW FIRM, P.C.

BY: _____

W. TIMOTHY HAYES, JR., #13821
KIMBERLY CROSS SHIELDS #17560
Attorneys for Defendant, AMISUB
(SFH), Inc. d/b/a St. Francis Hospital
119 South Main Street, Suite 800
Memphis, Tennessee 38103
(901) 525-8776

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing to Mr. Bill M. Wade, Attorney at Law, 2600 One Commerce Square, Memphis, Tennessee 38103, Mr. Joseph M. Clark, Attorney at Law, 40 South Main Street, Suite 2900, Memphis, TN 38103, Mr. Marty R. Phillips, Attorney at Law, 105 South Highland Avenue, Jackson, TN 38301 and Ms. Michelle Sellars, Attorney at Law, 50 North Front Street, Suite 610, Memphis, TN 38103 on this 18 day of March, 2010.

_____
KIMBERLY CROSS SHIELDS

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH DISTRICT AT MEMPHIS, SHELBY COUNTY

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Division VI
JURY DEMANDED

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

JOINDER OF ARSALAN SHIRWANY, M.D., AND EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC IN TENNESSEE EM-I MEDICAL SERVICES, P.C.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure and Rule 6 of the Local Rules of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Shelby County, Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC, hereby join in Defendant Tennessee EM-I Medical Services, P.C.'s Memorandum of Law in Support of Motion to Dismiss and herein and hereby incorporate by reference the facts stated therein and arguments made in that Motion.

For the foregoing reasons and for the arguments made in EM-I's Motion to Dismiss, Dr. Shirwany and East Memphis Chest Pain Physicians, PLLC's Motion to Dismiss is well taken and should be granted.

Respectfully submitted,

THOMASON, HENDRIX, HARVEY,
JOHNSON & MILLER, PLLC

By: _____

Joseph M. Clark (#18590)
Edd Peyton (#25635)
40 S. Main St. #2900
Memphis, TN 38103
(901) 525-8721
Attorneys for Defendants, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following via U.S. Mail, postage prepaid, this 10th day of November, 2009:

Mr. Bill M. Wade
Attorney for Plaintiff
THE COCHRAN FIRM – MEMPHIS
One Commerce Square, 26th Floor
Memphis, TN 38103

Mr. W. Timothy Hayes, Jr.
Attorney at Law
119 S. Main St., Suite 800
Memphis, TN 38103

Mr. Marty R. Phillips
Ms. Michelle Greenway Sellers
RAINEY KIZER
105 S. Highland Ave.
Jackson, TN 38301

_____
Edd L. Peyton

4841-4505-9845, v. 1

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Div. 6

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' COLLECTIVE MOTION TO DISMISS

COMES NOW the Plaintiff, Curtis Myers ("the Plaintiff"), and, by and through undersigned counsel, files the following response to the Motion to Dismiss filed by Defendant Tennessee EM-I Medical Services, P.C. ("TEMS"), and later joined by Defendants Arsalan Shirwany, M.D. ("Dr. Shirwany") and East Memphis Chest Pain Physicians, PLLC ("EMCPP"), and respectfully states as follows:

The Defendants' motion to dismiss presupposes an important fact: that TENN. CODE ANN. §§29-26-121 and 29-26-122 apply to this dispute. To the contrary, those provisions do not govern this dispute, so the Defendants' supposition is false.

This case is not a new cause of action falling under the purview of the recent additions to Tennessee's Medical Malpractice Act. This cause of action originated with the Defendants' alleged malpractice in July 2006, and was first brought before the Court

with a complaint filed January 5, 2007. All the factual allegations, all the legal theories, all the named Defendants date back to January 5, 2007. These same Defendants, who now come before the Court and claim they did not have any notice of this cause of action, were actually parties to this same cause of action for a period of twenty two months and exchanged over thirty sets of discovery. These same Defendants appeared before this very Court for almost two years by filing answers, engaging in motion practice and giving their own depositions. These Defendants have already had much more notice than the simple letter required by TENN. CODE ANN. §29-26-121.

These same Defendants who claim the Plaintiff erred somehow by failing to file a certificate of good faith fail to inform the Court that the Plaintiff filed expert disclosures not once but twice in 2007 and 2008. These are not the "fill in the blank" forms that the State has promulgated, which forms tell defendants nothing more than the plaintiff's attorney has consulted with an expert. These previous disclosures name the expert and disclose not only their opinions but the bases of their opinions. The Plaintiff has already gone far beyond the duties required by TENN. CODE ANN. §29-26-122.

All of this might actually matter if Tennessee law supported the Defendants' position, but it doesn't. Tennessee law has long been settled that new statutes do not always apply retroactively to causes of action. In Kuykendall v. Wheeler, the Tennessee Supreme Court wrote

> Whether a statute applies retroactively depends on whether its character is "substantive" or "procedural." If "substantive," it is not applied retroactively because to do so would "disturb a vested right or contractual obligation." On the other hand, remedial or procedural statutes apply retrospectively not only to causes of action arising before such acts become law, but also to all suits pending when the legislation takes effect, *unless the legislature*

> *indicates that a contrary intention or immediate application would produce an unjust result.*

Kuykendall v. Wheeler, 890 S.W.2d 785, 787 (Tenn. 1994) (citations omitted; emphasis added).

One of the Tennessee legislature's most obvious options for precluding retrospective application is to put an effective date in a new statute, and that is precisely what they did here. In 2009 TENN. PUB. ACTS 425, the legislature stated

> Section 1 [enacted as TENN. CODE ANN. §29-26-121] of this act shall take effect and apply to notice given on or after July 1, 2009, in all medical malpractice actions, the public welfare requiring it. Section 2 [enacted as TENN. CODE ANN. §29-26-122] of this act shall take effect on July 1, 2009, and shall apply only to those actions in which the required notice is given on or after July 1, 2009, pursuant to Section 1, the public welfare requiring it.

The Defendants in this case got their notice of intent to sue on January 5, 2007 when they received summonses and lawsuits. They got their certificate of good faith with expert disclosures filed July 5, 2007 and October 6, 2008, well before this statute took effect.

But, just in case any doubt remains, the legislature added one last sentence to 2009 TENN. PUB. ACTS 425: "[i]n the event that notice is successfully given more than once to a provider, the effect of the notice is determined by the law in effect on the date of the first successful notice." Unless these Defendants want to fashion an argument that getting sued and spending two years in litigation somehow didn't put them on notice of the Plaintiff's claim, that final sentence in the new act answers any remaining questions.

Respectfully submitted,

BILL M. WADE #21056
THE COCHRAN FIRM – MEMPHIS
One Commerce Square, Suite 2600
Memphis, Tennessee 38103
Phone (901) 523-1222
Attorneys for Plaintiffs

Certificate of Service

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing motion was served upon all counsel to this matter in conformity with the Tennessee Rules of Civil Procedure on this 1st day of December 2009.

Bill M. Wade

*2009 Tenn. ALS 425, *; 2009 Tenn. Pub. Acts 425;*
2009 Tenn. Pub. Ch. 425; 2009 Tenn. HB 2233

[illegible] (8)

TENNESSEE ADVANCE LEGISLATIVE SERVICE

STATENET

TENNESSEE 106TH GENERAL ASSEMBLY

PUBLIC CHAPTER NO. 425

HOUSE BILL NO. 2233

2009 Tenn. ALS 425; 2009 Tenn. Pub. Acts 425; 2009 Tenn. Pub. Ch. 425; 2009 Tenn. HB 2233

[illegible] SUMMARY FOR THIS DOCUMENT

[illegible] to amend Tennessee Code Annotated, Section 29-26-121, relative to health care liability.

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

[illegible] BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

[illegible] Tennessee Code Annotated, Section 29-26-121, is amended by deleting it in its entirety and by substituting instead [illegible]:

(a)

(1) Any person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider who will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;

(C) The name and address of the attorney sending the notice, if applicable;

(D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

(3) The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

(A) Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries to the provider or for arrival of the provider's patients at the provider's current practice location. Delivery must be established by an affidavit stating that such notice was personally delivered, and the identity of the individual to whom the notice was delivered; or

(B) Mailing of the notice:

(i) To an individual health care provider at both the address listed for the provider on the Tennessee department of health website and

the provider's current business address, if different from the address maintained by the Tennessee department of health; provided that, if the mailings are returned undelivered from both such addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient;

(B) In the case of a provider that is a corporation or other business entity at both the address for the agent for service of process; and the provider's current business address, if different from that of the agent for service of process; provided that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient;

(4) Compliance with the provisions of subdivision (a)(3)(B) shall be demonstrated by filing a certificate of mailing from the U.S. postal service stamped with the date of mailing, and an affidavit of the party mailing the notice, establishing that the specified notice was timely mailed by certified mail, return receipt requested. A copy of the notice sent shall be attached to the affidavit. It is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a letter sent by certified mail for service to be effective.

(b) If a complaint is filed in any court alleging a claim for medical malpractice, the pleadings shall state whether each party has complied with subsection (a) and shall provide the documentation specified in subdivision (a)(2). The court may require additional evidence of compliance to determine if the provisions of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

(c) When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider. Personal service is effective on the date of that service. Service by mail is effective on the first day that service by mail is made in compliance with subdivision (a)(2)(B). In no event shall this section operate to shorten or otherwise extend the statutes of limitations or repose applicable to any action asserting a claim for medical malpractice, nor shall more than one (1) extension be applicable to any provider. Once a complaint is filed alleging a claim for medical malpractice, the notice provisions of this section shall not apply to any person or entity that is made a party to the action thereafter by amendment to the pleadings as a result of a defendant's alleging comparative fault.

(d) All parties in an action covered by this section shall be entitled to obtain complete copies of the claimant's medical records from any other provider receiving notice. A party shall provide a copy of the specified portions of the claimant's medical records as of the date of the receipt of a legally authorized written request for the records within thirty (30) days thereafter. The claimant complies with this requirement by providing the providers with the authorized HIPAA compliant medical authorization required to accompany the notice. The provider may comply with this section by:

(1) Mailing a copy of the requested portions of the records with a statement for the cost of duplication of the records to the individual requesting the records;

(2) Informing the individual requesting the records that the records will be mailed only upon advance payment for the records for the stated cost of the records, calculated as provided in Section 63-2-102. Any request for advance payment must be made in writing twenty (20) days after the receipt of the request for medical records. The provider must send the records within three (3) business days after receipt of payment for the records; or

(3) Fulfilling such other method as the provider and the individual requesting the records shall agree to in writing.

The records received by the parties shall be treated as confidential, to be used only by the parties, their counsel, and their consultants.

(e) In the event that a complaint is filed in good faith reliance on the extension of the statute of limitations or repose granted by this section and it is later determined that the claim is not a medical malpractice claim, the extension of the statute of limitations and repose granted by this subsection is still available to the plaintiff.

[1-2] SECTION 2. Tennessee Code Annotated, Section 29-26-122(a), is amended by deleting the first clause in its entirety and by substituting instead the following:

(a) In any medical malpractice action in which expert testimony is required by Section 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that such failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in Section 29-26-121 or demonstrated extraordinary cause. The certificate of good faith shall state that:

[1-3] SECTION 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

[1-4] SECTION 4. Section 1 of this act shall take effect and apply to notice given on or after July 1, 2009, in all medical malpractice actions, the public welfare requiring it. Section 2 of this act shall take effect on July 1, 2009, and shall apply only to those actions in which the required notice is given on or after July 1, 2009, pursuant to Section 1, the public welfare requiring it. In the event that notice is successfully given more than once to a provider, the effect of the notice is determined by the law in effect on the date of the first successful notice.

HISTORY
Approved by the Governor June 11, 2009

SPONSOR: By Representative Coleman Substituted for: Senate Bill No. 2109 By Senators Overbey, Norris, Finney

Tenn. Code Ann. § 29-26-122

Title 29 Remedies And Special Proceedings
Chapter 26 Medical Malpractice
Part 1 --General Provisions

Tenn. Code Ann. § 29-26-122 (2009)

29-26-122. Filing of certificate of good faith.

(a) In any medical malpractice action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause. The certificate of good faith shall state that:

(1) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115; or

(2) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue and, as appropriate, information from the plaintiff or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the plaintiff or plaintiffs counsel; and that, despite the absence of this information, there is a good faith basis for maintaining the action as to each defendant consistent with the requirements of § 29-26-115. Refusal of the defendant to provide medical records in a timely fashion or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical record prior to expert certification.

(b) Within sixty (60) days after a defendant has alleged in an answer or amended answer that a non-party is at fault for the injuries or death of the plaintiff and expert testimony is required to prove fault as required by § 29-26-115, each defendant or defendant's counsel shall file a certificate of good faith stating that:

(1) The defendant or defendant's counsel has consulted with one (1) or more experts, which may include the defendant filing the certificate of good faith, who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to allege such fault against another consistent with the requirements of § 29-26-115; or

(2) The defendant or defendant's counsel has consulted with one (1) or more medical experts, which may include the defendant filing the certificate of good faith, who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinions or opinions in the case; and

(B) Believe, based on the information reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the information reasonably available to the defendant or defendant's counsel; and that, despite the absence of this information, there is a good faith basis for alleging such fault against another, whether already a party to the action or not, consistent with the requirements of § 29-26-115.

(c) The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice. The failure of a defendant to file a certificate of good faith in compliance with this section alleging the fault

62813-MRP

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs. No. CT-004650-09, DIV. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C.; and
EAST TENNESSEE CHEST
PAIN PHYSICIANS, PLLC,

Defendants.

DEFENDANT TENNESSEE EM-I MEDICAL SERVICES, P.C.'S MOTION FOR INTERLOCUTORY APPEAL

Defendant Tennessee EM-I Medical Services, P.C. moves the Court, pursuant to Tennessee Rule of Appellate Procedure 9, for an interlocutory appeal of the Court's Order Denying Defendant's Motion to Dismiss for failure to comply with Tennessee Code Annotated §§ 29-26-121 and 29-26-122. In support of this Motion, Defendant relies upon the Memorandum of Law submitted herewith and the entire record in this matter.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

BY: MARTY R. PHILLIPS (BPR #14990)
MICHELLE GREENWAY SELLERS (BPR# 20769)
Attorneys for Defendant Tennessee EM-I Medical Services, P.C.
50 N. Front St., Suite 610
Memphis, TN 38103
(901) 333-8101

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

Bill M. Wade (BPR #21056)
The Cochran Firm
One Commerce Square, Suite 2600
Memphis, TN 38103
(901) 523-1222

Attorney for Plaintiff

Timothy Hayes (BPR #13821)
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(901) 525-8776

Attorney for Defendant St. Francis Hospital

Joseph M. Clark (BPR #18590)
2900 One Commerce Square
Memphis, Tennessee 38103
(901) 525-8721

Attorney for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

This the 10th day of March, 2010.

Michelle Sellers of Pentecost

62813-MRP

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS

Plaintiff,

vs.

No. CT-004650-09, DIV. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C.; and
EAST TENNESSEE CHEST
PAIN PHYSICIANS, PLLC,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT TENNESSEE EM-I MEDICAL SERVICES, P.C.'S MOTION FOR
INTERLOCUTORY APPEAL

I. FACTS AND PROCEDURAL HISTORY

The Plaintiff, Curtis Myers, filed a Complaint in the Circuit Court of Shelby County, Tennessee, on September 30, 2009, alleging that the Defendants committed medical malpractice. (Compl.) Despite the clear mandates of section 29-26-121 of the Tennessee Code Annotated, the Plaintiff did not provide Defendant with the requisite statutory notice of this malpractice suit. The Plaintiff also failed to attach to the Complaint a Certificate of Good Faith, as is required by section 29-26-122 of the Tennessee Code Annotated.

On November 5, 2009, Defendant filed a Motion to Dismiss Plaintiff's medical malpractice action based on Plaintiff's failure to comply with Tennessee Code Annotated §§ 29-26-121 and 26-26-122. (Def. Mtn. to Dismiss.) On November 10, 2009, Arsalan

Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC filed a Joinder of Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC in Tennessee EM-I Medical Services, P.C.'s Memorandum of Law in Support of Motion to Dismiss. (Shirwany and East Memphis Chest Pain Physicians, PLLC Joinder in Motion to Dismiss.) of On December 8, 2009, Defendants AMISUB (SFH), Inc. d/b/a St. Francis Hospital filed a Joinder of Defendants, AMISUB (SFH), Inc., d/b/a St. Francis Hospital, in Motion to Dismiss. (AMISUB Joinder in Motion to Dismiss.) After hearing argument from all counsel, the Court denied Defendant's Motion to Dismiss on December 10, 2009. On February 16, 2010, the Court entered an Order Denying Defendants' Collective Motion to Dismiss. (Order Denying Defendants' Collective Mtn to Dismiss.) The Court found that Plaintiff substantially complied with the requirements of Tennessee Code Annotated §§ 29-26-121 and 29-26-122 because Defendant had notice of the potential claims and the existence of Plaintiff's expert through the original filing of the Plaintiff's Complaint on January 5, 2007, and the subsequent litigation until the filing of Plaintiff's voluntary nonsuit on October 21, 2008 under docket number CT-000091-07. (*See* Order Denying Defendants' Collective Mtn to Dismiss.)

II. LAW AND DISCUSSION

Defendant respectfully submits that an immediate appeal of the Court's Order denying Defendant's Motion to Dismiss for failure to comply with sections 29-26-121 and 29-26-122 of the Tennessee Code Annotated is warranted by Tennessee law. Trial courts are instructed to consider the following non-exclusive criteria in deciding whether to grant an interlocutory appeal: (1) the need to prevent irreparable injury, (2) the need to prevent needless, expensive, and protracted litigation, and (3) the need to develop a uniform body

of law. Tenn. R. App. P. 9(a). All three of these criteria are clearly present in this case and strongly weigh in favor of an immediate appeal.

A. An immediate appeal is imperative to prevent Defendant from suffering irreparable injury.

The first criterion set forth in Tennessee Rule of Appellate Procedure 9 regards avoiding "irreparable injury." In ruling on motions for interlocutory appeals, trial courts are instructed to consider:

> [T]he need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective.

Tenn. R. App. P. 9(a)(1). An "irreparable injury" is defined as "an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law." Black's Law Dictionary at 541 (Abridged 6th ed. 1991). Irreparable injury "does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage...." Id. An immediate appeal is warranted in this case to avoid irreparable injury. Defendant will be forced to expend large sums of money and significant amounts of time during discovery, trial, and appeal in contesting Plaintiff's claim. Such injury will surely occur should the Court be in error.

As discussed above, Defendant will also suffer irreparable injury due to the time and expense involved in defending against Plaintiff's claim. It is undisputed that if the case proceeds to trial without immediate appellate review, Defendants, as

well as Plaintiff, will be forced to incur great expense and expend significant amounts of time in developing proof on the substantive issues in the case. Nothing that can later be done on appeal will remedy this inevitable result. Such time and money will be forever expended. The potential injury to Defendant is therefore very high, and the injuries are of the type that a review on appeal after trial cannot fully remedy.

B. An immediate appeal is imperative to prevent needless, expensive, and protracted litigation in this case, as well as others.

The second criterion set forth in Tennessee Rule of Appellate Procedure 9 regards avoiding "needless, expensive, and protracted litigation." In ruling on motions for interlocutory appeals, trial courts are instructed to consider:

> [T]he need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed.

Tenn. R. App. P. 9(a)(2). This provision seeks to allow interlocutory review on issues that will prevent parties from expending significant amounts of time and money during discovery and trial on issues that may be resolved beforehand. Such result not only saves the parties from unnecessary litigation, but trial courts as well. *See West Tennessee Ass'n of Builders and Contractors, Inc.*, 138 F.Supp.2d at 1026 (W.D.T.N. 2000)(stating that interlocutory appeals should be allowed in cases of a complex nature where the financial and legal stakes are high because such will likely conserve judicial resources).

An immediate appeal in this case will undoubtedly save all parties vast amounts of time and money. The issue raised in Defendant's Motion is a legal issue which is

dispositive of the case. This case should not proceed without certainty of whether Plaintiff's claim should be dismissed for failure to comply with Sections 29-26-121 and 29-26-122 of the Tennessee Code Annotated. Should this Court deny an immediate appeal, Defendant will be forced to wait until after the conclusion of all trial court proceedings to know whether they can even be liable for the unspecified amount of damages in this matter. Defendant, therefore, would have to endure the continued costs of defending against Plaintiff's claim through trial. These costs include: (1) conducting and completing discovery, (2) drafting and arguing pre-trial motions, (3) conferring with expert witnesses, (4) preparing witnesses for trial, (5) presenting proof at trial, and (6) drafting and arguing post-trial motions. These activities would be extremely costly and time consuming for all parties, as well as the Court. Such a costly result on a dispositive issue is precisely the purpose of an interlocutory appeal.

C. An immediate appeal is imperative to develop a uniform body of law.

The third criterion set forth in Tennessee Rule of Appellate Procedure 9 regards developing a "uniform body of law." Tenn. R. App. P. 9(a)(3). Currently, no appellate decisions exist addressing this issue.

Pursuant to section 29-26-121 of the Tennessee Code Annotated, "[a]ny person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider who will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state." Tenn. Code Ann. § 29-26-121(a)(1).

The notice "shall" contain specific information to include:

> (A) The full name and date of birth of the patient whose treatment is at issue;
>
> (B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
>
> (C) The name and address of the attorney sending the notice, if applicable;
>
> (D) A list of the name and address of all providers being sent a notice; and
>
> (E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

Tenn. Code. Ann. § 29-26-121(a)(2). Pursuant to Tennessee Code Annotated § 29-26-121(b) "[i]f a complaint is filed in any court alleging a claim for medical malpractice, the pleadings *shall* state whether [the] party has complied with subsection (a) and *shall* provide the documentation specified in subdivision (a)(2) . . . The court has discretion to excuse compliance with this section *only for extraordinary cause shown*." Tenn. Code. Ann. § 29-26-121(b) (emphasis added). It is undisputed in this case that the Plaintiff did not comply with the above statutory provisions. First, no statutory notice was given to Defendant at least sixty (60) days prior to the filing of the September 30, 2009 Complaint. Second, no HIPAA compliant medical authorization was provided to Defendant. Third, Plaintiff did not state in the Complaint that they had complied with the notice requirement and provide evidence of compliance. Furthermore, 2009 Pub. Acts, c. 425, § 4, provides: "SECTION 4. Section 1 of this act shall take effect and apply to notice given on or after July 1, 2009, in *all medical malpractice actions*, the public welfare requiring it." (emphasis added.) In the present action, it is undisputed that the Complaint was filed on September 30, 2009. (Compl.) Therefore, pursuant to section 26-26-121 of the Tennessee Code Annotated, Plaintiff was required to provide written notice of the potential claim to each health care provider that would be a named defendant at least sixty (60) days before the filing of a

complaint based upon medical malpractice in any court of this state. *See* Tenn. Code Ann. § 29-26-121; *See also* Compl. Plaintiff was required to provide written notice of the potential claim to Defendant no later than August 1, 2009. It is undisputed that Plaintiff failed to provide the requisite notice. Pursuant to Tennessee Code Annotated § 29-26-121(b), "[t]he court has discretion to excuse compliance with this section only for extraordinary cause shown." Tenn. Code Ann. § 29-26-121(b). Plaintiff failed to set forth any extraordinary cause for his failure to comply with this statute. (*See* Pls. Response to Mtn to Dismiss.)

Pursuant to section 29-26-122 of the Tennessee Code Annotated, "in *any* medical malpractice action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel *shall* file a certificate of good faith with the complaint." Tenn. Code. Ann. § 29-26-122(a) (emphasis added).

> The certificate of good faith, filed with the Complaint, shall state that:
>
> (1) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:
>
> > (A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and
> >
> > (B) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115; or
>
> (2) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:
>
> > (A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

> (B) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue and, as appropriate, information from the plaintiff or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the plaintiff or plaintiffs counsel; and that, despite the absence of this information, there is a good faith basis for maintaining the action as to each defendant consistent with the requirements of § 29-26-115. Refusal of the defendant to release the medical records in a timely fashion or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical record prior to expert certification.

Tenn. Code. Ann. § 29-26-122(a)(1)-(2). "*If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent . . . extraordinary cause.*" Tenn. Code. Ann. § 29-26-122(a) (emphasis added). "The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal *with prejudice*." Tenn. Code Ann. § 29-26-122(c) (emphasis added). In the instant case, the Plaintiff did not comply with the above statutory provisions. No certificate of good faith was attached to the Complaint filed against Defendant Tennessee EM-I Medical Services, P.C.

III. CONCLUSION

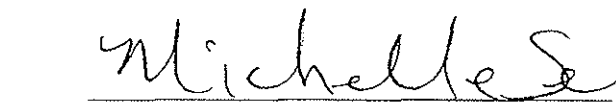
In conclusion, an interlocutory appeal is warranted in this case. All of the criteria that trial courts are instructed to consider as set forth in Tennessee Rule of Appellate Procedure 9 are present and demonstrate the need for an interlocutory appeal in this case. Should the Court deny Defendant's request for interlocutory appeal, Defendant would be subjected to the rigors, expense, and uncertainty of defending against a claim for an unspecified amount of damages that very well may have been extinguished by operation of law. Defendant also would be required to undertake discovery, put on proof at trial, and be subjected to a

judgment of liability. Appellate review of the merits of Defendant's Motion to Dismiss after trial would not prevent or remedy the financial burden of enduring substantial discovery and a trial.

Based upon the foregoing, the Court should grant Defendant's Motion for Interlocutory Appeal.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.



BY: MARTY R. PHILLIPS (BPR #14990)
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50 N. Front St., Suite 610
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(901) 333-8101

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

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(901) 525-8721

Attorney for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

This the 10th day of March, 2010.

Michelle Sellers of
plaintiff's

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

FILED
MAR 10 2010
CIRCUIT COURT CLERK
BY _____ D.C.

CURTIS MYERS

Plaintiff,

vs.

No. CT-004650-09, DIV. VI

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C.; and
EAST TENNESSEE CHEST
PAIN PHYSICIANS, PLLC,

Defendants.

NOTICE OF HEARING

TO: Bill M. Wade (BPR #21056)
The Cochran Firm
One Commerce Square, Suite 2600
Memphis, TN 38103
(901) 523-1222
Attorney for Plaintiff

Please take notice that a hearing on Defendant Tennessee EM-I Medical Services, P.C.'s Motion for Interlocutory Appeal filed in this cause will be set for March 26, 2010 at 9:00 a.m. before the Honorable Jerry Stokes, Judge of Division VI of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. You may attend and be heard if you wish.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

BY: MARTY R. PHILLIPS (BPR #14990)
MICHELLE G. SELLERS (BPR# 20769)
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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon counsel of record by mailing postage prepaid to such counsel:

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Memphis, Tennessee 38103
(901) 525-8721
Attorney for Defendants Arsalan Shirwany, M.D., and East Memphis Chest Pain Physicians, PLLC

This the 10th day of March, 2010.

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS,

Plaintiff,

v.

CASE NO. CT-004650-09
Div. 6

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

COMES NOW the Plaintiff, Curtis Myers ("the Plaintiff"), and, by and through undersigned counsel, files the following response to the Motion for Interlocutory Appeal filed by Defendants Tennessee EM-I Medical Services, P.C. ("TEMS"), Arsalan Shirwany, M.D. ("Dr. Shirwany") and East Memphis Chest Pain Physicians, PLLC ("EMCPP"), and respectfully states as follows:

For the purposes of this response, the Plaintiff will focus upon the arguments set forth in TEMS' supporting memorandum, as all other Defendants to this matter relied upon that brief.

First, TEMS failed to fully cite this Court's order Denying Defendants' Collective Motion to Dismiss. The TEMS brief makes it sound as if the Court merely ruled that the Plaintiff's past actions in this litigation constituted "substantial compliance" with the

notice requirements of TENN. CODE ANN. § 29-26-121. While the Court did in fact reach that conclusion, it is also important to note that the Court found "extraordinary cause to excuse strict compliance with TENN. CODE ANN. § 29-26-121, to the extent such strict compliance is required."

Next, TEMS argues three points supporting its motion. The first is that it will suffer "irreparable injury" if its motion is not granted. Then, TEMS suggests that the "injury" to be suffered will be the loss of "large sums of money and significant amounts of time during discovery, trial and appeal in contesting Plaintiff's claim." While such a statement might be true when describing some lawsuits, this is not that case. As the Court noted during the original motion hearing in December, this case is old. Most of it has already been litigated. Much of, if not most of, the hard expenses have already been incurred. Written discovery was mostly completed long ago, as were the depositions of most fact witnesses. At this point, to be realistic, the parties have reached the phase of expert discovery. To claim unneeded expenses will be incurred, and could be avoided, is completely false. This motion, and any subsequent work before the Court of Appeals, would be the only unnecessary expense that could be avoided.

TEMS follows this up with argument "B," which is really just argument "A" all over again: that granting the Defendants permission to file an interlocutory appeal would somehow save money. As shown above, this argument is demonstrably false. The underlying facts of this case were litigated to the verge of expert disclosure and depositions beginning way back with its filing in January 2007. The money has been spent.

TEMS' third point is not a point at all. It's just an attempt to get this Court to alter or amend its ruling on the original motion to dismiss. The title of argument "C" is "an immediate appeal is imperative to develop a uniform body of law." What follows is merely a rehash of TEMS' argument in support of its motion to dismiss, which is devoid of any explanation how the Court's denial of this motion would hinder the development of a uniform body of law.

While we are rehashing our arguments about whether dismissal was warranted by this Court, the Plaintiff will take the opportunity to once again point out a provision in the new legislation that has been completely avoided and disregarded by these Defendants, and rightfully so. When passing the recent tort reform statutes, the legislature added one last sentence to 2009 TENN. PUB. ACTS 425: "[i]n the event that notice is successfully given more than once to a provider, the effect of the notice is determined by the law in effect on the date of the first successful notice." These Defendants got notice when served with the original summonses in January 2007. It is completely undisputed, and, technically speaking, these Defendants have never denied it.

An interlocutory appeal will only accomplish everything that TEMS' claims to want to avoid in its motion: unnecessary expenses and costly delays. The Defendants should engage in expert discovery and get a trial date. Any questions remaining after trial can be appealed with this one, and one trip to the Court of Appeals will prove cheaper than two.

Respectfully submitted,

BILL M. WADE #21056
THE COCHRAN FIRM – MEMPHIS
One Commerce Square, Suite 2600
Memphis, Tennessee 38103
Phone (901) 523-1222
Attorneys for Plaintiffs

Certificate of Service

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing motion was served upon all counsel to this matter in conformity with the Tennessee Rules of Civil Procedure on this 24th day of ~~March 2010.~~

Bill M. Wade

EX. 18

Notice of filing transcript of motion for interlocutory appeal hearing held on March 26, 2010 and filed April _, 2010. (not filed as of date this application was bound).

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CURTIS MYERS AND
LISA MYERS,

Plaintiffs,

VS. NO. CT-00000091-07
DIVISION VI

AMISUB(SFH), INC. d/b/a
ST. FRANCIS HOSPITAL,
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL SERVICES, P.A.;
EAST TENNESSEE CHEST PAIN PHYSICIANS, PLLC;
LARRY K. ROBERTS, M.D.;
MEMPHIS PHYSICIANS RADIOLOGICAL GROUP, P.C.,

Defendants.

PROCEEDINGS

BE IT REMEMBERED that the above-captioned cause on for hearing this, the 26th day of March, 2010, in the above Court before the HONORABLE JERRY STOKES, JUDGE, presiding, when and where the following proceedings were had, to wit:

ORIGINAL

Kelly N. Stephens, RPR, CCR# 1392
22 North Second Street, Suite 303
Memphis, Tennessee 38103
(901) 340-0866
kstephens315@hotmail.com

APPEARANCES

On Behalf of the Plaintiffs:

MR. BILL M. WADE
The Cochran Firm
2600 One Commerce Square
Memphis, TN 38103

On Behalf of the Defendants:

MS. MICHELLE GREENWAY SELLERS
Rainey, Kizer, Reviere & Bell, P.L.C.
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Jackson, Tennessee 38301

MS. KIMBERLY C. SHIELDS
Hardison Law Firm
119 South Main Street
Suite 800
Memphis, Tennessee 38103

MR. JOSEPH M. CLARK
Thomason, Hendrix, Harvey, Johnson & Mitchell
2900 One Commerce Square
Memphis, Tennessee 38103

THE COURT: All right. Are we ready on this matter?

MS. SELLERS: Yes, Your Honor.

THE COURT: All right.

MS. SELLERS: Good morning. We're here today on Defendants' Motion For Interlocutory Appeal denying Defendants' Motions to Dismiss Plaintiffs' Claims For Failure to Comply With Tennessee Code Annotated 29-26-121 and Tennessee Code Annotated 29-26-122. As you'll recall, Your Honor, this Complaint was filed in this matter on September 30th, 2009, which was after the effective date of the statutes, which was July 1, 2009.

It's undisputed that Plaintiff did not provide the statutory or required notice or a Certificate of Good Faith in this matter as required by the statutes. However, Your Honor entered an Order denying Defendants' Motion For Summary -- denying Defendants' Motion to Dismiss on the basis that this matter was previously filed. And we had notice of the potential claims through that previous filing, so we found extraordinary cause on that basis.

We're here today on a Motion For Interlocutory Appeal of that Order. We feel that the criteria required for an Interlocutory Appeal are all satisfied in this matter. The criteria, first, there's -- an immediate appeal is imperative to prevent Defendants from suffering irreparable injury. If we are required to go forward in this case without an Interlocutory Appeal on this matter, we will have to conduct discovery, which is not complete, contrary to Plaintiffs' assertions. We will have to prepare for trial, which will be expensive. And this matter if reviewed afterwards in the Appellate Court -- I mean, it really cannot be remedied at that time.

An immediate appeal is imperative to prevent needless expense, protracted litigation in this case. If the Defendants' position is correct in this case, Your Honor, and the Court of Appeals overturns the Order and grants our Motion to Dismiss, then this case will be over with and there will be no need for any further action in this Court, no need for depositions, no need for motions, no need for hearings, no need for expert disclosures, expert discovery, trial

preparation.

Defendants in this case will be forced to spend a vast amount of money, time on this case. And if we are correct, then that would be an injury that could not be changed at a later date. Having the Court of Appeals review this issue right now will also help to provide a uniform body of law on this issue. There are no appellate decisions on this issue.

During our Motion to -- hearing on our Motion to Dismiss, Your Honor, I provided the Court with an Order from the Jones versus Michael O'Brien, M.D., an orthopedic surgeon in Oakridge, the Circuit Court for Anderson County, which held that Plaintiffs have failed to comply with 29-26-121, and the Court granted the Motion to Dismiss or Motion For Summary Judgment.

Plaintiffs' counsel submitted to the Court that he was aware of another case in another jurisdiction that had held for the Plaintiff on this issue. So there is not a uniform body of law for this area.

We feel that it's necessary for the Defendants and for all parties to know what's

required in this matter. And right now without a uniform body of law and appellate decision we don't feel that there is. We would move for Motion For Interlocutory Appeal to take this up and find out if the Court of Appeals will develop a uniform body of law for all lower courts to follow in this matter.

THE COURT: Who do you represent again?

MS. SELLERS: I represent Tennessee EM-I Medical Services, PC.

THE COURT: All right. Okay. Thank you, ma'am. Yes, sir, tell me who you represent.

MR. CLARK: I represent Dr. Shirwany and East Memphis Chest Pain Physicians.

THE COURT: Okay.

MR. CLARK: Basically, adding on to what she's already stated, with respect to a uniform body of law, what concerns us most is that the statute itself does not explain what extraordinary cause shown is, and so there's no case law out there on it as well.

And it's our position that simply saying, Well, I read the statute and didn't

think it applied to me," we don't think that the Appellate Court will possibly believe that that's extraordinary cause shown. And to create a uniform body of law, I think, this is a question that's going to be recurring. Everybody is going to want to know, because merely saying, "I didn't think the statute applied to me is simply enough," then we run into a situation of basically many people could file a case without a Certificate of Good Faith and just simply say, "Well, I didn't think the statute applies to me."

And the fact that we didn't bring out earlier, which I think is important in this particular case, is that the Complaint -- the last Amended Complaint that we had before the case was initially non-suited, the allegations of negligence were very tenuous, just a couple of paragraphs. In the new Complaint in its present case, it went on to go to two and a half pages.

So you're looking at a Complaint now that's really different. I mean, the facts are the same, but the actual allegations of negligence are much more detailed. So based on that, we think it's appropriate for them to actually have an expert

on the record up front with this Certificate of Good Faith saying, "I've looked at these additional allegations and believe there's good faith for it." And that's our rationale for creating a uniform body of law.

THE COURT: Thank you, sir. All right, counselor.

MS. SHIELDS: Good morning, Your Honor, I'm Kim Shields. I represent Saint Francis Hospital in this matter. We're joining in the motion and we don't need to add to the argument.

THE COURT: Thank you.

Mr. Wade, what do you say?

MR. WADE: Your Honor, I drafted a three-page brief that I filed back on Wednesday, and based on what I've heard here today, I don't have anything to add to it, unless you have any questions for me.

THE COURT: What do you think about this trying to at least obtain some uniform body of law that will help, not only the lawyers, but particularly the Court in deciding these type matters?

MR. WADE: I don't know how

that's going to play out because as Ms. Sellers pointed out in her brief, she said, I think, Tennessee law doesn't even tell her what it means to develop a uniform body of law. And as I pointed out in my response brief, they didn't explain how that would happen. They merely rehashed their argument from the original Motion to Dismiss.

THE COURT: I think she was making reference to the case that persuaded the Court the last time that we were here when I denied this Motion For Summary Judgment or Motion to Dismiss the case she cited out of East Tennessee.

MR. WADE: Correct. The case from West Tennessee, to the best of my knowledge, isn't even up on appeal. So it's not like we've got multiple districts -- appellate districts dealing with this issue right now, to the best of my knowledge, unless somebody knows something different, then they should tell us right now.

THE COURT: All right. You mean you persuaded me with a trial court decision?

MR. WADE: What's that, Your Honor?

THE COURT: You persuaded me

with a trial court decision?

MR. WADE: No, I'm sorry. The Court's got it backwards. I didn't use the trial court decision, they did.

MS. SELLERS: Your Honor, Mr. Wade told you that he was aware of another decision, he didn't provide any details of that decision.

THE COURT: All right.

MS. SELLERS: I provided you with the Order.

THE COURT: All right. I'm going to grant the motion, and I think a uniform body of law needs to be created. It would help us in situations such as this. You may draft an Order to that effect.

MR. WADE: Thank you, Your Honor.

MS. SELLERS: Thank you.

THE COURT: Thank you all, appreciate your patience this morning.

END OF PROCEEDINGS

C E R T I F I C A T E

(STATE OF TENNESSEE)

(COUNTY OF SHELBY)

I, KELLY N. STEPHENS, RPR, CCR #1392, a Notary Public, do hereby certify that the foregoing transcript of the proceedings in the above-styled cause in the Chancery Court of Shelby County, Tennessee, was reported by me in stenograph and taken down verbatim, and that the foregoing pages constitute a true and correct transcription of the proceedings in said cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and official seal this the 26th day of March, 2010.

KELLY N. STEPHENS, RPR, CCR #1392
NOTARY PUBLIC AT LARGE

MY COMMISSION EXPIRES: APRIL 4, 2012

29-26-122. Filing of certificate of good faith. —

(a) In any medical malpractice action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause. The certificate of good faith shall state that:

(1) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115; or

(2) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue and, as appropriate, information from the plaintiff or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the plaintiff or plaintiffs counsel; and that, despite the absence of this information, there is a good faith basis for maintaining the action as to each defendant consistent with the requirements of § 29-26-115. Refusal of the defendant to release the medical records in a timely fashion or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical record prior to expert certification.

(b) Within thirty (30) days after a defendant has alleged in an answer or amended answer that a non-party is at fault for the injuries or death of the plaintiff and expert testimony is required to prove fault as required by § 29-26-115, each defendant or defendant's counsel shall file a certificate of good faith stating that:

(1) The defendant or defendant's counsel has consulted with one (1) or more experts, which may include the defendant filing the certificate of good faith, who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and

(B) Believe, based on the information reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to allege such fault against another consistent with the requirements of § 29-26-115; or

(2) The defendant or defendant's counsel has consulted with one (1) or more medical experts, which may include the defendant filing the certificate of good faith, who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express an opinions or opinions in the case; and

(B) Believe, based on the information reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the information reasonably available to the defendant or defendant's counsel; and that, despite the absence of this information, there is a good faith basis for alleging such fault against another, whether already a party to the action or not, consistent with the requirements of § 29-26-115.

(c) The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice. The failure of a defendant to file a certificate of good faith in compliance with this section alleging the fault of a non-party shall, upon motion, make such allegations subject to being stricken with prejudice unless the plaintiff consents to waive compliance with this section. If the allegations are stricken, no defendant, except for a defendant who complied with this section, can assert, and neither shall the judge nor jury consider, the fault, if any, of those identified by the allegations. The court may, upon motion, grant an extension within which to file a certificate of good faith if the court determines that a health care provider who has medical records relevant to the issues in the case has failed to timely produce medical records upon timely request, or for other good cause shown.

(d) (1) Subject only to subdivision (d)(2), the written statement of an expert relied upon in executing the certificate of good faith is not discoverable in the course of litigation.

(2) If a party in a medical malpractice action subject to this section prevails on the basis of the failure of an opposing party to offer any competent expert testimony as required by § 29-26-115, the court may, upon motion, compel the opposing party or party's counsel to provide to the court a copy of each such expert's signed written statement relied upon in executing the certificate of good faith. The medical experts may be compelled to provide testimony under oath, as determined by the court, for the purposes of determining that party's compliance with subsection (a) or (b).

(3) If the court, after hearing, determines that this section has been violated, the court shall award appropriate sanctions against the attorney if the attorney was a signatory to the action and against the party if the party was proceeding pro se. The sanctions may include, but are not limited to, payment of some or all of the attorney's fees and costs incurred by a party in defending or responding to a claim or defense supported by the non-complying certificate of good faith. If the signatory was an attorney, the court shall forward the order to the board of professional responsibility for appropriate action. Upon proof that a party or party's counsel has filed a certificate of good faith in violation of this section in three (3) or more cases in any court of record in this state, the court shall, upon motion, require the party or party's counsel to post a bond in the amount of ten thousand dollars ($10,000) per adverse party in any future medical malpractice case to secure payment of sanctions for any violation of this section in such case.

(4) A certificate of good faith shall disclose the number of prior violations of this section by the executing party.

(5) The administrative office of the courts shall develop a certificate of good faith form to effectuate the purposes of this section.

[Acts 2008, ch. 919, § 1; 2009, ch. 425, § 2.]

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to David B. Guralnik
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extrasocial
extrasolar

☆**ex|tra-base hit** (eks'trə bās') *Baseball* any hit greater than a single; double, triple, or home run

ex|tra-bold (-bōld') *n. Printing* a style of type heavier than boldface

ex|tra-ca·non|i-cal (ek'strə kə nän'i kəl) *adj.* not included in the canon; not among the authorized books

ex·tract (*for v.* eks trakt', ik strakt'; *for n.* eks'trakt') *vt.* [ME *extracten* < L *extractus*, pp. of *extrahere*, to draw out < *ex-*, out + *trahere*, to DRAW] **1** to draw out by effort; pull out *[to extract* a tooth, to *extract* a promise from someone*]* **2** to remove or separate (metal) from ore **3** to obtain (a substance, esp. an essence or concentrate) by pressing, distilling, using a solvent, etc. *[to extract* juice from fruit*]* **4** to obtain as if by drawing out; deduce (a principle), derive or elicit (information, pleasure, etc.), or the like **5** to copy out or quote (a passage from a book, etc.); excerpt **6** *Math.* to compute (the root of a quantity) —*n.* something extracted; specif., *a*) a concentrated form, whether solid, viscid, or liquid, of a food, flavoring, etc. *[*beef *extract]* *b*) a passage selected from a book, etc.; excerpt; quotation *c*) *Pharmacy* the concentrated substance obtained by dissolving a drug in some solvent, as ether or alcohol, and then evaporating the preparation —**ex·tract'a|ble** or **ex·tract'|i|ble** *adj.*

***SYN.*—extract** implies a drawing out of something, as if by pulling, sucking, etc. *[to extract* a promise*]*; **educe** suggests a drawing out or evolving of something that is latent or undeveloped *[*laws were *educed* from tribal customs*]*; **elicit** connotes difficulty or skill in drawing out something hidden or buried *[*his jokes *elicited* no smiles*]*; **evoke** implies a calling forth or summoning, as of a mental image, by stimulating the emotions *[*the odor *evoked* a memory of childhood*]*; **extort** suggests a forcing or wresting of something, as by violence or threats *[*to *extort* a ransom*]*

ex·trac·tion (eks trak'shən, ik strak'-) *n.* [ME *extraccioun* < ML *extractio*] **1** the act or process of extracting; specif., the extracting of a tooth by a dentist **2** origin; lineage; descent *[*of Navaho *extraction]* **3** a thing extracted; extract

ex·trac·tive (eks trak'tiv, ik strak'-) *adj.* [ME *extractif* < ML *extractivus*] **1** extracting or having to do with extraction **2** capable of being extracted **3** having the nature of an extract —*n.* **1** an extractive substance **2** an extract

ex·trac·tor (eks trak'tər, ik strak'-) *n.* a person or thing that extracts; specif., the part of a breech-loading gun that withdraws the cartridge or shell case from the chamber

☆**ex|tra·cur·ric|u·lar** (eks'trə kə rik'yōō lər, -yə-) *adj.* **1** *a*) not part of the required curriculum; outside the regular course of study but under the supervision of the school *[*dramatics, athletics, and other *extracurricular* activities*]* *b*) not part of one's regular work, routine, etc. **2** [Colloq.] EXTRAMARITAL

ex|tra·dit·a|ble (eks'trə dit'ə bəl) *adj.* **1** that can be extradited **2** making liable to extradition

ex|tra·dite (eks'trə dīt') *vt.* **-dit|ed, -dit'ing** [back-form. < fol.] **1** to turn over (a person accused or convicted of a crime) to the jurisdiction of another country, State, etc. where the crime was allegedly committed **2** to obtain the extradition of

ex|tra·di·tion (eks'trə dish'ən) *n.* [Fr < L *ex*, out + *traditio*, a surrender: see TRADITION] the act of extraditing, as by treaty, a person accused or convicted of a crime

ex|tra·dos (eks trā'däs') *n.* [Fr < L *extra*, beyond + Fr *dos* < L *dorsum*, back] *Archit.* the outside curve of an arch: see ARCH[1], illus.

ex|tra·ga·lac·tic (eks'trə gə lak'tik) *adj.* outside or beyond our own galaxy

ex|tra·ju·di·cial (-jōō dish'əl) *adj.* **1** outside or beyond the jurisdiction of a court **2** outside the usual course of justice —**ex|tra·ju·di'|cial|ly** *adv.*

ex|tra·le|gal (-lē'gəl) *adj.* outside of legal control or authority; not regulated by law —**ex|tra·le'|gal·ly** *adv.*

ex|tra·mar·i|tal (-mar'i təl, -it'l) *adj.* of or relating to sexual intercourse with someone other than one's spouse *[extramarital* affairs*]*

ex|tra·mun·dane (-mun'dān') *adj.* [LL *extramundanus*: see EXTRA- & MUNDANE] outside the physical world; not of this world

ex|tra·mu·ral (-myoor'əl) *adj.* [see EXTRA- & MURAL] outside the walls or limits of a city, school, etc. *[extramural* activities*]*

ex|tra·ne|ous (eks trā'nē əs, ik strā'-) *adj.* [L *extraneus*, external, foreign < *extra*: see EXTRA-] **1** coming from outside; foreign *[*an *extraneous* substance*]* **2** not truly or properly belonging; not essential **3** not pertinent; irrelevant —***SYN.*** EXTRINSIC —**ex|tra'ne|ous·ly** *adv.* —**ex|tra'ne|ous·ness** *n.*

ex|tra·nu·cle|ar (eks'trə nōō'klē ər, -nyōō'-) *adj.* located or occurring outside of the nucleus of a cell

ex·tra|or·di·naire (ik strôr'də ner'; *Fr* ek strôr dē ner') *adj.* [Fr] extraordinary: used after the noun

ex|tra|or·di·nar|y (ek strôrd'n er'ē, ik-; -strôr'də ner'ē; *also* eks'trə ôrd'n er'ē, -ôr'də ner'ē) *adj.* [ME *extraordinari* < L *extraordinarius* < *extra ordinem*, out of the usual order < *extra* + acc. of *ordo*, ORDER] **1** not according to the usual custom or regular plan *[*an *extraordinary* session of Congress*]* **2** going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable **3** outside the regular staff; sent on a special errand; having special authority or responsibility *[*a minister *extraordinary]* —**ex|tra|or'di·nar'|i·ly** *adv.* —**ex|tra|or'di·nar'|i·ness** *n.*

ex·trap|o·late (ek strap'ə lāt', ik-) *vt., vi.* **-lat|ed, -lat'ing** [L *extra* (see EXTRA-) + (INTER)POLATE] **1** *Sta*
value, quantity, etc. beyond the know
tain variables within the known rang
value is assumed to follow **2** to arrive
hypothesizing from known facts or ob
to consequences on the basis of (know
trap|o·la'tion *n.* —**ex·trap'o·la'tive** *ad*

ex|tra·sen·so|ry (eks'trə sen'sə rē) *adj.*
apart from, or in addition to, the n
senses *[extrasensory* perception*]*

ex|tra·sys·to|le (-sis'tə lē') *n.* [EXTRA-
heart rhythm resulting in an extra con
regular beats —**ex|tra·sys·tol'|ic** (-sis t

ex·tra·ter·res·tri·al (eks'trə tə res'trē əl
or coming from outside the limits of th
trial being, as in science fiction

ex|tra·ter·ri·to·ri|al (-ter'ə tôr'ē əl) *adj.*
its or jurisdiction of the country, State
[extraterritorial rights*]* —**ex|tra·ter'ri·t**

ex|tra·ter·ri·to·ri·al·|ity (-ter'ə tôr'ē al'ə
jurisdiction of the country in which or
foreign diplomats **2** jurisdiction of a
foreign lands

ex|tra·u|ter·ine (-yōōt'ər in) *adj.* outside

ex·trav|a·gance (ek strav'ə gəns, ik-)
beyond reasonable or proper limits in c
able excess **2** a spending of more than
excessive expenditure; wastefulness **3**
spending, behavior, or speech Also **ex·t**

ex·trav|a·gant (-gənt) *adj.* [ME & An
extravagans, prp. of *extravagari*, to s
vagari, to wander < *vagus*: see VAGUE
bounds; wandering **2** going beyond rea
unrestrained *[extravagant* demands*]*
[extravagant designs*]* **4** costing or spen
SYN. EXCESSIVE, PROFUSE —**ex·trav'|a·ga**

ex·trav|a·gan|za (ek strav'ə gan'zə, ik-)
with L *ex-* < It *estravaganza*, extravaga
extravagans: see prec.] **1** a literary, m
characterized by a loose structure and fa
rate theatrical production, as some musi

ex·trav|a·gate (ek strav'ə gāt') *vi.* **-gat|ed**
gatus, pp.: see EXTRAVAGANT] [Rare] **1**
beyond reasonable limits; be extravagant

ex·trav|a·sate (ek strav'ə sāt') *vt.* **-sat|e**
EXTRA-) + *vas*, a vessel + **-ATE[1]**] to allo
flow from its normal vessels into the surr
1 to flow out or escape into surroundi
lymph, etc. **2** to flow out, as lava from a

ex|tra·vas|cu·lar (eks'trə vas'kyōō lər) *adj*
tem, or the blood and lymph vessels

☆**ex|tra·ve|hic|u·lar** (-vē hik'yōō lər) *adj.*
by an astronaut outside a vehicle in spac

ex|tra·ver·sion (eks'trə vur'zhən) *n.* EX
ex|tra·vert' (-vurt') *n., adj.*

ex|tra·vir|gin (eks'trə vur'jən) *adj.* designa
oil with the least acid and the best flavor,

Ex·tre·ma·du·ra (ek'strə mə door'ə) *Sp. n*

ex·treme (ek strēm', ik-) *adj.* [ME &
outermost, superl. of *exterus*, outer: see E
outermost point; farthest away; most rem
the greatest degree; very great or greatest
excessive degree; immoderate **3** far from
tional **4** deviating to the greatest degree fr
as in politics **5** very severe; drastic
[Archaic] last; final —*n.* **1** either of two th
or far as possible from each other **2** a
extreme act, expedient, etc. **4** an extrem
extreme of distress*]* **5** [Obs.] an extreme p
a) the first or last term of a proportio
extremes to be excessive or immoderate
the extreme to the utmost degree —**ex·tre**
ness *n.*

extremely high frequency *Radio* any f
and 300,000 megahertz

Extreme Unction ANOINTING OF THE SICK

ex·trem·ism (ek strēm'iz'əm, ik-) *n.* the qu
extremes, esp. the extreme right or extre
trem'ist *adj., n.*

ex·trem·|ity (ek strem'ə tē, ik-) *n., pl.* **-ties**
L *extremitas* < *extremus*: see EXTREME] **1**
point or part; end **2** the greatest degree **3**
sity, danger, etc. **4** [Archaic] the end of
measure; severe or strong action: *usually*
limb *b*) [*pl.*] the hands and feet

ex·tre·mum (ek strē'məm) *n., pl.* **-tre'ma** (-
neut. of *extremus*: see EXTREME] *Math.* th
value of a function

ex·tri·cate (eks'tri kāt') *vt.* **-cat|ed, -cat'in**
extricare, to disentangle < *ex-*, out + *tric*
to set free; release or disentangle *(from* a
tri·ca|bil'|i·ty *n.* —**ex'tri·ca|ble** (-kə bəl) *adj.*

ex·trin·sic (eks trin'sik, -zik; ik strin'-) *a*
extrinsecus, from without, outer < *exter*, w
otherwise < base of *sequi*, to follow: see
belonging to the thing with which it is co

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*2005 N.C. App. LEXIS 24, **

STATE OF NORTH CAROLINA and THE JOHNSTON COUNTY BOARD OF EDUCATION v. PHILLIP JADE SAUNDERS Defendant and MONTEE SPELLS, RANGER INSURANCE COMPANY, and EDDIE E. LEE, Surety-Petitioners

NO. COA03-1437

COURT OF APPEALS OF NORTH CAROLINA

2005 N.C. App. LEXIS 24

October 11, 2004, Heard in the Court of Appeals
January 4, 2005, Filed

NOTICE:

[*1] PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Reported at State v. Saunders, 606 S.E.2d 459, 2005 N.C. App. LEXIS 77 (N.C. Ct. App., Jan. 4, 2005)

PRIOR HISTORY: Johnston County. No. 97 CRS 8575-76.

DISPOSITION: Affirmed; remanded for correction of order.

CORE TERMS: forfeiture, notice, surety, sureties-appellants, mailed, remit, locate, extradition, clerk, matter of law, mail, clerk's office, contacted, obligor's, mailing, box, final judgment, review denied, proper notice, statutory requirements, appearance, remission, verified, spend, bail, computer records, notice of forfeiture, prejudiced, correction, bondsman

COUNSEL: Benjamin R. Kuhn for petitioners-appellants.

Daughtry, Woodard, Lawrence & Starling, by James R. Lawrence, Jr., and Woodruff, Reece & Fortner, by Gordon C. Woodruff and Michael J. Reece, for plaintiffs-appellees.

JUDGES: MARTIN, Chief Judge. Judges TIMMONS-GOODSON and HUDSON concur.

OPINION BY: MARTIN

OPINION

Appeal by petitioners from judgment entered 11 July 2003 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 11 October 2004.

MARTIN, Chief Judge.

Petitioner-appellants appeal from the trial court's order denying their petition for relief from a final judgment of bond forfeiture. The record discloses that on 3 June 1997, defendant Phillip Jade Saunders (Saunders) was arrested on a charge of trafficking in cocaine in violation of N.C. Gen. Stat. § 90- 95(h)(3). His bond was **[*2]** originally set at $ 200,000 but was reduced to $ 100,000 *sua sponte* by Superior Court Judge Lynn Johnson.

Montee Spells (Spells), as surety bondsman and attorney-in- fact for The Ranger Insurance Company (Ranger), secured defendant's appearance in court on 12 January 1998 by posting a $ 100,000 bond on 30 August 1997. Defendant returned to his home in Miami where Spells contacted him approximately once each month. Spells

regularly checked computer records of the Administrative Office of the Courts (AOC), but the records never indicated any change of court date, failure to appear, or forfeiture of bond in defendant's case.

Defendant Saunders failed to appear in court on 12 January 1998, and orders were issued for his arrest and for forfeiture of the bond. On 18 August 1998, Assistant District Attorney Dale Stubbs (Stubbs) dismissed all charges against defendant, believing defendant could not be readily found and produced for trial. On 12 April 1999, a notice was sent to Ranger at its Houston, Texas office, notifying it of the order of forfeiture and that judgment would be entered in the amount of the bond unless the principal, Saunders, appeared on or before 8 July 1999 or the **[*3]** surety, Ranger, satisfied the court that the principal's failure to appear was without the principal's fault. Judgment of forfeiture in the amount of the bond was entered on 8 July 1999, and notice of the judgment was mailed to Ranger. On 13 July, the court entered an Order of Bond Forfeiture.

The Notice of Judgment was not received by sureties-appellants until approximately 22 July 1999. Immediately upon learning of the judgment, sureties-appellants sought to locate defendant and return him to Johnston County. After traveling to Miami, defendant's last known address, Spells learned that defendant had fled to the Bahamas. Because only the local prosecuting authority could initiate extradition proceedings, Spells contacted Stubbs to enlist his help. Initially Stubbs tried to assist, filling out paperwork for defendant's extradition and making phone calls to Washington. However, due to time and money limitations, Stubbs discontinued his pursuit of defendant's extradition.

On 15 January 2003, sureties-appellants filed a Verified Petition to Remit Bond Forfeiture After Judgment. The Johnston County School Board responded and a hearing was held on 1 May 2003. On 11 June 2003, the court **[*4]** denied sureties-appellants petition to remit the bond forfeiture, concluding as a matter of law that sureties-appellants had not shown evidence of extraordinary cause.

Appellants contend the trial court erred in denying their motion to remit the judgment of bond forfeiture for extraordinary cause. North Carolina General Statute § 15A-544(a)-(h) (1997), now repealed, governed the bond forfeiture in this case. N.C. Gen. Stat. § 15A-544(h) provided in pertinent part, "for extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." N.C. Gen. Stat. § 15A-544 (h) (1997). Thus, "it is within the court's discretion to remit judgment for extraordinary cause," *State v. McCarn*, 151 N.C. App. 742, 745, 566 S.E.2d 751, 753 (2002) (citation omitted), and the appellate court reviews only for abuse of discretion. *Id.*

Although the statute does not define the term, this Court has previously defined "extraordinary cause" as "cause **[*5]** going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *Id.* "In determining whether the facts of a particular case constitute extraordinary cause, the trial court must make brief, definite, pertinent findings and conclusions." *Id.* Because the determination of extraordinary cause is a "heavily fact-based inquiry," *State v. Coronel*, 145 N.C. App. 237, 244, 550 S.E.2d 561, 567 (2001), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002), these cases must be reviewed on a "case by case basis." *Id.*

Appellants first argue they did not receive timely and proper notice of the Order of Forfeiture. N.C. Gen. Stat. § 15A-544(b) (1997) provides in pertinent part:

> If forfeiture is ordered by the court, a copy of the order of forfeiture and notice that judgment will be entered upon the order after 60 days must be served on each obligor. Service is to be made by the clerk mailing by first-class mail a copy of the order of forfeiture and notice to each obligor at each obligor's **[*6]** address as noted on the bond and note on the original the date of mailing. Service is complete three days after the mailing.

On 12 April 1999, the Clerk mailed, by first-class mail, the Order of Bond Forfeiture and Notice. Judgement of forfeiture was not entered until 8 July 1999, giving more than the required sixty day notice. The statute does not require notice to be mailed within a certain time period after the Order of Forfeiture is entered.

> The bond noted Ranger's address as:
>
> Ranger Insurance
>
> P.O. Box 2807
>
> Houston, TX 77252-2807

However, the Order of Bond Forfeiture and Notice shows notice was actually mailed to:

> Ranger Insurance Company

10777 Westheimer Rd.

P.O. Box 2807

Houston, TX 77252-2807.

At the 1 May 2003 hearing, Crystal Creech Sherron, Deputy Clerk in the Johnston County clerk's office, testified she addressed the notice to the address listed on her rolodex. Except for a street address, which was above the line containing the post office box, the address used for Ranger was identical to the address on the bond. Furthermore, there was no indication in the record that the notice was returned to the clerk's office. We conclude the **[*7]** addition of the street address was mere surplusage that did not affect compliance with the statute.

Appellant relies on *State v. Cox*, 90 N.C. App. 742, 370 S.E.2d 260 (1988), where the Court of Appeals found that the trial court committed reversible error when it entered an order of forfeiture and judgment of forfeiture without providing timely and proper notice to the surety. In *Cox*, however, the surety was neither mailed nor personally served with a copy of the order of forfeiture and notice. The Court found "the failure to follow the statutory requirements denied the surety his right to receive notice of the order of forfeiture." *Id.* at 745, 370 S.E.2d at 261. Here, the notice met all statutory requirements; it was mailed more than sixty days prior to the entry of judgment and it was mailed by first-class mail to the address listed on the bond.

Appellants also contend the fifteen to eighteen month delay between the date the Order of Forfeiture and Notice was entered and the date it was mailed and/or received by petitioners prejudiced the appellants. They argue if the sureties had been advised of defendant's failure to appear, defendant could **[*8]** have been apprehended and returned to face charges.

At the hearing, Spells admitted the last contact he had with defendant prior to his court date of 12 January 1998 was in November or December of 1997. He further testified that between 12 January 1998 and 12 April 1999 he contacted defendant between five and seven times during the five to six months after the court date. However, Spells was unaware defendant had missed his court date of 12 January 1998 until he received the fax from Eddie Lee in July 1999.

Although Spells repeatedly checked the AOC computer records which continued to show a 12 January court date even after the date had passed, he never spoke with defendant's attorney, the district attorney's office or the clerk's office to find out if defendant had appeared in court or if defendant had a new court date. Sureties-appellants offered no explanation as to why defendant was not in court nor did they present any evidence of defendant's whereabouts from 12 January 1998 until after sureties received notice of forfeiture. At the hearing, Spells admitted that as a professional bondsman, it was his job to make certain defendant appeared in court, even if he had to spend money **[*9]** to locate defendant. If the sureties had determined through their own efforts that defendant had not appeared in court, they would have had more time to locate defendant prior to the entry of Judgment of Forfeiture. Appellants were not prejudiced by the delay in receiving notice of forfeiture.

Appellants next argue the trial court abused its discretion in denying their petition to remit bond because the action and inaction of government officials made it impossible for the sureties to return defendant to Johnston County to face charges. Again, we disagree.

"The purpose of a bail bond is to secure the appearance of the principal in court as required." *State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804, *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987). "The sureties become custodians of the principal and are responsible for the bond if the principal fails to appear in court when required." *Id.* at 199, 356 S.E.2d at 805.

Here, appellants claim Stubbs' failure to seek extradition of defendant made it impossible for appellants to produce him for trial. However, in *State v. McCarn*, this Court held that the State does **[*10]** not have an "affirmative duty to aid a surety in its effort to locate a defendant who has not appeared in court as required." *McCarn*, 151 N.C. App. at 745, 566 S.E.2d at 753. Furthermore, it was foreseeable that sureties, licensed professional bondsmen who knew defendant was from the Bahamas, could be required to spend time, energy and money locating defendant should he fail to appear for court. *See Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804 (holding sureties effort and expense to locate and return defendant does not constitute extraordinary cause). Accordingly, we find the trial court did not abuse its discretion in concluding as a matter of law that extraordinary cause did not exist for remission of the bond.

Sureties-appellants next argue the trial court erred in finding as fact and concluding as a matter of law that the case was governed by N.C. Gen. Stat. § 15A-544.1, et. seq. The lower court's order made the following findings of fact:

> 2. That the parties are properly before the Court pursuant to North Carolina General Statute 15A-544.1 et seq., "Bond Forfeitures," and specifically **[*11]** 15A-544.8, "Relief from final Judgment."
>
> 3. That the parties are before the Court pursuant to a verified petition filed by the Surety, Montee Spells and Ranger Insurance Company, for Remission of a Bond After Execution for Extraordinary Cause.

4. That North Carolina General Statute 15A-544.1 et seq. is the sole jurisdictional statute and procedure for the petition to be heard.

The order also made the following conclusions of law:

1. That the Parties are properly before the Court pursuant to N.C. Gen. Stat. § 15A-544.8 . . . .

2. That this matter is governed by North Carolina General Statute 15A-544.8 as the exclusive remedy from a final judgment of forfeiture.

The bail bond, issued on 30 August 1997, was governed by N.C. Gen. Stat. § 15A-544(h), not N.C. Gen. Stat. § 15A-544.1 et seq. which became effective 1 January 2001. Sureties-appellants concede in their brief that the parties discussed the applicable law at the hearing and both parties acknowledged that N.C. Gen. Stat. § 15A-544(h) was the **[*12]** controlling law in the case. It is apparent from the record that the correct law was used by the court, and the trial court's error in referring to the incorrect statute has resulted in no prejudice to appellants. Nevertheless, we remand the matter to the trial court for the limited purpose of correcting the order to reflect the correct statute.

Sureties-appellants' remaining assignment of error was not brought forward in his brief and therefore is deemed abandoned. N.C. R. App. P. 28(a).

The order denying relief from the judgment of bond forfeiture is affirmed, and this matter is remanded for correction of the order in accordance with this opinion.

Affirmed; remanded for correction of order.

Judges TIMMONS-GOODSON and HUDSON concur.

Report per Rule 30(e).

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DISTRICT AT JACKSON

CURTIS MYERS,

Plaintiff/Appellee,

v. No. W2010-00837-COA-R9-CV

AMISUB (SFH), INC. d/b/a
ST. FRANCIS HOSPITAL;
SHEILA B. THOMAS, D.O.;
ARSALAN SHIRWANY, M.D.;
TENNESSEE EM-I MEDICAL
SERVICES, P.C., and EAST
MEMPHIS CHEST PAIN PHYSICIANS, PLLC,

Defendants/Appellants.

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether a Plaintiff who previously nonsuited a medical malpractice action is required upon filing a new complaint to comply with Tennessee Code Annotated § 29-26-121, which mandates that the Plaintiff provide written notice of all medical malpractice complaints to each named Defendant at least sixty (60) days prior to filing the complaint.

II. Whether a Plaintiff who previously nonsuited a medical malpractice action is required upon filing a new complaint to comply with Tennessee Code Annotated § 29-26-122, which mandates that the Plaintiff file a certificate of good faith with the complaint.

III. Whether the Plaintiff demonstrated "extraordinary cause" sufficient to excuse strict compliance with Tennessee Code Annotated § 29-26-121 and § 29-26-122.

STATEMENT OF THE CASE

A. Nature of the Case

The Defendants/Appellants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D., Tennessee EM-I Medical Services, P.C. and East Memphis Chest Pain Physicians, PLLC, filed motions to dismiss the complaint filed against them by the Plaintiff/Appellee, Curtis Myers, in Case No. CT-004650-09 filed in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, citing Plaintiff's failure to adhere to Tennessee Code Annotated § 29-26-121's notice provision and Tennessee Code Annotated § 29-26-122's requirement that the Plaintiff file a certificate of good faith with the complaint.

The trial court denied the motions to dismiss. AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D., Tennessee EM-I Medical Services, P.C. and East Memphis Chest Pain Physicians, PLLC appeal the trial court's order. In its Order, the trial court stated its finding that Defendants had notice of the potential claims against them and the existence of Plaintiff's medical expert through discovery in the previously non-suited case. The trial court also found extraordinary cause to excuse strict compliance with Tennessee Code Annotated § 29-26-121.

B. Course of Proceedings and Disposition in the Court Below

Plaintiffs, Curtis Myers and Lisa Myers, filed a medical malpractice complaint in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Case No. CT-000091-07, on January 5, 2007. (R. Vol. 1, pp. 1-8). They amended the complaint on May 17, 2007. (R. Vol. 1, pp. 9-16). Lisa Myers gave notice of voluntary non-suit as to her claims against all Defendants on August 24, 2007. (R. Vol. 1, pp. 52-53). Curtis

Myers gave notice of voluntary non-suit as to his claims against all Defendants on October 21, 2008. (R. Vol. 1, pp 85-86).

On September 30, 2009, Curtis Myers ("Myers")[1] filed a New Complaint alleging medical malpractice in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Case No. CT-004650-09. (R. Vol. 1, pp. 87-95). Defendants filed motions to dismiss the complaint for Plaintiff's failure to comply with the provisions of Tennessee Code Annotated §§ 29-26-121 and 29-26-122, which required Plaintiff to provide specific, detailed, written notice at least sixty (60) days prior to filing the New Complaint; to affirm in the complaint that the notice provisions were complied with; and to file a certificate of good faith with the new complaint. (R. Vol. 1, pp. 105-06, 112-13; R. Vol. 2, pp. 134-35). The trial court denied Defendants' motions. (R. Vol. 2, pp. 138-39). Defendants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D., Tennessee EM-I Medical Services, P.C., and East Memphis Chest Pain Physicians, PLLC appeal and seek reversal of the trial court's decision. (R. Vol. 2, pp. 143-44, 155-61, 167-68).

On April 15, 2010, Defendant Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC filed an Application for Permission to Appeal the Order of the Circuit Court of Shelby County denying Defendants' Motion to Dismiss. On April 19, 2010, Defendant Tennessee EM-I Medical Services, P.C. filed an Application for Permission to Appeal the Order of the Circuit Court of Shelby County denying Defendant's Motion to Dismiss. On April 20, 2010, Defendant AMISUB (SFH), Inc. d/b/a St. Francis Hospital filed an Application for Permission to Appeal the Order of the

[1] Lisa Myers did not join Mr. Myers in the filing of the New Complaint.

Circuit Court of Shelby County denying Defendant's Motion to Dismiss. Curtis Myers did not file a response to the applications. On July 8, 2010, the Court of Appeals entered an Order Granting Defendants' Applications for Interlocutory Appeal.

STATEMENT OF THE FACTS

Curtis Myers filed a new complaint for medical malpractice in Case No. CT-004650-09 in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis on September 30, 2009. (R. Vol 1, pp. 87-95) (hereinafter "New Complaint"). Curtis Myers, along with Lisa Myers, previously filed a medical malpractice complaint in Case No. CT-000091-07 in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis on January 5, 2007. (R. Vol. 1, pp. 1-8). They amended the complaint in Case No. CT-000091-07 on May 17, 2007. (R. Vol. 1, pp. 9-16) (hereinafter "Old Complaint"). Lisa Myers nonsuited the claims against all of the defendants named in the Old Complaint on August 24, 2007. (R. Vol. 1, pp. 52-53). On October 9, 2008, Arsalan Shirwany, M.D. and East Memphis Chest Pain Physicians, PLLC filed a motion in limine to limit Plaintiff's expert's opinion to standard of care issues and the necessity of medical expenses. (R. Vol. 1, pp. 80-85). Curtis Myers nonsuited his claims against all of the Defendants on October 21, 2008, before the motion in limine could be heard. (R. Vol. 1, pp. 85-86).

In 2008, the Tennessee General Assembly enacted two new statutory sections as part of the Tennessee Medical Malpractice Act. *See* TENN. CODE ANN. §§ 29-26-121 and 29-26-122. Both statutory sections became effective October 1, 2008, twenty (20) days before Plaintiff nonsuited his claims against all of the Defendants in CT-000091-07. The statutes were then amended effective July 1, 2009. *Howell v. Claiborne and Hughes Health Ctr.*, No. M2009-01683-COA-R3-CV, 2010 Tenn. App. LEXIS 400, at *41 n.6 (Tenn. Ct. App. Jun. 24, 2010) (copy attached in Appendix); *See also* 2009 Tenn. Pub. Acts 425. The 2009 amendment clarified the notice requirements enacted

in 2008 by stating who was required to receive notice and what information was required for inclusion in the notice. *Howell*, 2010 Tenn. App. LEXIS 400, at *41 n.6. It is undisputed that these statutes were in effect at the time Plaintiff filed his New Complaint in case number CT-004650-09.

Plaintiff was required to provide specific notice of his intent to file the New Complaint to each Defendant sixty (60) days before filing the New Complaint to fully comply with Tennessee Code Annotated § 29-26-121. TENN. CODE ANN. § 29-26-121. The notice was to contain:

> A. The full name and date of birth of the patient whose treatment is at issue;
>
> B. The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
>
> C. The name and address of the attorney sending the notice, if applicable;
>
> D. A list of the name and address of all providers being sent a notice; and
>
> E. A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

TENN. CODE ANN. § 29-26-121(a)(2). The statute also required Plaintiff to assert in the complaint that he complied with the notice provisions and to include notice documentation with the complaint. *See* TENN. CODE ANN. § 29-26-121(b).

Plaintiff did not provide written notice of his intent to file the New Complaint to Defendants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D.,

Tennessee EM-I Medical Services, P.C., and East Memphis Chest Pain Physicians, PLLC, at least sixty (60) days before its filing, assert compliance with the notice provisions in the New Complaint, or provide copies and proof of service of said notice as required by Tennessee Code Annotated § 29-26-121. (R. Vol. 1, pp. 87-95, 105-06, 112-13; Vol. 2, pp. 134-35).

Tennessee Code Annotated § 29-26-122 was amended, effective July 1, 2009, to require the inclusion of a certificate of good faith with the complaint when filed. *Howell*, 2010 Tenn. App. LEXIS 400, at *47 n.8. *See also* 2009 Tenn. Pub. Acts 425. Tennessee Code Annotated § 29-26-122 requires: "[i]n *any* medical malpractice action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel *shall* file a certificate of good faith with the complaint." *See* TENN. CODE ANN. § 29-26-122 (emphasis added). Moreover, the statute provides a specific penalty for Plaintiff's failure to file the certificate:

> "[I]f the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause."

TENN. CODE ANN. § 29-26-122.

Plaintiff neither filed a certificate of good faith with the New Complaint nor alleged that Defendants or any provider failed to timely provide copies of his records. (R. Vol. 1, pp. 87-95, 105-06, 112-13; Vol. 2, pp. 122-125, 134-35). The trial court did not find that Plaintiff's failure to provide a certificate of good faith with the New Complaint was due to the failure of any Defendant or other provider to timely provide copies of Plaintiff's

medical records. (R. Vol. 2, pp. 138-140). There is no evidence in the record to certify that any expert was consulted prior to the filing of the New Complaint. Plaintiff proffered no reason why he was unable to comply with the statute. (R. Vol. 1, pp. 122-25; R. Vol. 2, pp. 169-72; R. Vol. 3, pp. 1-11). It is also undisputed that Plaintiff did not request that the trial court provide him an extension within which to file a certificate of good faith. (R. Vol. 1, pp. 122-125.)

Plaintiff's New Complaint differed from the Old Complaint in many significant respects. Plaintiff named some, but not all, of the Old Complaint Defendants in the New Complaint. (R. Vol. 1, pp. 9, 87). Plaintiff omitted Larry K. Roberts, M.D. and Memphis Physicians Radiological Group, P.C. as Defendants in the New Complaint. (R. Vol. 1, p. 87).

The facts stated in the New Complaint remained substantially the same as the facts stated in the Old Complaint. (R. Vol. 1, pp. 12-14, 90-92). One significant exception was Plaintiff's deletion of any reference to Dr. Larry K. Roberts as Plaintiff's reading radiologist which appeared in the Old Complaint. (R. Vol. 1, pp. 11-12, 14, 88-92).

Plaintiff's allegations of medical malpractice stated in the New Complaint differed significantly from the allegations stated in the Old Complaint. The Old Complaint alleged:

> ACTS OF NEGLIGENCE, MEDICAL MALPRACTICE AND DEVIATIONS FROM THE STANDARD OF CARE
>
> 29. Defendants ARSALAN SHIRWANY, M.D.; SHEILA B. THOMAS, D.O., TENNESSEE EM-I MEDICAL SERVICES, P.A ["TEMS"]; EAST MEMPHIS CHEST PAIN PHYSICIANS, PLLC ["EMCPP"]; LARRY K. ROBERTS,

M.D.; MEMPHIS PHYSICIANS GROUP, P.C.; and AMISUB (SFH), INC., d/b/a ST. FRANCIS HOSPITAL, individually and/or vicariously, by or through their agents, servants and employees, are guilty of one (1) or more of the following acts of negligence, each and every such act being a direct and proximate cause of the Plaintiffs' harms and losses:

(a) Negligently and carelessly failing to exercise that degree of care and skill required of a reasonable and prudent physician and/or nurse under the same or similar circumstances in cities such as Memphis, Shelby County, Tennessee in 2006;

(b) Negligently and carelessly deviating from the recognized standard of acceptable professional practice required and expected of Defendants under the circumstances that existed at all times relevant hereto; and,

(c) Negligently and carelessly failing to properly evaluate, diagnose and/or treat Patient's condition upon admission to SFH ED.

(R. Vol. 1, pp. 14-15).

The New Complaint alleged:

V. MEDICAL MALPRACTICE

36. Dr. Thomas and Dr. Shirwany's treatment of the Plaintiff fell below the applicable standard of care as follows:

a) By failing to engage in proper medical decision making, proper assessment and proper diagnostic processes, including initiating hospitalization and neurological consultation and continued evaluation, monitoring, and facilitation the stabilization of the Plaintiff's condition;

b) By failing to timely recognize the existence of a stroke or similar neurological syndrome such as a transient ischemic attach after the preliminary evaluation of the Plaintiff in the emergency department;

c) By failing to rapidly order a cranial CT scan and timely obtain an interpretation by a qualified radiologist said scan;

d) By failing to recognize the presence of abnormal vital signs, that is hypotension and bradycardia and the need for on-going blood pressure and cardiac monitoring;

e) By failing to form an appropriate preliminary diagnosis of “transient ischemic attack” rather than “dizziness/vertigo acute” which was not supported by the Plaintiff’s presentation;

f) By failing to recognize the existence of multiple high risk factors for stroke in the Plaintiff;

g) By failing to recognize abnormal serial EKGs consistent with cardiac ischemia and an abnormal troponin in a patient with multiple risk factors for coronary ischemia and the significance of such with respect to patient disposition.

37. These breaches in the recognized standard of medical practice caused the Plaintiff’s wrongful discharge from the SFH ED on July 23, 2006. This wrongful discharge was the reason that the Plaintiff suffered his subsequent cerebral vascular accident at home.

38. These breaches in the recognized standard of care deprived the Plaintiff of timely treatment with anti-platelet, anti-coagulant and/or thrombolytic agents, as well as, general medical management of his hypertension and bradycardia in the hospital.

39. But for these breaches in the recognized standard of care, the Plaintiff would not have suffered damages from a cerebrovascular accident in July 2006.

40. TEMS is directly and vicariously liable for Dr. Thomas’s negligent acts and/or omissions.

41. SFH is vicariously liable for Dr. Thomas’s negligent acts and/or omissions.

> 42. EMCPP is directly and vicariously liable for Dr. Shirwany's negligent acts and/or omissions.
>
> 43. SFH is vicariously liable for Dr. Shirwany's negligent acts and/or omissions.

(R. Vol. 1, pp. 92-94)(emphasis in original). The New Complaint and the Old Complaint did not contain identical allegations.

In the Order Denying Defendants' Collective Motion to Dismiss, the trial court found that "the Plaintiff substantially complied with the requirements of Tennessee Code Annotated § 29-26-121 and § 29-26-122 because all Defendants had notice of both the potential claims against them and the existence of the Plaintiff's medical expert through the original filing of the Plaintiff's Complaint on January 5, 2007, and the subsequent litigation from that date until the filing of the Plaintiff's voluntary nonsuit on October 21, 2008 under docket number CT-000091-07." (R. Vol. 2, p. 138). The trial court also found "extraordinary cause to excuse strict compliance with the requirements of Tennessee Code Annotated § 29-26-121(b) …." (R. Vol. 2, p. 138). The trial court's order did not address "demonstrated extraordinary cause" necessary to excuse compliance with Tennessee Code Annotated § 29-26-122. (R. Vol. 2, pp. 138-39). Further, although the plain language of Tennessee Code Annotated § 29-26-121 and § 29-26-122 do not contain any provision excusing a party's failure to comply based on "substantial compliance", the Order is premised on the Plaintiff's substantial compliance with the requirements of Tennessee Code Annotated § 29-26-121 and § 29-26-122.

SUMMARY OF THE ARGUMENT

The Tennessee General Assembly amended Tennessee Code Annotated § 29-26-121, effective July 1, 2009, to require persons bringing a medical malpractice action to provide specific, detailed, written notice of the potential claim to Defendants sixty (60) days before filing a medical malpractice complaint. The statute provides for the specific content and manner of providing notice to the defendants. The General Assembly also amended Tennessee Code Annotated § 29-26-122, effective July 1, 2009. Tennessee Code Annotated § 29-26-122 requires that the person bringing the medical malpractice complaint file a certificate of good faith with the complaint. Pursuant to the plain language of the statutes, a court is authorized to excuse compliance only for extraordinary cause shown.

Plaintiff filed a New Complaint for medical malpractice ninety-one (91) days after the 1999 amendments to the Medical Malpractice Act became effective. No written notice of intent to file the New Complaint was provided to Defendants as mandated by Tennessee Code Annotated § 29-26-121. A certificate of good faith was not filed with the New Complaint as mandated by Tennessee Code Annotated § 29-26-122. To date, no certificate of good faith has been provided to Defendants in this matter. Further, Plaintiff's New Complaint was significantly different than the previously filed complaint. Tennessee Code Annotated § 29-26-122 required Plaintiff to certify his consultation with an expert competent to testify in accordance with Tennessee Code Annotated § 29-26-115 regarding the allegations set forth in the New Complaint.

Plaintiff had sufficient time within the savings statute period to adhere to the notice and pleading requirements of Tennessee Code Annotated § 29-26-121 and § 29-

26-122 and still timely file the New Complaint had he chosen to do so. Instead, Plaintiff ignored the requirements of Tennessee Code Annotated § 29-26-121 and § 29-26-122 by failing to provide the statutorily required notice of his intent to file the 2009 medical malpractice complaint to any Defendant and failing to provide a certificate of good faith to Defendants.

Once filed, the New Complaint lacked the requisite: 1) statement averring compliance with the notice provisions, 2) documentation demonstrating compliance with the notice provisions, and 3) a HIPAA compliant medical authorization. Plaintiff also failed to file a certificate of good faith with the New Complaint. Plaintiff provided no extraordinary reason why he was unable to comply with the plainly-worded mandates of Tennessee Code Annotated §§ 29-26-121 and 29-26-122. Compliance is mandated absent delay in obtaining records or demonstrated extraordinary cause. Plaintiff's access to records was not delayed. Plaintiff did not demonstrate extraordinary cause for his failure to comply with the statutes. The unequivocal language of Tennessee Code Annotated §§ 29-26-121 and 29-26-122 provide for dismissal of the New Complaint in this matter for failure to abide by its mandates. For these reasons, Plaintiff's complaint should be dismissed.

LAW AND ARGUMENT

A. Standard of Review

Defendants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D., Tennessee EM-I Medical Services, P.C., and East Memphis Chest Pain Physicians, PLLC's, Motions to Dismiss the New Complaint are motions to dismiss for failure to state a claim pursuant to Rule 12.02(6). "A Rule 12.02(6) motion to dismiss only seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof…." *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). The trial court's dismissal of a complaint pursuant to Rule 12.02(6) presents a question of law to be reviewed *de novo* without a presumption of correctness to the conclusions reached below. *Conley v. State*, 141 S.W.3d 591, 594-95 (Tenn. 2004).

Tennessee Code Annotated § 29-26-121 and § 29-26-122 do not define or set out criteria for use in determining "extraordinary cause" to excuse compliance with the Medical Malpractice Act, amended effective July 1, 2009. The standard used by the trial court to determine whether the Plaintiff demonstrated "extraordinary cause" to excuse Plaintiff's failure to comply with Tennessee Code Annotated §§ 29-26-121 and 29-26-122 is a question of statutory construction. A question of statutory construction presents a question of law that is to be reviewed *de novo* without a presumption of correctness to the conclusions reached below. *Conley*, 141 S.W.3d at 595.

B. Persons Asserting a Potential Claim for Medical Malpractice Shall Give Written Notice Meeting TENN. CODE ANN. § 29-26-121's Criteria

The interpretation of Tennessee Code Annotated § 29-26-121 is a question of law to be discerned under the rules governing statutory construction. Tennessee courts interpret statutes as follows:

> The primary rule governing our construction of any statute is to ascertain and give effect to the legislature's intent. To that end, we begin by examining the language of the statute. In our examination of statutory language, we must presume that the legislature intended that each word be given full effect. When the language of a statute is ambiguous in that it is subject to varied interpretations producing contrary results, we construe the statute's meaning by examining "the broader statutory scheme, the history of the legislation, or other sources." However, when the import of a statute is unambiguous, we discern legislative intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning."

In re Hogue, 286 S.W.3d 890, 894 (Tenn. 2009) (internal citations omitted). "Where the language contained within the four corners of a statute, is plain, clear and unambiguous, […] 'the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it.'" *Carson Creek Vacation Resorts v. Dept. of Revenue*, 865 S.W.2d 1, 3-4 (Tenn. 1993) (*citing Miller v. Childress*, 21 Tenn. 319, 321-22 (Tenn. 1841)). When a statute is unambiguous, the court "need only enforce the statue as written [,] with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose." *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 516 (Tenn. 2005).

Tennessee Code Annotated § 29-26-121 was amended, effective July 1, 2009, to clarify the notice requirements, enacted in 2008, requisite to filing a potential claim for medical malpractice. *See Howell*, 2010 Tenn. App. LEXIS 400, at *41 n.6. The amended statute requires:

> Any person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state.

TENN. CODE ANN. § 29-26-121 (emphasis added). Written notice shall include:

> (A) The full name and date of birth of the patient whose treatment is at issue;
>
> (B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
>
> (C) The name and address of the attorney sending the notice, if applicable;
>
> (D) A list of the name and address of all providers being sent a notice; and
>
> (E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

TENN. CODE ANN. § 29-26-121(a)(2)(emphasis added). Tennessee Code Annotated § 29-26-121(b) directs the party to state in the pleading whether it complied with the notice provisions of Tennessee Code Annotated § 29-26-121(a) and to include with the complaint the § 29-26-121(a) notice documentation. TENN. CODE ANN. § 29-26-121(b). A court may excuse compliance with Tennessee Code Annotated § 29-26-121(b) "only for extraordinary cause shown." TENN. CODE ANN. § 29-26-121(b).

The language of Tennessee Code Annotated § 29-26-121 is unambiguous. Thus, the statute is to be enforced in accordance with its natural and ordinary meaning. Plaintiff, by statute, is required to provide the notice specifically required by Tennessee

Code Annotated § 29-26-121(a) to the defendant more than sixty (60) days prior to filing the medical malpractice complaint or demonstrate extraordinary cause for excuse.

Plaintiff did not provide to any Defendant the written notice mandated by the statute. (R. Vol. 1, pp. 105-06, 112-13; R. Vol. 2, pp. 134-35). A court must determine whether a Plaintiff's excuse for failing to provide notice demonstrates "extraordinary cause shown." Tennessee Code Annotated § 29-26-121 does not define "extraordinary cause" or provide any examples for reference. Nor does any Tennessee case interpreting the statute provide the meaning of "extraordinary cause." The court is left to determine the meaning of "extraordinary cause" from its natural and ordinary meaning.

The natural and ordinary meaning of "extraordinary" is 1) "not according to the usual custom or regular plan," 2) "going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable." *Webster's New World College Dictionary,* 3rd Ed., 1997 (copy attached in Appendix). A North Carolina court defines "extraordinary cause" as "cause going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *State v. Saunders*, No. COA03-1437, 2005 N.C. App. LEXIS 24, at *4-5 (N.C. Ct. App. Jan. 4, 2005)(copy attached in Appendix).

The record in the case before this Court provides no basis upon which Plaintiff can demonstrate any cause meeting the above definitions of "extraordinary cause" such that he was prevented from: 1) providing the statutorily required notice to all Defendants prior to filing the new medical malpractice complaint, 2) stating in the New Complaint

that he complied with the notice provisions, 3) providing notice documentation with the New Complaint, and 4) providing a certificate of good faith.

Plaintiff argued in his response to Defendants' Motions to Dismiss that the provisions of the 2009 amendments to Tennessee Code Annotated §§ 29-26-121 and 29-26-122 do not apply to the New Complaint because the case was initially filed in 2007 before these amendments to the Tennessee Malpractice Act went into effect. (R. Vol. 1, pp. 122-23). Plaintiff argues that Defendants' participation in the litigation of the Old Complaint provided more notice than required by Tennessee Code Annotated § 29-26-121, as amended. (R. Vol. 1, p. 123). Plaintiff's argument ignores the amended statutes' all-inclusive language which provide no specific exclusion for nonsuited cases refiled after July 1, 2009. In addition, Plaintiff's argument ignores the impact of the substantive changes to the legal theories advanced and Defendants sued in the New Complaint. Plaintiff is not exempt from complying with the statutes that applied at the time of Plaintiff's filing his New Complaint, which is a separate case with a separate file number.

The Tennessee Court of Appeals has not addressed a party's failure to provide the statutorily required notice under the 2009 amendments to the Medical Malpractice Act. Likewise, the Tennessee Court of Appeals has not addressed a party's failure to provide a certificate of good faith as required by either the 2008 or 2009 amendments. The Court of Appeals recently addressed a trial court's dismissal of a complaint for failure to comply with the 2008 notice provisions of Tennessee Code Annotated § 29-26-121 in the case *Howell v. Claiborne & Hughes Health Center*, No. M2009-01683-COA-R3-CV, 2010 Tenn. App. LEXIS 400 (Tenn. Ct. App. Jun. 24, 2010). However, the

Howell case does not support Myers' arguments in the present action as it does not address a party's failure to file a certificate of good faith pursuant to Tennessee Code Annotated § 29-26-122 and does not address a party's failure to comply with the 2009 notice provisions pursuant to Tennessee Code Annotated § 29-26-121. Further, the Court did not evaluate whether the plaintiff's failure to timely provide notice pursuant to the 2008 notice provisions was due to some extraordinary reason.

In *Howell*, the plaintiff filed a medical malpractice complaint before the Medical Malpractice Act's 2008 notice requirement went into effect. *Howell*, 2010 Tenn. App. LEXIS 400 at *46-47. *Howell* subsequently non-suited the action on November 28, 2007. *Id.* at *1, 47. The Tennessee General Assembly enacted the 2008 notice provisions of the Medical Malpractice Act after the nonsuit. *Howell* refiled a medical malpractice complaint on October 6, 2008, only five (5) days after the 2008 notice provisions of the Medical Malpractice Act went into effect. *Id*. at *1, 39, 47. Importantly, *Howell* filed a certificate of good faith in the second action certifying that he consulted with an expert competent to testify under Tennessee Code Annotated § 29-26-115 and that there was a good faith basis to maintain the second action. *Id.*

The trial court dismissed the action for failure to comply with the notice requirements of Tennessee Code Annotated § 29-26-121. *Id.* at *1. On appeal, *Howell* argued that it was impossible for him to provide the statutorily required notice to the defendants sixty (60) days prior to the filing of the new complaint without exceeding the savings statute period. *Id.* at *42. Even if *Howell* had given the Defendants notice of the potential claim on October 1, 2008, the effective date of the notice provision, he could not have filed his new complaint within the time required by the savings statute.

Howell would have been required to wait until November 30, 2008 to file the new complaint, however, he was required to file the new complaint by no later than November 28, 2008 or else he would exceed the savings statute period.

In reversing the trial court's decision, the Court of Appeals opined that the purpose behind Tennessee Code Annotated § 29-26-121 was "to provide notice to health care providers of potential claims against them so that they might investigate the matter and perhaps settle the claim, and also to reduce the number of meritless claims which were filed." *Id.* at *48-49. In keeping with this purpose, the appellate court held that the trial court erred in not excusing compliance with the 2008 notice requirements where the defendant had actual notice of the claim more than a year before the second suit was filed, had ample time to investigate and possibly settle the claim, and where the plaintiff filed a certificate of good faith demonstrating that the claim had merit. *Id.* at *49-50(emphasis added).

The facts pertaining to *Myers* are different than the facts examined by the Court of Appeals in *Howell*. Plaintiff Myers filed a complaint which included allegations of medical malpractice before the statutory notice requirement went into effect. (R. Vol. 1, pp. 1-16). Myers nonsuited the first action twenty (20) days after the 2008 Amendments to the Medical Malpractice Act went into effect. (R. Vol.1, pp. 52-53, 85-86). Unlike *Howell*, however, Myers filed his second medical malpractice action ninety-one (91) days after the 2009 amended notice provisions of the Medical Malpractice Act went into effect. (*See* R. Vol. 1, pp. 87-95). Under the 2009 amended statute, Plaintiff was required to provide written notice of the potential claim no later than August 1, 2009. (*See* R. Vol. 1, p. 109). Defendants obviously had notice of the allegations contained in

the Old Complaint and defended against them prior to the Nonsuits. Myers' New Complaint, however, differed substantially from the first action such that Defendants had no actual notice of the new claims asserted. (*See* R. Vol. 1, pp. 1-16, 87-95). Further, unlike in *Howell*, Myers never filed a certificate of good faith certifying that he consulted with an expert competent to testify under Tennessee Code Annotated § 29-26-115 who signed a written statement stating that there is a good faith basis to maintain the action. (R. Vol. 1, 87-95, 123). Notably, Myers did not simply refile an identical case.

The plain words of Tennessee Code Annotated § 29-26-121 require the plaintiff to provide specific, detailed, written notice to each defendant at least sixty (60) days before filing the medical malpractice complaint. Plaintiff Myers failed to provide the requisite notice to any Defendant and did not provide a legitimate excuse for his noncompliance. (R. Vol. 1, pp. 87-95, 103, 105, 107, 120). Plaintiff Myers also failed to state in the New Complaint that he complied with the notice provisions, provide evidence of compliance, or include a HIPAA compliant medical authorization. (R. Vol. 1, pp. 87-95). Unlike in *Howell*, Myers had sufficient time to adhere to the statutory notice provisions of Tennessee Code Annotated § 29-26-121 and to file the New Complaint before the expiration of the savings statute period. Myers' failure to provide notice to Defendants along with a HIPAA compliant medical authorization eliminated the possibility that Defendants could investigate the new claims, Myers' present medical condition, and perhaps settle the case before the New Complaint was filed. There is no reason which prevented Plaintiff from complying with the notice provisions other than his own refusal to do so. Mere refusal to comply with the statute does not meet the

burden of extraordinary cause shown. Even though the first filed cause did not settle, Myers deprived Defendants of any attempt to settle without being sued again.

C. A Complaint Which Does Not Contain a Certificate of Good Faith Shall Be Dismissed Absent Demonstrated Extraordinary Cause.

The interpretation of Tennessee Code Annotated § 29-26-122 is a question of law to be discerned under the rules governing statutory construction, as explained in Section A above. Tennessee Code Annotated § 29-26-122 states:

> (a) … if the certificate is not filed with the complaint, the complaint shall be dismissed, as provided in subsection (c), absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in § 29-26-121 or demonstrated extraordinary cause.
>
> …
>
> (c) The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice.

TENN. CODE ANN. § 29-26-122(a), (c).

The language of Tennessee Code Annotated § 29-26-122 is unambiguous. Thus, this Court should apply the statute as written and apply the natural and ordinary meaning of the words. Tennessee Code Annotated § 29-26-122 requires a plaintiff to file a certificate of good faith with the medical malpractice complaint. TENN. CODE ANN. § 29-26-122. Tennessee Code Annotated § 29-26-122 requires the dismissal of a complaint when it does not include the requisite certificate of good faith, absent a showing that the failure was due to a medical provider failing to timely provide copies of the claimant's records or demonstrated extraordinary cause. TENN. CODE ANN. § 29-26-122 (emphasis added). Plaintiff does not allege that any provider failed to timely

provide records. (R. Vol. 1, pp. 122-25; Vol. 2, pp. 169-72; Vol. 3, pp. 1-11). Plaintiff may, therefore, only save his New Complaint from dismissal by demonstrating extraordinary cause.

The record lacks evidence sufficient to demonstrate extraordinary cause excusing Plaintiff's failure to attach the certificate of good faith to the New Complaint. The trial court's Order Denying Defendants' Collective Motion states that "Plaintiff substantially complied with the requirements of Tennessee Code Annotated § 29-26-121 and § 29-26-122 because all Defendants had notice of both the potential claims against them and the existence of the Plaintiff's medical expert through the original filing of the Plaintiff's Complaint on January 5, 2007 and the subsequent litigation . . . until the filing of the Plaintiff's voluntary nonsuit on October 21, 2008 under docket number CT-000091-07." (R. Vol. 2, p. 138). Without elaborating, the trial court's order found "extraordinary cause to excuse strict compliance with Tennessee Code Annotated § 29-26-121…." (R. Vol. 2, p. 138). The Order did not excuse strict compliance with Tennessee Code Annotated § 29-26-122.

The record before this Court contains no basis upon which Plaintiff can demonstrate a cause meeting the previously cited definitions of "extraordinary", which would have prevented Plaintiff from filing a certificate of good faith with his New Complaint. Plaintiff argues in his response to the Defendants' Collective Motion to Dismiss that Tennessee Code Annotated §§ 29-26-121 and 29-26-122 do not apply to his New Complaint. (R. Vol. 1, p. 122). He also argues that he is not required to file a certificate of good faith having filed expert disclosures in the litigation of the Old Complaint. (R. Vol. 1, p. 123).

The plain language of Tennessee Code Annotated § 29-26-122 does not authorize a plaintiff to substitute expert disclosures from a previously nonsuited case in lieu of providing the certificate of good faith required by statute. Instead, the statute requires the inclusion of a specific form verifying specific information related to an expert's analysis of a plaintiff's claims with the complaint. (*See* Appendix). In completing the certificate of good faith, a plaintiff informs all defendants that an expert has provided a signed written statement confirming that upon information and belief the expert is competent under Tennessee Code Annotated § 29-26-115 to express an opinion on the case and: 1) believes based on the medical records concerning the care and treatment of the plaintiff that there is a good faith basis to maintain the action consistent with the requirements of Tennessee Code Annotated § 29-26-115, or 2) believes based on information available from the plaintiff's medical records, plaintiff and witnesses, in the absence of material information not reasonably available, that there is a good faith basis to maintain the action consistent with the requirements of Tennessee Code Annotated § 29-26-115. The certificate also requires the person executing the certificate to indicate how many times they have been found in violation of Tennessee Code Annotated § 29-26-122. It is the filing of a Certificate of Good Faith that indicates to Defendants that the allegations in a lawsuit are supported by competent expert proof.

Even assuming that Tennessee Code Annotated § 29-26-122 provided a basis for Plaintiff to rely upon disclosures filed in a prior matter, Plaintiffs' Initial Disclosure of Expert Witnesses filed July 5, 2007 and Plaintiffs' Supplemental Disclosure of Expert Witnesses filed October 6, 2008, in case no. CT-000091-07, do not meet the requirements for a certificate of good faith set forth in Tennessee Code Annotated § 29-

26-122. First, the disclosures fail to indicate whether Plaintiff is proceeding under a belief that there is a good faith basis to maintain the action based on the information available from Plaintiff's medical records or whether an expert has found an absence of material facts but still believes there is a good faith basis to maintain the action. (*See* R. Vol. 1, pp. 17-51, 54-79). Second, the disclosures relied upon by Plaintiff are not signed by any expert and do not aver that an expert was willing to sign a written statement confirming the existence of a good faith basis for filing the complaint. (R. Vol. 1, pp. 17-51, 54-79). Third, the expert disclosures do not indicate how many times the individual executing the certificate of good faith has been found in violation of Tennessee Code Annotated § 29-26-122. (R. Vol. 1, pp. 17-51, 54-79). Thus, the expert disclosures cannot be said to conform to the most basic of requirements of the statute.

In addition, an examination of the content of Plaintiff's expert disclosures submitted in the litigation of the Old Complaint demonstrates that the expert's opinions do not support the allegations in the New Complaint and therefore cannot be used to prove that there is good faith basis to maintain the new action consistent with the requirements of Tennessee Code Annotated § 29-26-115.

Plaintiff's expert disclosures were premised on the allegations in the Old Complaint. In the disclosures, Plaintiff's expert relied upon the following facts:

> Dr. Larry K. Roberts was noted as Mr. Myers' "reading radiologist" on an unenhanced cranial CT scan report with a time noted as 1:43 p.m. Dr. Roberts read Mr. Myers' CT as a "negative study." He noted a clinical history of "dizziness, left eye pain," as well as a diagnosis of "slurred speech, dizziness."
>
> …

> Dr. Vu read Patient's July 24, 2006 CT scan and found that it was not "significantly" changed from the July 23, 2006 CT scan read by Dr. Roberts.

(R. Vol. 1, pp. 19-20, 57).

Plaintiff's New Complaint alleges:

> "22. The Defendants performed a cranial CT scan on the Plaintiff and read it as a "negative study." The Defendants noted a clinical history of "dizziness, left eye pain," as well as a diagnosis of "slurred speech, dizziness."

(R. Vol. 1, p. 90). The disclosures state that Larry Roberts, M.D. read a CT scan and noted the clinical history. The New Complaint, which did not name Dr. Roberts as a defendant, claims that the Defendants read a CT scan and noted the clinical history. In light of the significant changes to the facts, Plaintiff's prior disclosures form an insufficient basis for excusing compliance with the requirements of Tennessee Code Annotated § 29-26-122.

In litigating the Old Complaint, Plaintiff never identified an expert to offer an opinion on the issue of causation as required by Tennessee Code Annotated § 29-26-115. (R. Vol. 1, pp. 17-53). Plaintiff's identification of experts to testify to some, but not all, of the requirements of Tennessee Code Annotated § 29-26-115 does not meet Tennessee Code Annotated § 29-26-122's requirement that Plaintiff file a certificate of good faith affirming the Plaintiff's consultation with an expert who has provided a written statement stating that there is a good faith basis to maintain the action consistent with the requirements of Tennessee Code Annotated § 29-26-115.

In litigating the Old Complaint, Plaintiff offered Dr. Sobel as a Rule 26 expert to testify regarding alleged breaches of the relevant standards of care and the necessity of

the Plaintiff's medical bills only. Plaintiff's Initial Disclosure of Expert Witnesses states that Dr. Richard M. Sobel is expected to testify that Defendants "failed to provide Mr. Myers with care commensurate with the appropriate minimum standards of care" and "acted with less than or failed to act with ordinary and reasonable care in accordance with recognized standards of acceptable professional practice…." (R. Vol. 1, p. 5). Dr. Sobel is also expected to testify regarding the necessity of Plaintiff's medical bills as they relate to his injuries and clinical presentation. (R. Vol. 1, p. 6).

On August 25, 2008, Plaintiff filed a Motion to Amend Scheduling Order stating:

> Plaintiff's initial expert disclosure deadline passed on December 1, 2007. Plaintiff originally disclosed Dr. Richard Sobel as his expert to testify regarding the standard of care. As previously disclosed, Dr. Sobel will testify that Defendants breached the applicable standard of care by failing to diagnose and treat Plaintiff's stroke, or Cerebrovascular Accident ("CVA"). Dr. Sobel's opinion has not changed since it was originally disclosed.
>
> Plaintiff now seeks a new deadline solely to disclose another expert who will testify to the extent of Plaintiff's current damages from his misdiagnosed CVA.

(R. Vol. 1, p. 81).

On September 5, 2008, in a hearing before the trial court, Plaintiff's attorney maintained that Dr. Sobel was to testify regarding the standard of care. (R. Vol. 1, p. 81). Plaintiffs' Supplemental Disclosure of Expert Witnesses, filed October 6, 2008, did not alter or change any disclosure with respect to Dr. Sobel. (R. Vol. 1, pp. 18-22; R. Vol. 1, pp. 55-59, 62).

Plaintiff, repeatedly in his initial disclosure, Motion to Amend Scheduling Order and oral argument on said motion, circumscribed Dr. Sobel's testimony to only include

opinions regarding alleged breaches of the applicable standard of care and the necessity of Plaintiff's medical bills. Plaintiff was required to disclose an expert on the issue of causation to maintain the action consistent with the requirements of Tennessee Code Annotated § 29-26-115, as required in Tennessee Code Annotated § 29-26-122. Tennessee Code Annotated § 29-26-115 requires:

> **29-26-115. Claimant's burden in malpractice action – Expert testimony – Presumption of negligence – Jury instructions.**
>
> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) the recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Plaintiff never identified or made known to Defendants the existence of any expert who would offer opinions regarding causation in the case. No disclosures have been made since Plaintiff filed the New Complaint. No certificate of good faith has been provided to date. Thus, Plaintiff, in litigating the New Complaint cannot rely on the initial and supplemental disclosures filed in support of the Old Complaint to circumvent the plainly stated requirements of Tennessee Code Annotated § 29-26-122 which require

Plaintiff to file a certificate of good faith affirming the Plaintiff's consultation with an expert who has provided a written statement stating that there is a good faith basis to maintain the action consistent with the requirements of Tennessee Code Annotated § 29-26-115. This includes an essential element of causation.

CONCLUSION

The Appellants/Defendants, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D., Tennessee EM-I Medical Services, P.C., and East Memphis Chest Pain Physicians, PLLC, seek to reverse the trial court's denial of their motions to dismiss. The plain terms of the Medical Malpractice Act do not excuse compliance with its provisions because Plaintiff nonsuited a previously filed medical malpractice case. Instead, the plain terms require any person filing a medical malpractice complaint after July 1, 2009 to adhere to the statute's terms. While a court may excuse compliance for "demonstrated extraordinary cause", Appellee/Plaintiff demonstrated no extraordinary reason why he was unable to comply with the requirements of the statute as written. Plaintiff's failure to comply with Tennessee Code Annotated §§ 29-26-121 and 29-26-122 was not caused by any pressure to file within the savings statute period. Plaintiff had sufficient time to provide notice to Defendants and timely file the New Complaint with a certificate of good faith.

For the foregoing reasons, AMISUB (SFH), Inc. d/b/a St. Francis Hospital, Arsalan Shirwany, M.D., Tennessee EM-I Medical Services, P.C., and East Memphis Chest Pain Physicians, PLLC, are entitled to the dismissal of the complaint against them and reversal of the trial court's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following via U.S. Mail, postage prepaid, addressed as follows:

Mr. Bill M. Wade
THE COCHRAN FIRM – MEMPHIS
One Commerce Square, 26th Floor
Memphis, TN 38103

Dated this 14th day of October, 2010.

Michelle Sellers

Michelle Greenway Sellers

APPENDIX

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*2010 Tenn. App. LEXIS 400, **

SHAWN HOWELL, Individually and as Administrator for the Estate of JESSE FRANKLIN BROWNING, JR. v. CLAIBORNE AND HUGHES HEALTH CENTER

No. M2009-01683-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

2010 Tenn. App. LEXIS 400

May 27, 2010, Session
June 24, 2010, Filed

PRIOR HISTORY: [*1]
Tenn. R. App. P. 3 Appeal as of Right. Judgment of the Circuit Court Reversed and Remanded. Direct Appeal from the Circuit Court for Williamson County. No. 08625. Timothy L. Easter, Judge.

DISPOSITION: Judgment of the Circuit Court Reversed and Remanded.

CORE TERMS: saving, notice, statute of limitations, lawsuit, medical malpractice, proper party, amend, notice requirements, good faith, certificate, real party in interest, original action, substitution, non-suit, administrator, purpose behind, cause of action, summary judgment, decedent's, wrongful death, failure to provide, particularity, grand-nephew, substituted, surviving, re-filed, matters outside, non-suited, deceased, commencement

COUNSEL: A. Allen Smith, III, Goodlettsville, Tennessee, for the appellant, Shawn Howell.

David L. Steed, Nashville, Tennessee, for the appellees, Claiborne and Hughes Health Center.

JUDGES: J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

OPINION BY: J. STEVEN STAFFORD

OPINION

This is a medical malpractice action. Appellant originally filed a claim in 2007 in the name of an estate. The original claim was subsequently non-suited. Less than one year later, the claim was then re-filed, also in the name of an estate. With permission of the court, the Appellant later amended the complaint to name the administrator of the estate as the plaintiff. However, upon the Appellee's motion, the trial court dismissed the complaint finding: (1) the complaint was barred by the statute of limitations as there were no allegations in the complaint which would invoke the savings statute; (2) the complaint failed to state with particularity **[*2]** the specific acts of negligence; and (3) that the Appellant failed to comply with the notice requirements for a medical malpractice action found in Tenn. Code. Ann. § 29-26-121. Finding that the trial court erred, we reverse the decision of the trial court and remand for further proceedings.

OPINION

The first complaint in this case was filed on July 5, 2007, in the name of the "Estate of Jesse Franklin Browning, Jr.," against the Appellee herein, Claiborne and Hughes Health Center ("CHHC"). Mr. Browning had been a resident at CHHC from September, 2004 until July 19, 2006. Specifically, the complaint alleged that Mr. Browning died on July 20, 2006, as a result of severe dehydration due to the alleged negligent care and supervision he received at CHHC. The complaint did not identify any other individual or entity as a plaintiff, nor did the complaint assert that any proceedings had been initiated to create an estate for Mr. Browning. According to the Appellee's brief, CHHC filed a motion to dismiss the initial complaint. A copy of the "Motion to Dismiss or For More Particular Statement" does appear in the record as an attachment to one of CHHC's filings. In this motion CHHC argued that **[*3]** the original

lawsuit should be dismissed as there was no named plaintiff in accordance with Tenn. Code. Ann. § 20-5-107 [1] and the Tenn. Rules of Civil Procedure. The trial court heard arguments on this motion on October 15, 2007, and on October 29, 2007 entered an order granting CHHC's motion by ordering Plaintiff to file an amended complaint, "including a Plaintiff in compliance with the Tennessee Rules of Civil Procedure and Tenn. Code Ann. 20-5-107," within fifteen days. However, instead of amending the complaint, the Plaintiff chose to voluntarily non-suit its claim. A notice of voluntary non-suit was filed on November 2, 2007, and an order of voluntary non-suit was entered on November 28, 2007.

FOOTNOTES

1 Tenn. Code. Ann. § 20-5-107 details who may bring a claim for wrongful death:

> Prosecution of Action by representative or surviving spouse or next of kin-(a) The action may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or if there is no surviving spouse, by the children of the deceased or by the next of kin; also without the consent of the personal representative, either may use the personal representative's name **[*4]** in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless the personal representative signs the prosecution bond in an individual capacity.

On October 6, 2008, a second complaint was filed. Like the initial complaint, the second complaint named the "Estate of Jesse Franklin Browning, Jr." as the plaintiff, and again did not identify any other individual or entity as a plaintiff, nor did this complaint assert that an estate had been opened for Mr. Browning. On November 7, 2008, CHHC filed a Tenn. R. Civ. P. 12 motion to dismiss the second complaint. For grounds, CHHC again asserted that the second complaint, like the first complaint does not include a proper plaintiff, and is, therefore, a nullity under Tenn. Code Ann. § 20-5-107. In its motion, CHHC also argues that the second complaint should be dismissed because: (1) the complaint was barred by the statute of limitation because it was filed more than two years after Mr. Browning's death; and (2) in the event the case is not dismissed, Tenn. R. Civ. P. 12.05 requires a more definite or particular **[*5]** statement of the claim.

In response to CHHC's motion to dismiss the second complaint, Plaintiff's counsel filed a response brief on December 2, 2008, with the initial complaint and the order of voluntary dismissal attached thereto. In its brief, Plaintiff acknowledged the following:

> 3. The instant complaint was refiled on October 6, 2008. In anticipation of creation of the decedent's estate and appointment of his daughter, Mrs. Shawn Howell, as Administrator, the Complaint was refiled naming the "Estate of Jesse Franklin Browning, Jr." as the party Plaintiff.
>
> 4. At the time of his death, the decedent had four living [children].... Accordingly, bond waiver forms and waivers permitting Ms. Howell to serve as Executrix were sent to each of the decedent's surviving issue. Unfortunately, not all of the forms have been returned frustrating efforts to formally set-up the Estate, nevertheless, following diligent and good-faith efforts to contact all surviving issue. Counsel is, concomitant to this response, filing the Petition for the setting-up of the Estate and appointment of Ms. Howell as Administrator. The Petition is expected to be heard on December 18, 2008 in the Chancery Court, Probate **[*6]** Division for Williamson County, Tennessee.

Based upon the foregoing, on December 3, 2008, the Plaintiff filed a motion requesting leave to amend the October 6, 2008 complaint to list Shawn Howell, individually, and on behalf of the Estate of Jesse Browning, as plaintiff, and to include information concerning the filing of the original complaint, as well as its voluntary dismissal. Even though the record indicates that Mr. Browning was survived by a spouse, Plaintiff asserted that Tenn. Code Ann. § 20-5-107 "expressly permits an action to be maintained by the surviving children of the deceased, including Ms. Shawn Howell." Plaintiff asserted that Mr. Browning's wife suffered from dementia at the time of the filing of the complaints. CHHC opposed the motion to amend the second complaint.

On December 8, 2008, the trial court heard CHHC's motion to dismiss and/or for more definite statement and the Plaintiff's motion to amend the complaint. By Order of January 8, 2009, the court granted the motion to amend the complaint. Specifically, the court allowed the Plaintiff to amend its complaint to include Ms. Howell as an individual plaintiff, and on behalf of the Mr. Browning's estate. Moreover, **[*7]** the court allowed Plaintiff to amend its complaint to include allegations concerning the original complaint and its voluntary dismissal. Finally, the court granted CHHS's motion for a more definite statement, ordering amendment of the complaint to include "allegations regarding the specific acts...in this matter sufficient to give defendant notice of all acts that are alleged in this litigation, and the dates of such acts." The court reserved its ruling on CHHS's motion to dismiss, pending filing of

the amended complaint. Pursuant to this order, Plaintiff had until January 7, 2009 to file an amended complaint.

On or about January 7, 2009, Plaintiff filed its first amended complaint. [2] This complaint listed "Jesse Franklin Browning, Jr., deceased by and through Shawn Howell, as next of friend of Jesse Franklin Browning, Jr" as the Plaintiff. This complaint was substantially the same as the original complaint. However, it included an allegation that his family, including Shawn Howell, suffered a loss of consortium and that therefore the Plaintiff is entitled to damages.

FOOTNOTES

2 A copy of Plaintiff's first amended complaint marked as filed does not appear in the record. However, there is a copy **[*8]** of the first amended complaint in the record marked "Received January 7, 2009 Circuit Court." Both parties through their respective briefs appear to concede that there were two amended complaints filed.

Also on January 7, 2009, Plaintiff filed a motion for extension of time to file its amended complaint and motion for extension of time pursuant to Tenn. Code Ann. § 29-26-121 (which requires a plaintiff to give sixty days notice prior to filing a medical malpractice claim), and Tenn. Code Ann. § 29-26-122 (which requires a Certificate of Good Faith).

Plaintiff, also on January 7, 2009, filed a motion requesting permission to file a second amended complaint. In this motion, Plaintiff asserts that he seeks to amend the complaint to name Shawn Howell, Administrator of the Estate of Jesse Franklin Browning, Jr., as the party Plaintiff. The motion asserted that Ms. Howell filed a petition to be named the administrator of the estate on December 18, 2008, but that the Chancery Court had "passed on" the petition. According to the motion, the Plaintiff expected Ms. Howell to be named the administrator of the estate within the next sixty days. Plaintiff also asserted that he was in the process **[*9]** of providing notice to the defendants pursuant to Tenn. Code. Ann. § 29-26-121 and in obtaining a good faith certificate pursuant to Tenn. Code Ann. § 29-26-122. Based on these facts, Plaintiff requested permission to amend his complaint a second time.

In response, CHHC filed a renewed motion to dismiss on April 6, 2009. In this renewed motion, CHHC asserted that the first amended complaint should be dismissed because (1) it was barred by the statute of limitations, (2) the complaint had not been amended to name a Real Party in Interest as ordered, (3) Plaintiff had not filed a certificate of good faith as required by Tenn. Code Ann. § 29-26-122(c) or notice as required by Tenn. Code. Ann. § 29-26-121 (b), and (4) that the complaint fails to state with particularity the basis for liability.

On April 30, 2009, CHHC filed a motion to rehear its motion to dismiss. The motion indicates that the motion to dismiss was taken under advisement on April 13, 2009. Again, CHHC argues that the trial court should dismiss Plaintiff's first amended complaint.

A hearing on all pending motions was held on May 11, 2009. At that hearing, the court considered additional authority filed by the parties, as well **[*10]** as their respective proposed findings of fact and conclusions of law. By Order of May 22, 2009, the trial court denied CHHC's motion to dismiss the complaint and the first amended complaint. The trial court granted the Plaintiff's motion to file a second amended complaint, thereby giving Plaintiff until June 22, 2009 to file a complaint "naming the proper real party in interest as previously ordered by the court." In addition, Plaintiff was given until June 22, 2009 to "comply with the notice and filing provisions of [Tenn. Code Ann.] § 29-26-121 and [Tenn. Code Ann.] § 29-26-122." In reaching its decision, the court made the following, relevant comments:

> The Court acknowledges that this is its second Order in which the Court is allowing the Plaintiff an opportunity to properly present its Complaint for prosecution of their alleged claims in this matter.

The trial court also specifically found that CHHC's opportunity to raise the defenses of: (1) statute of limitations (under Tenn. Code Ann. §§ 29-26-116 and 28-3-104), (2) failure to comply with Tenn. Code Ann. § 28-1-105(a), and (3) non-compliance with Tenn. Code Ann. §§ 29-26-121 and 29-26-122 "shall not be lost and shall survive for **[*11]** future potential argument and defense."

On June 22, 2009, Plaintiff filed its second amended complaint in the name of the Appellant, "Jesse Franklin Browning, Jr., by and through Shawn Howell, as Administrator of the Estate of Jesse Franklin Browning, Jr., Deceased." [3] This complaint is substantially similar to the others. The complaint included an allegation that Mr. Browning's family, including his wife Dorothy Browning, had suffered a loss of consortium and that therefore Plaintiff was entitled to damages. Plaintiff attached to the amended complaint a copy of a letter sent by the attorney to CHHC's agent, providing notice of the potential claim. [4] Also, on June 22, 2009, in an effort to comply with Tenn. Code Ann. § 29-26-122, the Plaintiff filed a Certificate of Good Faith which indicated that the Plaintiff's attorney had consulted with an expert who found merit in Plaintiff's claim.

FOOTNOTES

3 The second amended complaint is styled "Amended Complaint." However, it is clear from the record that this is actually the second amended complaint.

4 We note that the parties dispute whether the agent to whom the letter was addressed, was the authorized agent for CHHC. Based on our decision below, we **[*12]** do not find this dispute to be material.

On July 7, 2009, CHHC filed a motion to dismiss the second amended complaint. In relevant part, CHHC argued that the case was barred by the statute of limitations because it was filed more than a year after Mr. Browning's death, that the Savings Statute was not invoked or even pled, and that there was no "commencement" of an action within the statute of limitations for purposes of the Savings Statute, even if it had been pled.

The motion was heard on July 20, 2009. By Order of August 3, 2009, the court granted the motion, thereby dismissing Plaintiff's second amended complaint. Specifically, the court found that:

> 1. The case is barred on its face by the statute of limitations, in that the pleadings establish that the case was filed more than a year after the death of Jesse Browning on July 19, 2006. There are no allegations in the [Second] Amended Complaint filed on June 22, 2009 that avoid the application of the statute of limitations. There are no facts stated in the Second Amended Complaint that would invoke the Savings Statute; in fact, the Savings Statute is not even referenced in the Second Amended Complaint, nor is there any allegation of **[*13]** "commencement" of an action within the statute of limitations for purposes of the Savings Statute. The court twice previously permitted Plaintiff to amend the Complaint to respond to issues raised by Defendant's Motions to Dismiss. The Court's Order of January 8, 2009 permitted amendment and stated that no further amendments to the pleadings would be permitted. The Court nevertheless again permitted Plaintiff to amend the Complaint by Order dated May 22, 2009. Despite these two amendments to the Complaint, the "four corners" of the Complaint still demonstrate that the case is barred by the one year statute of limitations.

The court also based its decision to dismiss the complaint on its finding that the complaint failed to state, with particularity the specific acts of negligence, with dates, as required by the Court's previous order. The court also found that Plaintiff had failed to deliver notice to CHHC prior to June 22, 2009, as required under Tenn. Code Ann. § 29-26-121 and ordered by the court.

Ms. Howell, as administrator of the estate, appeals, raising three issues for review as stated in the brief:

> 1. The trial court erred by dismissing the Plaintiff/Appellant's case based upon **[*14]** a failure to specifically plead the savings statute, Tenn. Code Ann. § 28-1-105(a), within the "four corners" of the complaint.
>
> 2. The trial court erred by granting the Defendant/Appellee's motion for a more particular statement and erred again by dismissing the action based upon a lack of particularity contained in the second amended complaint.
>
> 3. The trial court erred by dismissing the complaint based upon a failure to deliver notice to Defendant pursuant to Tenn. Code Ann. § 29-26-121.

Standard of Review

It is well settled that a Tenn. R. Civ. P. 12.02 motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. It admits the truth of all relevant and material allegations but asserts that such allegations do not constitute a cause of action as a matter of law. *See* ***Riggs v. Burson***, 941 S.W.2d 44 (Tenn.1997). Obviously, when considering a motion to dismiss for failure to state a claim upon which relief can be granted, we are limited to the examination of the complaint alone. *See* ***Wolcotts Fin. Serv., Inc. v. McReynolds***, 807 S.W.2d 708 (Tenn. Ct. App.1990). The basis for the motion is that the allegations in the **[*15]** complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law. *See* ***Cornpropst v. Sloan***, 528 S.W.2d 188 (Tenn.1975). In considering such a motion, the court should construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. See ***Cook by and through Uithoven v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934 (Tenn.1994).

However, if a party files a motion to dismiss and includes matters outside the pleadings, the trial court, upon considering the matters outside the pleadings, must review the motion as a motion for summary judgment pursuant to Tenn. R. Civ. P. 56. Tenn. R. Civ. P. 12.02; *see* ***Staats v. McKinnon***, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006). A trial court's decision to grant a motion for summary judgment presents a question of law. Our review is therefore *de novo* with no presumption of correctness afforded to the trial court's determination. ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). "This Court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied." ***Mathews Partners, LLC v. Lemme***, No. M2008-01036-COA-R3-CV, 2009 Tenn. App. LEXIS 667, 2009 WL 3172134 at *3 (citing **[*16]** ***Hunter v. Brown***, 955 S.W.2d 49, 50-51 (Tenn. 1977).

Savings Statute

Pursuant to Tenn. Code Ann. § 28-1-105 (the "Savings Statute,") a voluntarily dismissed lawsuit may be re-filed within one year of such dismissal:

> If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, ... the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest....

Because Tennessee law favors the resolution of disputes on their merits, the Savings Statute must be given a broad and liberal construction. ***Henley v. Cobb***, 916 S.W.2d 915, 916 (Tenn.1996). The purpose behind the Savings Statute is "'to aid the courts in administering the law fairly between litigants without binding them to minor and technical mistakes made by their counsel in interpreting the complexities of our laws of procedure.'" ***Id.*** at 917 (quoting ***Gen. Accident Fire & Life Assurance Corp. v. Kirkland***, 210 Tenn. 39, 356 S.W.2d 283, 285 (1962)). To determine whether the Savings Statute **[*17]** is applicable, the court must ascertain whether the defendant had notice: "[N]otice to the party affected is the true test of the statute's applicability.... 'The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.'" ***Id.*** at 917-18 (quoting ***Burns v. Peoples Tel. & Tel. Co.***, 161 Tenn. 382, 33 S.W.2d 76, 78 (1930)). Thus, the Savings Statute is only applicable when the original complaint and the new complaint allege substantially the same cause of action, which includes identity of the parties. *See* ***Turner v. Aldor Co. of Nashville***, 827 S.W.2d 318, 321 (Tenn. Ct. App.1991). It is not necessary that the two complaints be identical, only that the allegations arise out of the same transaction or occurrence. *See* ***Energy Sav. Prods., Inc. v. Carney***, 737 S.W.2d 783, 784-85 (Tenn. Ct. App.1987) (holding that the Savings Statute was applicable to the second complaint, which had been amended to add a new claim, because the claim arose out of the same conduct, transaction, or occurrence alleged in the original action and the plaintiff, therefore, could have added the claim to the first **[*18]** action under Tenn. R. Civ. P. 15). In determining whether there is identity of the parties between the two actions, we are mindful that, though the caption of a case is intended to identify the parties, the allegations of the complaint itself dictate the true parties to the lawsuit. ***Goss v. Hutchins***, 751 S.W.2d 821, 824-25 (Tenn.1988).

A plaintiff relying upon the Savings Statute has the burden of showing that the case is not barred by the statute of limitations, if that question is raised by the defendant:

> As enunciated in *East Tennessee Coal Co. v. Daniel*, when the plaintiff's declaration shows upon its face that the claim sued upon is barred by the statute of limitations, then a plea of the statute interposed by the defendant will shift the burden of producing evidence to the plaintiff who must show that his action falls within the saving statute; i.e., he must prove that his original action was instituted within one year after the taking occurred.

Knox Co. v. Moncier, 224 Tenn. 361, 455 S.W.2d 153, 157 (Tenn. 1970).

In this case, it is undisputed that Mr. Browning died on July 20, 2006, and that the initial complaint was filed on July 5, 2007. Following the November 28, 2007 non-suit, the case was **[*19]** re-filed on October 6, 2008, which would be outside the one-year statute of limitations, Tenn. Code Ann. §§ 28-3-104 and 29-26-116, unless the Savings Statute is applicable. If, however, the Savings Statute is not applicable, then the October 6, 2008 filing is outside the one-year statute of limitations, and the case was properly dismissed. To determine whether the Savings Statute is applicable in this case, we first address whether the original action was "commenced" within the meaning of the Savings Statute. Rule 3 of the Tennessee Rules of Civil Procedure provides simply that "[a]ll civil actions are commenced by filing a complaint with the clerk of the court." Tenn. R. Civ. P. 3 describes some circumstances under which the original commencement may not toll the statute of limitations, as where process is not issued within thirty days or not served within thirty days of issuance and the plaintiff fails to obtain issuance of new process within the prescribed time. ***Id.*** Rule 3 does not, however, address the effect of the filing of a lawsuit by an improper party. *See* ***id.***

Our Supreme Court in ***Chapman v. King***, 572 S.W.2d 925 (Tenn. 1978) discussed whether the proper party in a wrongful **[*20]** death case should be allowed to be substituted as the real party in interest after the statute of limitations expired. Like this case, ***Chapman*** was a wrongful death case. ***Id.*** at 926. In Chapman, however, the action was originally filed by the parents of the decedent. ***Id.*** Unfortunately, the parents were not the proper party to file the lawsuit as the wrongful death statute granted that right exclusively to the decedent's husband. ***Id.*** The ***Chapman*** defendants filed a motion to dismiss on the basis that the parents had no right of action. ***Id.*** The decedent's husband then moved to be substituted as the plaintiff. ***Id.*** However, this was done after the statute of limitations expired and the trial court denied his request for substitution. ***Id.*** 926-27.

In reversing the trial court, our Supreme Court reviewed Tennessee Rule of Civil Procedure 17.01 and 15.03. ***Id.*** at 927. The ***Chapman*** court recognized that the parents of the decedent had no right to bring the action, but still held that the trial court erred in dismissing the action and not allowing the husband to be substituted as the plaintiff. ***Id.***

The Chapman court noted that Tenn. R. Civ. P. 17.01 provides in pertinent part:

> No action shall be dismissed **[*21]** on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

The ***Chapman*** court noted the "liberality of this Court in allowing the addition or substitution of a proper party plaintiff for an improper plaintiff although the statute of limitations would have prevented the filing of a new suit...." ***Id.*** (citing Committee Comment to Rule 15.03, Tenn. R. Civ. P.). [5] The ***Chapman*** court then specifically noted, that "[t]he cases in which this liberality has been most evident have been wrongful death actions in which a wrong party has brought the suit." ***Id.*** at 928 (citations omitted). As explained in ***Chapman***, "the reason for this liberal policy in wrongful death cases has been the fact that the cause of action is not changed by the substitution of the proper party plaintiff for the improper plaintiff,...and that such a substitution does not prejudice the defendant who has had **[*22]** notice, from the beginning of the suit, of the nature of the cause of action and that it was being pressed against him." ***Id.*** (internal citations omitted). The Chapman court turned to the reasoning behind the Tenn. R. Civ. P. 17.01 with respect to substitution of a plaintiff after the statute of limitations had run, holding that:

> it has come to be settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff...; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff.

Id. (citing ***Wallis v. United States***, 102 F. Supp. 211, 212 (E.D.N.C. 1951). Our Supreme Court held that based on Tenn. R. Civ. P. 17.01, the husband, as the real party in interest should be allowed to substitute as the plaintiff, and that the substitution "'shall have the same effect as if the action had been commenced in the name of the real party in interest.'" ***Id.*** at 929.

FOOTNOTES

5 As provided in ***Chapman***, the Committee Comment **[*23]** to Rule 15.03 of the Tenn. R. Civ. P. 15.03 provides:

> Under prior law, an amendment which added a new party plaintiff or substituted a party plaintiff, related back to the institution of the original suit, and thus could be made even though an applicable statute of limitations would have barred a new suit by the new or substituted party.
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> * * *
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> But where the amendment sought relief against a new party defendant after the statute of limitations has barred a new suit, such defendant could successfully plead the bar.

Chapman, 572 S.W.2d at 927-28.

This Court previously addressed a similar issue in ***Foster v. St. Joseph Hospital***, 158 S.W.3d 418 (Tenn. Ct. App. 2004). In ***Foster***, the decedent's husband gave his grand-nephew power of attorney. ***Id.*** at 419. The grand-nephew then filed a wrongful death action against the hospital and doctors, alleging medical malpractice. ***Id.*** The grand-nephew then voluntarily non-suited the first action. ***Id.*** No objection to his capacity to file the lawsuit was made prior to the action being dismissed. ***Id.*** However, he then re-filed the action outside the statute of limitations, but within the one-year savings statute, and added the decadent's husband as a plaintiff. **[*24]** ***Id.*** The defendants filed a motion for summary judgment arguing that the second action was barred by the statute of limitations. ***Id.*** The trial court in ***Foster*** granted the motion, finding that the grand-nephew was not a proper party and therefore the first action was a nullity and did not toll the statute of limitations. ***Id.*** On appeal, this Court reversed the trial court, holding that the first lawsuit was merely voidable and the second lawsuit was filed within the time period provided by the savings statute. ***Id.***

In reversing the trial court, the ***Foster*** court reviewed the purpose of the savings statue. As stated in ***Foster***, "Tennessee law favors the resolution of disputes on their merits, [therefore] the savings statue must be given a broad and liberal construction. ***Id.*** at 420 (citing ***Henley v. Cobb***, 916 S.W.2d 915, 916 (Tenn. 1996)). The ***Foster*** court then reviewed the Tennessee Rules of Civil Procedure and the case of ***Chapman v. King***, 572 S.W.2d 925 (Tenn. 1978), in order to determine whether the original action was "commenced" for purposes of the savings statute. ***Id.*** at 422. The ***Foster*** court noted the "liberality" that should be applied, as instructed by our Supreme Court, in permitting **[*25]** the proper party to be substituted for an improper party, even after the expiration of the statute of limitations. ***Id.*** at 424. Recognizing the "avowed liberality" of the Tennessee Supreme Court, this Court held that the trial court erred in finding that the original lawsuit was a nullity, reasoning that "[c]learly, under

Chapman, if the Defendants had sought to have the [original] lawsuit dismissed on the grounds that the [grand-nephew] was not the proper party plaintiff, [the grand nephew] would have had an opportunity to substitute the proper party plaintiff." ***Id***. Therefore, this Court found that the original lawsuit did "commence" the action for purposes of the savings statute. ***Id***.

The case before this Court is strikingly similar to ***Foster***. In the instant case, the original lawsuit was filed in the name of the Estate of Jesse Franklin Browning, Jr. As with ***Foster***, the original lawsuit was not filed in the name of a proper party plaintiff, and the original lawsuit was voluntarily non-suited and then re-filed outside the statute of limitations, but within the time period provided by the savings statute. However, there are some differences between this case and ***Foster***: (1) there was **[*26]** an objection filed by the Appellees in the original lawsuit, unlike ***Foster***; and (2) the second complaint was not filed in the name of the real party in interest, also unlike ***Foster***. Accordingly, we must determine whether these differences result in an outcome contrary to ***Foster***. After reviewing the record and the law on this issue, we find that they do not.

As the Appellees aptly point out, unlike ***Foster***, they filed an objection to the original lawsuit by filing a motion to dismiss. However, the trial court adjudicated that motion, and in accordance with ***Chapman***, declined to dismiss the first action and instead granted the Appellant time to amend the complaint to name a proper plaintiff. The Appellant however, chose to take a voluntary non-suit instead of amending the complaint to name a proper plaintiff at that time. Had the Appellant not chosen to take a voluntary non-suit, clearly, based on ***Chapman***, it would have been permitted to substitute a proper party plaintiff, even after the expiration of the statute of limitations. Accordingly, the question becomes: did the Appellant forfeit the right to amend the complaint to name a proper party plaintiff by taking a voluntary non-suit. **[*27]** We find that it did not. The savings statute confers on a plaintiff, who voluntarily non-suits a prior action, the same procedural and substantive benefits that were available to the plaintiff in the first action. ***Parnell v. APCOM, Inc.***, No. M2003-00178-COA-R3-CV, 2004 Tenn. App. LEXIS 858, 2004 WL 2964723, at*5 (Tenn. Ct. App. Dec. 21, 2004)(citing ***Dukes v. Montgomery County Nursing Home***, 639 S.W.2d 910, 913 (Tenn. 1982). Accordingly, the Appellant did not forfeit the right to amend the complaint, even outside the statute of limitations, in order to name a proper party plaintiff. This is especially so considering our Supreme Court's specifically expressed policy of liberality in permitting the substitution of a proper party plaintiff for an improper party plaintiff after the expiration of the statute of limitations, particularly in wrongful death cases. *See* ***Chapman***, 572 S.W.2d at 928.

The Appellees submit that based on ***Foster***, because they filed an objection in the original action, the first action was void and therefore not "commenced" for purposes of the statute of limitations. We disagree. ***Foster*** held that because the grand-nephew would have been entitled to amend his complaint to name a proper party plaintiff, **[*28]** even outside the statute of limitations, the original lawsuit was voidable and not void. ***Foster***, 158 S.W.3d at 424. To support this finding, the ***Foster*** court also noted that there was no case law to indicate that the grand-nephew could not have prosecuted the claim to conclusion absent an objection from the defendants. ***Id***. Like ***Foster***, the original lawsuit was only voidable because the Appellant, as the trial court found, had the right to amend its complaint to name the proper party plaintiff. If the Appellant had not non-suited its action, the trial court could have dismissed the claim if the Appellant did not properly amend the complaint within the time period provided by the trial court. However, the trial court declined to do so when adjudicating CHHC's motion to dismiss in the first action. Consequently, the fact that the Appellees filed a motion to dismiss based upon the absence of the proper party plaintiff, does not affect this Court's determination that an action was "commenced" for purposes of the savings statute.

Finally, we do not find the fact that the second action was also not commenced in the name of the proper party plaintiff to be determinative. As stated, clearly, **[*29]** the Appellant had the right to amend the complaint within a reasonable time to name the real party in interest. *See* ***Chapman***, 572 S.W.2d at 928; ***Foster***, 158 S.W.3d at 424; Tenn. R. Civ. P. 17.01. The trial court, in the second action, granted the Appellant the right to amend the complaint twice. The Appellees have not raised an issue with this decision on appeal, and therefore error, if any, is waived. ***Osborne v. Mountain Life Ins. Co.***, 130 S.W.3d 769, N.6 (Tenn. 2004). The second amended complaint was filed in the name of "Jesse Franklin Browning, Jr., by and through Shawn Howell, as Administrator of the Estate of Jesse Franklin Browning, Jr., Deceased. Therefore, it was filed in the name of the proper party plaintiff. Tenn. Code. Ann. § 20-5-107. Moreover, as provided in ***Chapman***, the substitution of the proper party, shall have the same effect as if the action had been commenced in the name of the real party in interest.

In making these determinations, this Court is cognizant of the fact that neither the original lawsuit nor the original complaint in the second lawsuit was filed in the name of the proper party plaintiff. However, we are mindful that the purpose of the Savings Statute **[*30]** is "'to aide the courts in administering the law fairly between litigants without binding them to minor and technical mistakes made by their counsel in interpreting the complexities of our laws and procedure,'" ***Henley***, 916 S.W.2d at 917. Moreover, Tennessee law favors the resolution of disputes on their merits, therefore the Savings Statute is given a broad and liberal construction. ***Id***. As discussed in ***Foster*** and ***Chapman***, the important consideration in determining the applicability of the savings statute is timely notice to the defendants. Here, CHHC, had notice of the claim within the statute of limitations. Therefore, they had the ability to take the appropriate action to protect themselves.

For the foregoing reasons, this Court finds that the original action was "commenced" for purposes of the savings statute. We must now determine whether the savings statute was applicable.

The only issue on appeal as to the applicability of the savings statute is the identity of the parties. The Appellees assert that because the present action was brought in the name of Shawn Howell, who is not mentioned in the original action, there is no identity of parties. We disagree. In determining whether **[*31]** there is identity of the parties between the two actions, we are mindful that, though the caption of a case is intended to identify the parties, the allegations of the complaint itself dictate the true parties to the lawsuit. ***Goss v. Hutchins***, 751 S.W.2d 821, 824-25 (Tenn.1988). Both the original complaint and the second amended complaint in the present lawsuit allege a cause of action based upon the wrongful death of Mr. Franklin Browning, Jr. As held in ***Chapman***, wrongful death cases are often instituted in the name of an improper party, but that does not change the change the nature of the cause of action or prejudice the defendants. ***Chapman***, 572 S.W.2d at 928. Also, while not a proper party, the original action was brought in the name of the Estate of Franklin Browning, Jr. Ms. Howell merely serves as a representative of Mr. Browning's estate in the present lawsuit. Accordingly, we find that for purposes of the savings statute, there is an identity of parties.

We next address the trial court's decision to dismiss the Appellant's action for failure to plead facts which would invoke the Savings Statute. CHHC contends that because it was proceeding on a motion to dismiss, the trial **[*32]** court was only allowed to consider the allegations contained in the complaint. (Citing this Court's explanation of the standard of review for a Motion for Dismiss as stated in ***421 Corp. v. Metropolitan Gov't of Nashville***, 36 S.W.3d 469 (Tenn. Ct. App. 2000). According to CHHC, it was entitled to a dismissal because the Appellant's complaint failed to state any facts which would invoke the savings statute.

CHHC fails to recognize that often motions to dismiss are converted into and considered as motions for summary judgment when matters outside the pleadings are considered. This is such standard practice that Tenn. R. Civ. P. 12.02 provides the procedure for dealing with such motions, requiring "[i]f...matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...." Accordingly, if a party files a motion to dismiss and includes matters outside the pleadings, the trial court, upon considering the matters outside the pleadings, must review the motion as a motion for summary judgment pursuant to Tenn. R. Civ. P. 56. Tenn. R. Civ. P. 12.02; *see* ***Staats v. McKinnon***, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006). **[*33]** In this case, CHHC admitted that a suit was previously filed in its response to the Appellant's reply to its first motion to dismiss filed December 10, 2008. Further, CHHC attached to this response its motion to dismiss from the original lawsuit along with the order of non-suit. These matters were clearly outside the pleadings of this case. Further, as stated in the order dismissing the action, the trial court considered "the entire record in this matter...." Consequently, the trial court should have reviewed CHHC's motion as a motion for summary judgment pursuant to Tenn. R. Civ. P. 56.

Because the trial court was required to review the motion as a motion for summary judgment, we find, after reviewing the record, that the trial court erred in dismissing the Appellant's claim for failure to plead the Savings Statute. After reviewing the entire record, we find that there are no genuine issues of material fact. We find that the parties do not dispute when the original action was filed or dismissed, nor when the present action was re-filed. It is clear that the present action was filed within one year of the order of voluntary non-suit as required by the Savings Statute. Tenn. Code Ann. § 28-1-105. **[*34]** Based on the undisputed facts, we find that the Appellee's motion to dismiss should have been denied as a matter of law as the Appellant fully complied with the Savings Statute.

Particularity of the Complaint

Next, we address Appellant's contention that the trial court erred in dismissing the complaint for failure "to state with particularity the specific acts of negligence, with dates, as required by the [trial court's] previous order...." Tenn. R. Civ. P. 8 governs pleadings and provides, in pertinent part:

> **8.01 Claims for Relief.**- A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.
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> **8.05 Pleading to Be Concise and Direct-Statutes, Ordinances and Regulations-Consistency.** - (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Every pleading stating a claim or defense relying upon the violation of a statute **[*35]** shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.
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> **8.06 Construction of Pleadings.** - All pleadings shall be so construed as to do substantial justice.

Pleadings give notice to the parties and the trial court of the issues to be tried. Courts should liberally construe

complaints in favor of the plaintiff when considering a motion to dismiss. ***White v. Revco Discount Drug Centers, Inc.***, 33 S.W.3d 713, 718 (Tenn. 2000). "'A complaint "need not contain in minute detail the facts that give rise to the claim," so long as the complaint does "contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial."'" ***Givens v. Mullikin***, 75 S.W.3d 383, 399 (Tenn. 2002)(quoting **[*36]** ***White***, 33 S.W.3d at 725 (quoting ***Donaldson v. Donaldson***, 557 S.W.2d 60, 61(Tenn. 1977)). Further, averments of time and place are not required if they are unnecessary to give the defendants notice of the claim. ***Taylor v. Lakeside Behavioral Health System***, No. W2009-00914-COA-R3-CV, 2010 Tenn. App. LEXIS 198, 2010 WL 891879, *11 (Tenn. Ct. App. March 15, 2010).

We have reviewed the second amended complaint and find that it does aver sufficient facts to put CHHC on notice of the claim. The complaint alleges that Mr. Browning resided at CHHC from September 2004 until July 19, 2006. It alleges that CHHC was understaffed, causing Mr. Browning to suffer harm from dehydration, malnutrition, pain and suffering, poor hygiene, mental anguish, humiliation, and death. The complaint also alleges that Mr. Browning required assistance with daily activities, and that CHHC failed to provide assistance. Further, the complaint alleges that CHHC was aware of the neglect of it residents that was occurring due to "staffing problems." As to negligence, the allegations in the complaint span three pages and specifically allege that CHHC beached a duty they owed to Mr. Browning through allegations such as a failure to provide him with **[*37]** basic and necessary care and supervision; failure to protect him from abuse and neglect; failure to adequately hire, train, supervise and retain a sufficient staff; failure to ensure that Mr. Browning received the prescribed treatment and diet, necessary supervision, and appropriate care; and a failure to comply with state and federal law. The complaint then alleges that Mr. Browning's injuries were proximately caused by the acts or omissions described. Additionally, the complaint alleges causes of action for: negligence *per se* based upon the Tennessee Nursing Home Residents Rights Act, Tenn. Code Ann. § 68-11-901 *et seq.*; gross negligence, willful, wanton, reckless, malicious and/or intentional misconduct; negligence pursuant to the Tennessee Medical Malpractice Act, Tenn. Code. Ann. § 29-26-115, *et seq.*; violation of the Tennessee Adult Care Protection Act, Tenn. Code. Ann. § 71-6-101 *et seq.*; negligent or intentional misrepresentation based upon representations that the defendants had adequate staff; violations of the Tennessee Consumer Protection Act, Tenn. Code. Ann. § 47-18-101 *et seq*; and survival and wrongful death claims. As to the medical malpractice claim, the complaint **[*38]** specifically alleges that CHHC owed a duty to Mr. Browning and breached that duty through allegations such as the failure to provide and ensure adequate nursing care plans; failure to provide adequate therapy and exercise; failure to provide care, treatment and medication in accordance with the physician's orders; failure to timely notify the physicians of significant changes in Mr. Browning's condition; failure to adequately and appropriately monitor Mr. Browning; failure to provide adequate treatment for persistent, unresolved problems; failure to provide adequate fluids to Mr. Browning; failure to transfer Mr. Browning to a hospital when he developed conditions beyond the treatment capabilities of CHHC; and failure to maintain medical records.

After reviewing the complaint, we find that the Appellant pled sufficient facts to give notice to CHHC of the claims against it. Further, the Appellant complied with Tenn. R. Civ. P. 8.05 and the requirements for pleading violations of a statute by specifically alleging violations of the Tennessee Nursing Home Residents Rights Act, Tenn. Code Ann. § 68-11-901 *et seq*; the Tennessee Medical Malpractice Act, Tenn. Code. Ann. § 29-26-115, *et seq.*; **[*39]** the Tennessee Adult Care Protection Act, Tenn. Code. Ann. § 71-6-101 *et seq.*; and the Tennessee Consumer Protection Act, Tenn. Code. Ann. § 47-18-101 *et seq*. Consequently, we find that the trial court erred in dismissing the complaint for failure to state with sufficient particularity the alleged acts of negligence.

Medical Malpractice Act

Finally, we address the Appellant's contention that the trial court erred in dismissing the complaint for failure to provide notice to CHHC as required by Tenn. Code Ann. § 29-26-121. In 2008 the Tennessee legislature made substantial changes to the Medical Malpractice Act, Tenn. Code Ann. § 29-26-115 *et seq*. These amendments went into effect on October 1, 2008, five days before this action was filed. At the time this complaint was filed Tenn. Code. Ann. § 29-26-121 (2008) provided in pertinent part:

> (a)(1) Any person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider against whom the potential claim is being made at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state. Attached **[*40]** to the written notice shall be a list of all health care providers to whom notice is being given pursuant to this section.

According to 29-26-121(b)(2008) when a complaint was filed alleging medical malpractice, "the pleadings shall state whether each party had complied with subsection (a) and shall provide such evidence of compliance as the court may require to determine if the provisions of this section have been met." Pursuant to the statute, the trial court has discretion to excuse compliance for "extraordinary cause shown." Tenn. Code Ann. § 29-26-121(2008). Moreover, according to the statute in effect in 2008, if notice was given as provided by the statute, the applicable statute of limitations would be extended by up to ninety days. Tenn. Code Ann. § 29-26-121(2008). [6] The purpose of this notice requirement and 60 day period has been described by one commentator as follows:

> to **[*41]** give the defendant the opportunity to investigate and perhaps even settle the case before it is actually filed. At a minimum, it will give the defendant the opportunity to gather information before suit is filed and should eliminate the need for extensions of time to answer the complaint or slow-walk discovery.

Day, John A., *Med Mal Makeover 2009 Act Improves on '08*, 45-JUL Tenn. B.J. 14 (July 2009).

FOOTNOTES

6 Tenn. Code Ann. § 29-26-121 was amended effective July 1, 2009. The 2009 amendment clarified who had to receive notice and explicitly stated what information must be contained in the notice. The amendments also clarified when and how notice was effective and increased the statute of limitations extension to 120 days. Tenn. Code. Ann. § 29-26-121(2009); *see also* Day, John A., *Med Mal Makeover 2009 Act Improves on '08*, 45-JUL Tenn. B.J. 14 (July 2009).

Appellant concedes that notice was not provided to CHHC prior to filing the complaint as required by Tenn. Code. Ann. § 29-26-121. On appeal, however, the Appellant contends that the notice requirement does not apply to its claim. Alternatively, in the event that the requirement does apply, the Appellant contends that it substantially complied **[*42]** with the notice requirement. In support of the argument that the notice requirement is not applicable to its claim, Appellant argues that (1) the original action, which was voluntarily non-suited, was filed prior to the enactment of the notice requirement, and (2) the second action was filed a mere five days after the requirement went into effect and compliance was impossible because while the statute extended the statute of limitations period, it did not extend the savings statute period.

Because the notice requirement is such a recent enactment, there is a dearth of cases interpreting and construing the requirement and the "extraordinary cause exception." One of only several cases which have even considered the requirements of Tenn. Code Ann. § 29-26-121 is ***Jenkins v. Marvel***, 683 F. Supp. 2d 626 (E.D. Tenn. Jan. 14. 2010). In ***Jenkins***, the plaintiff originally filed a medical malpractice claim prior to the amendments to Tennessee's Medical Malpractice Act. ***Id.*** at 629. However, the plaintiff chose to take a voluntary non-suit and dismissed the original action on October 18, 2007. ***Id.*** The ***Jenkins*** plaintiff chose to re-file the medical malpractice claim on October 17, 2008, seventeen **[*43]** days after the amendments went into effect. ***Id.*** The defendants in ***Jenkins*** filed a motion to dismiss, arguing that the plaintiff had failed to comply with the notice requirement in the Medical Malpractice Act which became effective on October 1, 2008. ***Id.*** at 637. As in the case before us, the ***Jenkins*** plaintiff argued that the amendments should not apply to their case. ***Id.*** at 638. The plaintiff contended that the underlying purpose of the statute had been met. ***Id.***

In considering the motion to dismiss, the ***Jenkins*** court first compared Tennessee's statute to a similar statute in Texas, Texas Civil Practice and Remedies Code § 74.051 and the intent behind the Texas statute as found by Texas courts. ***Id.*** The ***Jenkins*** court found the Texas statute helpful as the Tennessee statute and the Texas statute were very similar. 7 ***Id.*** As stated by the ***Jenkins*** court, the purpose behind the Texas statute was to "'facilitate discussion of the merits of a potential health care claim and thereby initiate amicable settlement negotiations,'" (quoting ***Phillips v. Sharpstown General Hosp.***, 664 S.W.2d 162, 168 (Tex. App. 1983), and to "'facilitate the early identification of unmeritorious claims.'" ***Id.*** (quoting **[*44]** ***Schepps v. Presbyterian Hosp. Of Dallas***, 652 S.W.2d 934, 937 (Texas. 1983)).

FOOTNOTES

7 As stated by the ***Jenkins*** court, Texas Civil Practice and Remedies Code § 74.051(a) provides:

> Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician, or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

Jenkins, 683 F. Supp. 2d at 638. The court also noted that § 74.051(b) required plaintiffs to include a statement of compliance in their complaint and provided that plaintiffs may have to provide additional evidence of compliance.

The ***Jenkins*** court then reviewed the legislative history behind the Tennessee statute, noting that there was no Tennessee case law discussing the purpose behind the statute. ***Id.*** at 639. The ***Jenkins*** court found that the State of Tennessee Senate Republican Caucus newsletter for the week of April 2, 2007 discussed the purpose behind the new requirements. ***Id.*** The newsletter stated "'[t]he legislation is designed to reduce the number of frivolous lawsuits **[*45]** filed in Tennessee each year...by requiring early evaluation and streamlined disclosure of medical records.'" ***Id.*** (quoting TN Senate Republican Caucus Weekly Wrap, April 6, 2007). The ***Jenkins*** court also considered an April 24, 2008 news release from the Senate Republican caucus which provided:

> The State Senate has approved and sent to the governor major tort reform legislation aimed at weeding out meritless medical malpractice lawsuits.
>
> * * *

Key provisions in this bill include:

> . Notice would be provided at least two months before a lawsuit is filed to help resolve the case before it goes to court.

Id. (citing TN News Rel., S. Rep. 4/24/2008). Based on this history, the ***Jenkins*** court found that the purpose behind the Tennessee statute was similar to the purpose behind the Texas statute - "to provide notice to potential parties and to facilitate early resolution of cases through settlement." ***Id.***

Utilizing this intent, the ***Jenkins*** court held that the plaintiff's second action should not be dismissed as the defendants had actual notice of the claim and there was no need for the plaintiff to provide the statutory notice. ***Id.*** The court found that the defendants "clearly" had more than sixty days **[*46]** notice of the plaintiff's claims, that in fact the defendants had a year's notice, and had the opportunity to enter into any attempts at resolution. ***Id.*** The court also found that the plaintiff's failure to state compliance with the statute in the complaint was unnecessary under the circumstances. ***Id.*** Further, the court noted that the plaintiff had complied with another requirement of the Medical Malpractice Act, the filing of a Certificate of Good Faith as provided by Tenn. Code Ann. § 29-26-122, and therefore the legislature's goal of ensuring that claims filed had merit was met. ***Id.*** Because the defendants had notice of the claim through the filing of the first lawsuit, before the notice requirements were in effect, and because the plaintiff had demonstrated the claim had some merit, the ***Jenkins*** court found that the purpose of the statute had been met. ***Id.*** Therefore, the court found that under the unique circumstances of the case, the plaintiff's noncompliance with the notice requirements did not warrant a dismissal. ***Id.***

We find that the case before us is virtually identical to ***Jenkins***. As in ***Jenkins***, the Appellant filed a complaint which included allegations of medical malpractice **[*47]** before the notice requirement was in effect and subsequently non-suited the first action. Then, as in ***Jenkins***, mere days after the amendments went into effect, the Appellant re-filed the complaint which again included allegations of medical malpractice. As in ***Jenkins***, the defendants had actual notice of the claim at least one year before the Appellant filed the current action by virtue of the previously filed claim. Finally, as in ***Jenkins***, the Appellant filed a Certificate of Good Faith wherein the Appellant's attorney certified that he had consulted with an expert, competent to testify under Tenn. Code. Ann. § 29-26-115, and that there was a good faith basis to maintain the action. [8]

FOOTNOTES

[8] We recognize that the Appellant's Certificate of Good Faith was not filed with the original complaint in this action. However, at that time the statute provided that a plaintiff must only file the Certificate of Good Faith within ninety days of filing the complaint. Tenn. Cod. Ann. § 29-26-122 (2008). This statute was subsequently amended, effective July 1, 2009, to provide that the Certificate of Good Faith must be filed with the complaint. Tenn. Code. Ann. 29-26-122 (2009). Further, by order entered **[*48]** May 22, 2009, the trial court granted Appellant an extension until June 22, 2009 to provide a Certificate of Good Faith. Appellant then filed a Certificate of Good Faith with the second amended complaint on June 22, 2009. Accordingly, the timeliness of the Appellant's filing of the Certificate of Good Faith does not affect this decision.

We recognize that ***Jenkins*** is not binding upon this Court. However, we too are faced with deciding this case with no Tennessee case law discussing the purposes behind the notice requirement and the "extraordinary cause exception" found in Tenn. Code. Ann. § 29-26-121 (2008). After reviewing the requirements as they existed in 2008, the subsequent amendments to Tenn. Code Ann. § 29-26-121 which went into effect on July 1, 2009, the reasoning in ***Jenkins***, and commentary from others discussing the reform to Tennessee's Medical Malpractice Act in 2008 and 2009, this Court finds the reasoning in ***Jenkins*** sound and will apply the same analysis to this case. [9] The purpose behind Tenn. Code. Ann. § 29-26-121 and other recent amendments to the Medical Malpractice Act was to provide notice to health care providers of potential claims against them so that they might **[*49]** investigate the matter and perhaps settle the claim, and also to reduce the number of meritless claims which were filed. See ***Jenkins***, 683 F. Supp. 2d 626 (E.D. Tenn. 2010); and Day, John A., *Med Mal Makeover 2009 Act Improves on '08*, 45-JUL Tenn. B.J. 14 (July 2009). However, the Tennessee legislature recognized the need to create an exception to the notice requirement so that it would not be an absolute bar to all claims whatsoever for failure to comply with the notice requirements. The legislature created such an exception by providing that "[t]he court has discretion to excuse compliance with the section only for extraordinary cause shown." Tenn. Code Ann. § 29-26-121(b). Accordingly, we review the trial court's decision not to allow an exception under an abuse of discretion standard. A trial court abuses its discretion when it has applied an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining. ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001).

FOOTNOTES

[9] This Court recognizes that the trial court entered its order on August 3, 2009, and therefore the trial court did not have the benefit of the ***Jenkins*** opinion **[*50]** which was filed on January 14, 2010.

We find that the trial court erred in not excusing compliance with the notice requirements. It is well settled that Tennessee law favors the resolution of all disputes on the merits. ***Henley v. Cobb***, 916 S.W.2d 915, 916 (Tenn. 1996)(citations omitted). CHHC had actual notice of the claim more than one year prior to the filing of the present action. Accordingly, CHHC had ample time to investigate and possibly settle the claim. Moreover, the Appellant filed a Certificate of Good Faith demonstrating that the claim had merit. Consequently, all purposes behind the 2008 amendments to the Medical Malpractice act were met. Under the unique circumstances of this case, the trial court should have exercised its discretion and excused compliance with the deadlines imposed by Tenn. Code Ann. § 29-26-121. Therefore, we reverse the trial court's dismissal of the Appellant's medical malpractice claims on the basis that the Appellant failed to comply with Tenn. Code Ann. § 29-26-121.

Conclusion

For the foregoing reasons we reverse the decision of the trial court dismissing Appellant's complaint and remand this case to the trial court for further proceedings. Costs of **[*51]** this appeal are taxed to the Appellee Claiborne and Hughes Health Center for which execution may issue if necessary.

J. STEVEN STAFFORD, JUDGE

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EXHIBIT B

WEBSTER'S NEW WORLD™ COLLEGE DICTIONARY

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David B. Guralnik

Editor in Chief Emeritus

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extraplanetary
extraprofessional
extrasocial
extrasolar

☆**ex|tra-base hit** (eks'trə bās') *Baseball* any hit greater than a single; double, triple, or home run

ex|tra-bold (-bōld') ***n.*** *Printing* a style of type heavier than boldface

ex|tra-ca·non|i·cal (ek'strə kə nän'i kəl) ***adj.*** not included in the canon; not among the authorized books

ex·tract (*for v.* eks trakt', ik strakt'; *for n.* eks'trakt') ***vt.*** [ME *extracten* < L *extractus*, pp. of *extrahere*, to draw out < *ex-*, out + *trahere*, to DRAW] **1** to draw out by effort; pull out *[to extract* a tooth, to *extract* a promise from someone*]* **2** to remove or separate (metal) from ore **3** to obtain (a substance, esp. an essence or concentrate) by pressing, distilling, using a solvent, etc. *[to extract* juice from fruit*]* **4** to obtain as if by drawing out; deduce (a principle), derive or elicit (information, pleasure, etc.), or the like **5** to copy out or quote (a passage from a book, etc.); excerpt **6** *Math.* to compute (the root of a quantity) —***n.*** something extracted; specif., *a)* a concentrated form, whether solid, viscid, or liquid, of a food, flavoring, etc. *[*beef *extract] b)* a passage selected from a book, etc.; excerpt; quotation *c) Pharmacy* the concentrated substance obtained by dissolving a drug in some solvent, as ether or alcohol, and then evaporating the preparation —**ex·tract'a|ble** or **ex·tract'|i|ble** ***adj.***

SYN.—**extract** implies a drawing out of something, as if by pulling, sucking, etc. *[to extract* a promise*]*; **educe** suggests a drawing out or evolving of something that is latent or undeveloped *[*laws were *educed* from tribal customs*]*; **elicit** connotes difficulty or skill in drawing out something hidden or buried *[*his jokes *elicited* no smiles*]*; **evoke** implies a calling forth or summoning, as of a mental image, by stimulating the emotions *[*the odor *evoked* a memory of childhood*]*; **extort** suggests a forcing or wresting of something, as by violence or threats *[to extort* a ransom*]*

ex·trac·tion (eks trak'shən, ik strak'-) ***n.*** [ME *extraccioun* < ML *extractio*] **1** the act or process of extracting; specif., the extracting of a tooth by a dentist **2** origin; lineage; descent *[*of Navaho *extraction]* **3** a thing extracted; extract

ex·trac·tive (eks trak'tiv, ik strak'-) ***adj.*** [ME *extractif* < ML *extractivus*] **1** extracting or having to do with extraction **2** capable of being extracted **3** having the nature of an extract —***n.*** **1** an extractive substance **2** an extract

ex·trac·tor (eks trak'tər, ik strak'-) ***n.*** a person or thing that extracts; specif., the part of a breech-loading gun that withdraws the cartridge or shell case from the chamber

☆**ex|tra·cur·ric|u·lar** (eks'trə kə rik'yōō lər, -yə-) ***adj.*** **1** *a)* not part of the required curriculum; outside the regular course of study but under the supervision of the school *[*dramatics, athletics, and other *extracurricular* activities*] b)* not part of one's regular work, routine, etc. **2** [Colloq.] EXTRAMARITAL

ex|tra·dit·a|ble (eks'trə dīt'ə bəl) ***adj.*** **1** that can be extradited **2** making liable to extradition

ex|tra·dite (eks'trə dīt') ***vt.*** **-dit'|ed, -dit'ing** [back-form. < fol.] **1** to turn over (a person accused or convicted of a crime) to the jurisdiction of another country, State, etc. where the crime was allegedly committed **2** to obtain the extradition of

ex|tra·di·tion (eks'trə dish'ən) ***n.*** [Fr < L *ex*, out + *traditio*, a surrender: see TRADITION] the act of extraditing, as by treaty, a person accused or convicted of a crime

ex|tra·dos (eks trā'däs') ***n.*** [Fr < L *extra*, beyond + Fr *dos* < L *dorsum*, back] *Archit.* the outside curve of an arch: see ARCH[1], illus.

ex|tra·ga·lac·tic (eks'trə gə lak'tik) ***adj.*** outside or beyond our own galaxy

ex|tra·ju·di·cial (-jōō dish'əl) ***adj.*** **1** outside or beyond the jurisdiction of a court **2** outside the usual course of justice —**ex'|tra·ju·di'|cial|ly** ***adv.***

ex|tra·le|gal (-lē'gəl) ***adj.*** outside of legal control or authority; not regulated by law —**ex'|tra·le'|gal·ly** ***adv.***

ex|tra·mar·i|tal (-mar'i təl, -it'l) ***adj.*** of or relating to sexual intercourse with someone other than one's spouse *[extramarital* affairs*]*

ex|tra·mun·dane (-mun'dān') ***adj.*** [LL *extramundanus*: see EXTRA- & MUNDANE] outside the physical world; not of this world

ex|tra·mu·ral (-myoor'əl) ***adj.*** [see EXTRA- & MURAL] outside the walls or limits of a city, school, etc. *[extramural* activities*]*

ex|tra·ne|ous (eks trā'nē əs, ik strā'-) ***adj.*** [L *extraneus*, external, foreign < *extra*: see EXTRA-] **1** coming from outside; foreign *[*an *extraneous* substance*]* **2** not truly or properly belonging; not essential **3** not pertinent; irrelevant —***SYN.*** EXTRINSIC —**ex|tra'ne|ous·ly** ***adv.*** —**ex|tra'ne|ous·ness** ***n.***

ex|tra·nu·cle|ar (eks'trə nōō'klē ər, -nyōō'-) ***adj.*** located or occurring outside of the nucleus of a cell

ex·tra|or·di·naire (ik strôr'də ner'; *Fr* ek strôr dē ner') ***adj.*** [Fr] extraordinary: used after the noun

ex|tra|or·di·nar|y (ek strôrd"n er'ē, ik-; -strôr'də ner'ē; *also* eks'trə ôrd"n er'ē, -ôr'də ner'ē) ***adj.*** [ME *extraordinari* < L *extraordinarius* < *extra ordinem*, out of the usual order < *extra* + acc. of *ordo*, ORDER] **1** not according to the usual custom or regular plan *[*an *extraordinary* session of Congress*]* **2** going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable **3** outside the regular staff; sent on a special errand; having special authority or responsibility *[*a minister *extraordinary]* —**ex|tra|or'di·nar'|i·ly** ***adv.*** —**ex|tra|or'di·nar'|i·ness** ***n.***

ex·trap|o·late (ek strap'ə lāt', ik-) ***vt., vi.*** **-lat'|ed, -lat'ing** [L *extra* (see EXTRA-) + (INTER)POLATE] **1** *Stc* value, quantity, etc. beyond the know tain variables within the known rang value is assumed to follow **2** to arrive hypothesizing from known facts or ot to consequences on the basis of (know **trap'|o·la'|tion** ***n.*** —**ex·trap'|o·la'|tive** ***ad***

ex|tra·sen·so|ry (eks'trə sen'sə rē) ***adj.*** apart from, or in addition to, the n senses *[extrasensory* perception*]*

ex|tra·sys·to|le (-sis'tə lē') ***n.*** [EXTRA- heart rhythm resulting in an extra con regular beats —**ex'|tra·sys·tol'|ic** (-sis t

ex·tra·ter·res·tri·al (eks'trə tə res'trē əl or coming from outside the limits of t trial being, as in science fiction

ex|tra·ter·ri·to·ri|al (-ter'ə tôr'ē əl) ***adj.*** its or jurisdiction of the country, State *[extraterritorial* rights*]* —**ex'|tra·ter·ri·t**

ex|tra·ter·ri·to·ri·al·i|ty (-ter'ə tôr'ē al'ə jurisdiction of the country in which or foreign diplomats **2** jurisdiction of a foreign lands

ex|tra·u|ter·ine (-yōōt'ər in) ***adj.*** outside

ex·trav|a·gance (ek strav'ə gəns, ik-) beyond reasonable or proper limits in c able excess **2** a spending of more than excessive expenditure; wastefulness **3** spending, behavior, or speech Also **ex·t**

ex·trav|a·gant (-gənt) ***adj.*** [ME & An *extravagans*, prp. of *extravagari*, to s *vagari*, to wander < *vagus*: see VAGUE bounds; wandering **2** going beyond rea unrestrained *[extravagant* demands*] [extravagant* designs*]* **4** costing or spen ***SYN.*** EXCESSIVE, PROFUSE —**ex·trav'|a·ga**

ex·trav|a·gan|za (ek strav'ə gan'zə, ik-) with L *ex-* < It *estravaganza*, extravag *extravagans*: see prec.] **1** a literary, m characterized by a loose structure and fa rate theatrical production, as some musi

ex·trav|a·gate (ek strav'ə gāt') ***vi.*** **-gat'|ed** *gatus*, pp.: see EXTRAVAGANT] [Rare] **1** beyond reasonable limits; be extravagant

ex·trav|a·sate (ek strav'ə sāt') ***vt.*** **-sat'|** EXTRA-) + *vas*, a vessel + -ATE[1]] to allo flow from its normal vessels into the surr **1** to flow out or escape into surroundi lymph, etc. **2** to flow out, as lava from a

ex|tra·vas|cu·lar (eks'trə vas'kyōō lər) ***adj*** tem, or the blood and lymph vessels

☆**ex|tra·ve|hic|u·lar** (-vē hik'yōō lər) ***adj.*** by an astronaut outside a vehicle in spac

ex|tra·ver·sion (eks'trə vur'zhən) ***n.*** EX **ex'|tra·vert'** (-vurt') ***n., adj.***

ex|tra·vir|gin (eks'trə vur'jən) ***adj.*** designa oil with the least acid and the best flavor,

Ex·tre·ma·du·ra (ek'strə mə door'ə) *Sp. n*

ex·treme (ek strēm', ik-) ***adj.*** [ME & outermost, superl. of *exterus*, outer: see E outermost point; farthest away; most rem the greatest degree; very great or greatest excessive degree; immoderate **3** far from tional **4** deviating to the greatest degree f as in politics **5** very severe; drastic [Archaic] last; final —***n.*** **1** either of two t or far as possible from each other **2** a extreme act, expedient, etc. **4** an extrem *extreme* of distress*]* **5** [Obs.] an extreme *a)* the first or last term of a proportio **extremes** to be excessive or immoderate **the extreme** to the utmost degree —**ex·tre ness** ***n.***

extremely high frequency *Radio* any f and 300,000 megahertz

Extreme Unction ANOINTING OF THE SICK

ex·trem·ism (ek strēm'iz'əm, ik-) ***n.*** the qu extremes, esp. the extreme right or extre **trem'ist** ***adj., n.***

ex·trem·i|ty (ek strem'ə tē, ik-) ***n., pl.*** **-ties** L *extremitas* < *extremus*: see EXTREME] **1** point or part; end **2** the greatest degree **3** sity, danger, etc. **4** [Archaic] the end of li measure; severe or strong action: *usually* limb *b)* [*pl.*] the hands and feet

ex·tre·mum (ek strē'məm) ***n., pl.*** -tre'ma (-n neut. of *extremus*: see EXTREME] *Math.* the value of a function

ex·tri·cate (eks'tri kāt') ***vt.*** **-cat'|ed, -cat'ing** *extricare*, to disentangle < *ex-*, out + *trica* to set free; release or disentangle (*from* a ne **tri·ca|bil'|i|ty** ***n.*** —**ex'tri·ca|ble** (-kə bəl) ***adj.***

ex·trin·sic (eks trin'sik, -zik; ik strin'-) ***ad*** *extrinsecus*, from without, outer < *exter*, wit otherwise < base of *sequi*, to follow: see belonging to the thing with which it is con

EXHIBIT C

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Citation: **2005 N.C. App. LEXIS 24**

*2005 N.C. App. LEXIS 24, **

STATE OF NORTH CAROLINA and THE JOHNSTON COUNTY BOARD OF EDUCATION v. PHILLIP JADE SAUNDERS Defendant and MONTEE SPELLS, RANGER INSURANCE COMPANY, and EDDIE E. LEE, Surety-Petitioners

NO. COA03-1437

COURT OF APPEALS OF NORTH CAROLINA

2005 N.C. App. LEXIS 24

October 11, 2004, Heard in the Court of Appeals
January 4, 2005, Filed

NOTICE:

[*1] PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Reported at State v. Saunders, 606 S.E.2d 459, 2005 N.C. App. LEXIS 77 (N.C. Ct. App., Jan. 4, 2005)

PRIOR HISTORY: Johnston County. No. 97 CRS 8575-76.

DISPOSITION: Affirmed; remanded for correction of order.

CORE TERMS: forfeiture, notice, surety, sureties-appellants, mailed, remit, locate, extradition, clerk, matter of law, mail, clerk's office, contacted, obligor's, mailing, box, final judgment, review denied, proper notice, statutory requirements, appearance, remission, verified, spend, bail, computer records, notice of forfeiture, prejudiced, correction, bondsman

COUNSEL: Benjamin R. Kuhn for petitioners-appellants.

Daughtry, Woodard, Lawrence & Starling, by James R. Lawrence, Jr., and Woodruff, Reece & Fortner, by Gordon C. Woodruff and Michael J. Reece, for plaintiffs-appellees.

JUDGES: MARTIN, Chief Judge. Judges TIMMONS-GOODSON and HUDSON concur.

OPINION BY: MARTIN

OPINION

Appeal by petitioners from judgment entered 11 July 2003 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 11 October 2004.

MARTIN, Chief Judge.

Petitioner-appellants appeal from the trial court's order denying their petition for relief from a final judgment of bond forfeiture. The record discloses that on 3 June 1997, defendant Phillip Jade Saunders (Saunders) was arrested on a charge of trafficking in cocaine in violation of N.C. Gen. Stat. § 90- 95(h)(3). His bond was **[*2]** originally set at $ 200,000 but was reduced to $ 100,000 *sua sponte* by Superior Court Judge Lynn Johnson.

Montee Spells (Spells), as surety bondsman and attorney-in- fact for The Ranger Insurance Company (Ranger), secured defendant's appearance in court on 12 January 1998 by posting a $ 100,000 bond on 30 August 1997. Defendant returned to his home in Miami where Spells contacted him approximately once each month. Spells

regularly checked computer records of the Administrative Office of the Courts (AOC), but the records never indicated any change of court date, failure to appear, or forfeiture of bond in defendant's case.

Defendant Saunders failed to appear in court on 12 January 1998, and orders were issued for his arrest and for forfeiture of the bond. On 18 August 1998, Assistant District Attorney Dale Stubbs (Stubbs) dismissed all charges against defendant, believing defendant could not be readily found and produced for trial. On 12 April 1999, a notice was sent to Ranger at its Houston, Texas office, notifying it of the order of forfeiture and that judgment would be entered in the amount of the bond unless the principal, Saunders, appeared on or before 8 July 1999 or the **[*3]** surety, Ranger, satisfied the court that the principal's failure to appear was without the principal's fault. Judgment of forfeiture in the amount of the bond was entered on 8 July 1999, and notice of the judgment was mailed to Ranger. On 13 July, the court entered an Order of Bond Forfeiture.

The Notice of Judgment was not received by sureties-appellants until approximately 22 July 1999. Immediately upon learning of the judgment, sureties-appellants sought to locate defendant and return him to Johnston County. After traveling to Miami, defendant's last known address, Spells learned that defendant had fled to the Bahamas. Because only the local prosecuting authority could initiate extradition proceedings, Spells contacted Stubbs to enlist his help. Initially Stubbs tried to assist, filling out paperwork for defendant's extradition and making phone calls to Washington. However, due to time and money limitations, Stubbs discontinued his pursuit of defendant's extradition.

On 15 January 2003, sureties-appellants filed a Verified Petition to Remit Bond Forfeiture After Judgment. The Johnston County School Board responded and a hearing was held on 1 May 2003. On 11 June 2003, the court **[*4]** denied sureties-appellants petition to remit the bond forfeiture, concluding as a matter of law that sureties-appellants had not shown evidence of extraordinary cause.

Appellants contend the trial court erred in denying their motion to remit the judgment of bond forfeiture for extraordinary cause. North Carolina General Statute § 15A-544(a)-(h) (1997), now repealed, governed the bond forfeiture in this case. N.C. Gen. Stat. § 15A-544(h) provided in pertinent part, "for extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." N.C. Gen. Stat. § 15A-544 (h) (1997). Thus, "it is within the court's discretion to remit judgment for extraordinary cause," *State v. McCarn*, 151 N.C. App. 742, 745, 566 S.E.2d 751, 753 (2002) (citation omitted), and the appellate court reviews only for abuse of discretion. *Id.*

Although the statute does not define the term, this Court has previously defined "extraordinary cause" as "cause **[*5]** going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *Id.* "In determining whether the facts of a particular case constitute extraordinary cause, the trial court must make brief, definite, pertinent findings and conclusions." *Id.* Because the determination of extraordinary cause is a "heavily fact-based inquiry," *State v. Coronel*, 145 N.C. App. 237, 244, 550 S.E.2d 561, 567 (2001), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002), these cases must be reviewed on a "case by case basis." *Id.*

Appellants first argue they did not receive timely and proper notice of the Order of Forfeiture. N.C. Gen. Stat. § 15A-544(b) (1997) provides in pertinent part:

> If forfeiture is ordered by the court, a copy of the order of forfeiture and notice that judgment will be entered upon the order after 60 days must be served on each obligor. Service is to be made by the clerk mailing by first-class mail a copy of the order of forfeiture and notice to each obligor at each obligor's **[*6]** address as noted on the bond and note on the original the date of mailing. Service is complete three days after the mailing.

On 12 April 1999, the Clerk mailed, by first-class mail, the Order of Bond Forfeiture and Notice. Judgement of forfeiture was not entered until 8 July 1999, giving more than the required sixty day notice. The statute does not require notice to be mailed within a certain time period after the Order of Forfeiture is entered.

> The bond noted Ranger's address as:
>
> Ranger Insurance
>
> P.O. Box 2807
>
> Houston, TX 77252-2807

However, the Order of Bond Forfeiture and Notice shows notice was actually mailed to:

> Ranger Insurance Company

10777 Westheimer Rd.

P.O. Box 2807

Houston, TX 77252-2807.

At the 1 May 2003 hearing, Crystal Creech Sherron, Deputy Clerk in the Johnston County clerk's office, testified she addressed the notice to the address listed on her rolodex. Except for a street address, which was above the line containing the post office box, the address used for Ranger was identical to the address on the bond. Furthermore, there was no indication in the record that the notice was returned to the clerk's office. We conclude the **[*7]** addition of the street address was mere surplusage that did not affect compliance with the statute.

Appellant relies on *State v. Cox*, 90 N.C. App. 742, 370 S.E.2d 260 (1988), where the Court of Appeals found that the trial court committed reversible error when it entered an order of forfeiture and judgment of forfeiture without providing timely and proper notice to the surety. In *Cox*, however, the surety was neither mailed nor personally served with a copy of the order of forfeiture and notice. The Court found "the failure to follow the statutory requirements denied the surety his right to receive notice of the order of forfeiture." *Id.* at 745, 370 S.E.2d at 261. Here, the notice met all statutory requirements; it was mailed more than sixty days prior to the entry of judgment and it was mailed by first-class mail to the address listed on the bond.

Appellants also contend the fifteen to eighteen month delay between the date the Order of Forfeiture and Notice was entered and the date it was mailed and/or received by petitioners prejudiced the appellants. They argue if the sureties had been advised of defendant's failure to appear, defendant could **[*8]** have been apprehended and returned to face charges.

At the hearing, Spells admitted the last contact he had with defendant prior to his court date of 12 January 1998 was in November or December of 1997. He further testified that between 12 January 1998 and 12 April 1999 he contacted defendant between five and seven times during the five to six months after the court date. However, Spells was unaware defendant had missed his court date of 12 January 1998 until he received the fax from Eddie Lee in July 1999.

Although Spells repeatedly checked the AOC computer records which continued to show a 12 January court date even after the date had passed, he never spoke with defendant's attorney, the district attorney's office or the clerk's office to find out if defendant had appeared in court or if defendant had a new court date. Sureties-appellants offered no explanation as to why defendant was not in court nor did they present any evidence of defendant's whereabouts from 12 January 1998 until after sureties received notice of forfeiture. At the hearing, Spells admitted that as a professional bondsman, it was his job to make certain defendant appeared in court, even if he had to spend money **[*9]** to locate defendant. If the sureties had determined through their own efforts that defendant had not appeared in court, they would have had more time to locate defendant prior to the entry of Judgment of Forfeiture. Appellants were not prejudiced by the delay in receiving notice of forfeiture.

Appellants next argue the trial court abused its discretion in denying their petition to remit bond because the action and inaction of government officials made it impossible for the sureties to return defendant to Johnston County to face charges. Again, we disagree.

"The purpose of a bail bond is to secure the appearance of the principal in court as required." *State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804, *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987). "The sureties become custodians of the principal and are responsible for the bond if the principal fails to appear in court when required." *Id.* at 199, 356 S.E.2d at 805.

Here, appellants claim Stubbs' failure to seek extradition of defendant made it impossible for appellants to produce him for trial. However, in *State v. McCarn*, this Court held that the State does **[*10]** not have an "affirmative duty to aid a surety in its effort to locate a defendant who has not appeared in court as required." *McCarn*, 151 N.C. App. at 745, 566 S.E.2d at 753. Furthermore, it was foreseeable that sureties, licensed professional bondsmen who knew defendant was from the Bahamas, could be required to spend time, energy and money locating defendant should he fail to appear for court. *See Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804 (holding sureties effort and expense to locate and return defendant does not constitute extraordinary cause). Accordingly, we find the trial court did not abuse its discretion in concluding as a matter of law that extraordinary cause did not exist for remission of the bond.

Sureties-appellants next argue the trial court erred in finding as fact and concluding as a matter of law that the case was governed by N.C. Gen. Stat. § 15A-544.1, et. seq. The lower court's order made the following findings of fact:

> 2. That the parties are properly before the Court pursuant to North Carolina General Statute 15A-544.1 et seq., "Bond Forfeitures," and specifically **[*11]** 15A-544.8, "Relief from final Judgment."
>
> 3. That the parties are before the Court pursuant to a verified petition filed by the Surety, Montee Spells and Ranger Insurance Company, for Remission of a Bond After Execution for Extraordinary Cause.

4. That North Carolina General Statute 15A-544.1 et seq. is the sole jurisdictional statute and procedure for the petition to be heard.

The order also made the following conclusions of law:

1. That the Parties are properly before the Court pursuant to N.C. Gen. Stat. § 15A-544.8 . . . .

2. That this matter is governed by North Carolina General Statute 15A-544.8 as the exclusive remedy from a final judgment of forfeiture.

The bail bond, issued on 30 August 1997, was governed by N.C. Gen. Stat. § 15A-544(h), not N.C. Gen. Stat. § 15A-544.1 et seq. which became effective 1 January 2001. Sureties-appellants concede in their brief that the parties discussed the applicable law at the hearing and both parties acknowledged that N.C. Gen. Stat. § 15A-544(h) was the **[*12]** controlling law in the case. It is apparent from the record that the correct law was used by the court, and the trial court's error in referring to the incorrect statute has resulted in no prejudice to appellants. Nevertheless, we remand the matter to the trial court for the limited purpose of correcting the order to reflect the correct statute.

Sureties-appellants' remaining assignment of error was not brought forward in his brief and therefore is deemed abandoned. N.C. R. App. P. 28(a).

The order denying relief from the judgment of bond forfeiture is affirmed, and this matter is remanded for correction of the order in accordance with this opinion.

Affirmed; remanded for correction of order.

Judges TIMMONS-GOODSON and HUDSON concur.

Report per Rule 30(e).

IN THE _____ COURT
OF _____ COUNTY, TENNESSEE

_____ **Plaintiff,** **v.** _____ _____ _____ **Defendant/s.**	**NO.** _____ **JURY DEMAND** **Judge** _____

CERTIFICATE OF GOOD FAITH

Medical Malpractice Case

PLAINTIFF'S FORM

A. In accordance with T.C.A. § 29-26-122, I hereby state the following: (Check item 1 or 2 below and sign your name beneath the item you have checked, verifying the information you have checked. Failure to check item 1 or 2 and/or not signing item 1 or 2 will make this case subject to dismissal with prejudice.)

☐ 1. The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express opinion(s) in the case; and

(B) Believe, based on the information available from the medical records concerning the care and treatment of the Plaintiff for the incident(s) at issue, that there is a good faith basis to maintain the

action consistent with the requirements of § 29-26-115.

_____

Signature of Plaintiff if not represented, or Signature of Plaintiff's Counsel

or

☐ 2. The Plaintiff or Plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

(A) Are competent under § 29-26-115 to express opinion(s) in the case; and

(B) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the Plaintiff for the incident(s) at issue and, as appropriate, information from the Plaintiff or others with knowledge of the incident(s) at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the Plaintiff or Plaintiff's counsel; and that despite the absence of this information there is a good faith basis for maintaining the action as to each Defendant consistent with the requirements of § 29-26-115 . Refusal of the defendant to release the medical records in a timely fashion, or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical records prior to expert certification.

_____

Signature of Plaintiff if not represented, or Signature of Plaintiff's Counsel

B. You MUST complete the information below and sign:

I have been found in violation of T.C.A. § 29-26-122 _____ prior times. (Insert number of prior violations by you.)

_____ _____

Signature of Person Executing This Document Date

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

BARRY CHARLES BLACKBURN EX REL.
BRITON B.,

Plaintiff,

No. M2018-01796-COA-R10-CV

v.

Circuit Court for Maury County
No. 15513

MARK A. McLEAN, M.D. and MAURY
REGIONAL HOSPITAL, d/b/a
MAURY REGIONAL MEDICAL
CENTER,

Defendants.

DEFENDANTS' JOINT ANSWER IN OPPOSITION TO THE PLAINTIFF'S APPLICATION FOR EXTRAORDINARY APPEAL

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I. SUMMARY OF THE ARGUMENT

A. Rule 10 Extraordinary Appeal

This Court should deny Plaintiff's Application for Extraordinary Appeal in its entirety given the "narrowly circumscribed" criteria required for extraordinary review. Extraordinary review is appropriate only "if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or if necessary for complete determination of the action on appeal as otherwise provided in these rules." Tenn. R. App. P. 10(a). The trial court's actions in this case simply do not meet this heightened standard.

B. Order Granting Defendant's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support

The trial court properly granted Defendant's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support. In this health care liability action, Plaintiff is required by Tennessee Code Annotated § 29-26-115 to prove that

Defendants acted with less than or failed to act with ordinary and reasonable care in accordance with the recognized standard of acceptable professional practice in the profession and specialty that Defendants practice or in a similar community at the time of the alleged injury or wrongful action occurred **AND** that as a proximate result of Defendants' negligent acts or omissions, Mr. Blackburn suffered injuries which would not otherwise have occurred. Tenn. Code Ann. § 29-26-115 (a)(1)-(3). Plaintiff's expert's standard of care claims must have a causal nexus to an injury that otherwise would not have occurred. *Id.*

The Order simply eliminates Dr. Sobel's seventeen (17) standard of care allegations against Dr. McLean that have no causal nexus to an injury to Mr. Blackburn that would not otherwise have occurred as required by Tennessee law. The trial court's Order regarding Maury Regional Medical Center's ("MRMC") Motion to Strike simply strikes Dr. Sobel's seventeen (17) standard of care allegations that are directed at MRMC and have no causal nexus to an injury to Mr. Blackburn that would not otherwise have occurred. (Order; Appendix 34) The trial court left intact Plaintiff's standard of care claims with a causal nexus. The Orders are consistent with Tennessee law, and the Court did not err in granting the Motion for Partial Summary Judgment.

Plaintiff provides no support for the claim that the trial court so far departed from the accepted course of judicial proceedings by entering these orders. Furthermore, the trial court's rulings are not dispositive of this case and an extraordinary appeal is not necessary to provide Plaintiff an adequate remedy upon entry of a final judgment in this matter.

C. Order Denying Plaintiff's Motion to Alter or Amend Order Granting Defendant Mark McLean's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support or in the Alternative for Rule 9 Appeal

The trial court's Order denying Plaintiff's Motion to Alter or Amend Order Granting Defendant Mark McLean's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support or in the Alternative for Rule 9 Appeal is a discretionary ruling and is consistent with Tennessee law. Plaintiff presented no new evidence or even any new argument in support of the Motion to Alter or Amend. Plaintiff's primary argument in this Motion is that Dr. Sobel's Affidavit creates a genuine issue of material fact as to the seventeen (17) standard of care allegations set forth by Dr. Sobel. Although Plaintiff only cited to Paragraph 10 of Dr. Sobel's Affidavit in response to the Motion, Dr. Sobel's Affidavit was more than sufficiently considered during the hearing. Dr. Sobel's Affidavit does not create an issue of material fact with regard to the seventeen (17) standard of care violations that he advanced. Further, during the hearing, the Court asked Plaintiff's counsel about the Affidavit of Dr. Sobel, Dr. Allen's deposition, and Dr. Sobel's deposition, and Plaintiff's counsel responded that he did not think the cited testimony tells the Court that any of the seventeen (17) items were a delay in diagnosis that ultimately caused Mr. Blackburn's death. (Hearing Transcript at 89-90; Appendix to Plaintiff's Application 22.) The trial court set forth appropriate reasoning for denial of the Motion. The factual basis for the decision is properly supported by evidence in the record. The trial court properly

identified and applied the most appropriate legal principles applicable to the decision. The trial court denied the Plaintiff's Motion pursuant to Rule 59 and Rule 56.02 of the Tennessee Rules of Civil Procedure. The decision was within the range of acceptable alternative dispositions and should not be reviewed by this Court.

D. Order Denying Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018, Regarding the April 30, 2018 Status Conference or in the Alternative for Rule 9 Appeal

The trial court's Order Denying Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018, Regarding the April 30, 2018 Status Conference or in the Alternative for Rule 9 Appeal is another discretionary ruling that is also consistent with Tennessee law. Plaintiff has attempted numerous times and in numerous ways to obtain all new experts to testify as to all issues in this matter. Plaintiff's Application for Extraordinary Appeal of this Order is simply another attempt to "get back to square one" and start this case over from the beginning. Plaintiff presented no new evidence in support of the Motion to Alter or Amend. Plaintiff failed to cite to any applicable legal authority for altering or amending the Court's Order regarding the April 30, 2018 status conference. A motion to alter or amend an order serves a limited purpose and should only be granted for one of three reasons: "(1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) to correct a clear error of law or to prevent injustice." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005); *see also Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003). Whether to grant such a motion

lies within the sound discretion of the trial court. *Chambliss*, 124 S.W.3d at 120.

Plaintiff previously identified experts in this matter to testify as to the recognized standard of acceptable professional practice required of Defendants. Plaintiff's standard of care experts, Richard Sobel, M.D. and Lori Jaggers Alexander, DNP, MSN, RN, testified to numerous standard of care violations as to both Defendants. The Court has already granted Plaintiff the opportunity to disclose additional experts on the issue raised by Defendants' Amended Answers. Additionally, the Court has already granted Plaintiff the opportunity to depose Defendants' expert witnesses on the issue raised by the Defendants' Amended Answer. Plaintiff did not identify any new experts in this matter or request to depose any of Defendants' expert witnesses regarding the issue raised by the Defendants' Amended Answer as permitted by the Court. In sum, Plaintiff failed to satisfy any of the reasons that are considered in determining whether to grant a Rule 9 Appeal.

E. Order Granting Defendants' Motion to Amend Answer

This Court should deny as untimely the portion of Plaintiff's Application for Extraordinary Appeal that relates to the trial court's Order Granting Defendant Mark A. McLean, M.D.'s Motion to Amend Answer. (Order Granting Def. Mark A. McLean, M.D.'s Mtn. to Am.; Appendix to Plaintiff's Application 15.) Defendant Maury Regional Medical Center joined in the Motion. (*Id.*) The Tennessee Supreme Court has recognized that Applications filed pursuant to Tennessee Rule

of Appellate Procedure 10 must be filed within a "reasonable time" *State v. Best*, 614 S.W.2d 791, 794 (Tenn. 1981). Plaintiff inexplicably allowed six months to pass before filing his Application seeking extraordinary review of the trial court's March 28, 2018 Order. Consequently, the Court should deny the portion of Plaintiff's Application seeking interlocutory review of the trial court's March 28, 2018 Order, which allows Defendants to amend their Answers to assert the fault of Cody Blackburn for failure to seek timely medical attention.

Additionally, although Defendants assert that Plaintiff's Application to Appeal the trial court's Order Granting Defendants' Motions to Amend is too late, the Court also properly granted Defendants' Motions to Amend to assert the comparative fault of Mr. Blackburn for failure to seek timely medical attention. Dr. Allen, Plaintiff's causation expert, testified that if Plaintiff had sought earlier treatment and if that treatment were the same as what was provided when he did present, he would probably be alive. (Depo. Keith Allen at 70-71; Appendix to Plaintiff's Application 8.) On January 2, 2018, in accordance with the Amended Agreed Scheduling Order (drafted and agreed to by Plaintiff), the facts in this matter, and the testimony of Plaintiff's experts, Defendant, Mark A. McLean, M.D. filed a timely Motion to Amend Answer to Assert the Comparative Fault of Cody Charles Blackburn for failure to seek earlier medical treatment. (Am. Agreed Sch. Order; Appendix 35; Def's Mot. to Amend; Appendix to Plaintiff's Application 10.) The Motion to Amend was filed before any of Defendant McLean's expert witnesses were deposed by Plaintiff. Defendant Maury Regional Medical Center also filed a Motion to Amend

to assert the fault of Cody Blackburn for failure to seek earlier medical treatment. (Mot. of Def. Maury Regional Hospital d/b/a Maury Regional Medical Center to Am. Ans.; Appendix 36.) On March 7, 2018, two days before the hearing on Defendants' Motion to Amend, Plaintiff filed a response in opposition to the Motions to Amend.[1] The Motion was heard on March 9, 2018 due to the unavailability of Plaintiff's counsel, not due to any delay by Defendants. (Not. of Hearing on Def's Mot. to Am. Answer; Appendix 37; Notice of Hearing; Appendix 38; Amended Not. of Hearing; Appendix 39; Notice of Resetting Hearing; Appendix 40.) The Court granted Defendants' Motion to Amend. The Court also offered Plaintiff the opportunity to continue the trial of this matter at the hearing but Plaintiff's counsel declined. Plaintiff then filed a Motion for Continuance of the Trial in this matter after Dr. Sobel produced documents related to his income from medico-legal matters. Although the Motion was opposed by Defendants, the Court granted Plaintiff's Motion for Continuance, continued the trial for eleven (11) months, and permitted Plaintiff to obtain additional experts to address the issue raised by Defendants' amendment. The Court did not even limit the Plaintiff to the one expert Plaintiff claimed that he needed a continuance for in this matter, but instead permitted the Plaintiff to obtain whatever experts he needed from whatever specialty he needed to address whether or not Mr. Blackburn was at fault for failing to seek timely medical attention. For the Plaintiff to now say that the Court erred in

[1] Defendant McLean did not receive Plaintiff's Response until after the hearing.

limiting Plaintiff's expert testimony in light of the amendment by the Defendants is misplaced.

Furthermore, Plaintiff has an adequate remedy of appeal as of right upon entry of final judgment in this matter and Plaintiff's Application for Extraordinary Appeal should be denied.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff filed this health care liability action on January 12, 2016. (Compl.; Appendix to Plaintiff's Application 1) On January 27, 2017, Plaintiff filed a Motion to Set this matter for trial. (Pl.'s Mot. to Set; Appendix 41.) On February 23, 2017, the Court entered an Agreed Scheduling Order setting this matter for trial beginning on April 30, 2018. Paragraph 10 of the Agreed Scheduling Order provides: "[t]his scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties. Failure to abide by this order may result in sanctions as set forth in Tenn. R. Civ. P. 16.06." (Agreed Scheduling Order; Appendix 42.) The Agreed Scheduling Order also provided that "All motions to amend the pleadings shall be filed by January 1, 2018." (*Id.*) The deadline for filing motions to amend the pleadings was agreed to by Plaintiff. (*Id.*) On April 7, 2017, the Court entered an Amended Agreed Scheduling Order. (Am. Agreed Scheduling Order; Appendix 35.) The Amended Agreed Scheduling Order provided that the trial would begin on April 30, 2018. It also contained the statement that: "[t]his scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties. Failure to abide by this order may result in

sanctions as set forth in Tenn. R. Civ. P. 16.06." The Amended Agreed Scheduling Order also provides that "All motions to amend the pleadings shall be filed by January 1, 2018." (*Id.*) Again, the deadline for filing motions to amend the pleadings was agreed to by Plaintiff. (*Id.*)

On May 1, 2017, Plaintiff served Plaintiff's Rule 26 Disclosures. (Pl's Rule 26 Disclosures as to All Defendants; Appendix to Plaintiff's Application 6.)[2] Plaintiff disclosed one medical opinion expert witness to testify as to the standard of care as to Defendant McLean, Dr. Richard Sobel; one medical opinion expert witness to testify as to causation, Dr. Keith Allen; one nurse expert witness, Lori Jaggers Alexander, DNP, MSN, RN; and one economist, Gilbert Mathis, PhD. (*Id.*.) On July 14, 2017, in accordance with the Amended Agreed Scheduling Order, Dr. McLean disclosed his Rule 26 Expert Witnesses. Dr. McLean disclosed two cardiothoracic surgeons, two emergency department physicians, a cardiologist, a radiologist, several treating physicians, and Dr. McLean. (Defendant Mark A. McLean's Rule 26 Expert Disclosures; Appendix 43.) Dr. McLean also cross-designated the experts disclosed by MRMC to the extent that those experts were not adverse to him. (*Id.*) Additionally, in accordance with the Amended Agreed Scheduling Order, MRMC disclosed Rule 26 Expert Witnesses. MRMC disclosed one emergency department physician, one nurse, and an economist. (Rule 26 Disclosures of Defendant Maury Regional d/b/a Maury Regional Medical Center ("Maury") – Timothy Price, M.D.;

[2] Expert Disclosures are not sworn testimony.

Appendix 44; Jodi Thurman, MBA, BSN, RN, CEN; Appendix 45; Ralph D. Scott, Jr., PhD; Appendix 46.) Therefore, Plaintiff has known since July 14, 2017 the number of experts identified by Defendants and their specialties.

Dr. Sobel was deposed on October 4, 2017. (Depo. of Richard Sobel, M.D.; Appendix to Plaintiff's Application 9) During his deposition, Dr. Sobel testified under oath that Dr. McLean acted negligently in violation of the standard of care in certain specific ways. (*Id.*) Dr. Sobel included seventeen (17) standard of care allegations against Defendants that were not supported by expert causation testimony. Contrary to Plaintiff's assertions in his Application, the statements regarding how Defendants violated the standard of care in those seventeen (17) ways were not simply facts that supported Dr. Sobel's opinions. Dr. Sobel did not support the seventeen (17) standard of care claims with causation testimony. Instead, during his deposition, Dr. Sobel testified that "he died because of delayed treatment." (*Id.*) He further testified that he preferred not to give causation testimony because his "**opinions are only that there was a loss of opportunity**." (*Id.* at 99 (emphasis added).) He went on to testify that he **could not "properly tell a jury if this gentleman would have survived with this CT under these circumstances. That would be the purview of the cardiothoracic surgeon**." (*Id.*) Any loss of opportunity/loss of chance causation testimony by Dr. Sobel is not permitted by Tennessee law.

Dr. Allen was deposed on September 21, 2017. (Depo. of Keith Allen, M.D.; Appendix to Plaintiff's Application 8.)[3] He did not support all of the standard of care opinions offered by Dr. Sobel. Dr. Allen testified that Mr. Blackburn needed a CT in a more timely fashion and needed to be transferred to a hospital that was capable of performing heart surgery. (*Id.* at 62-63; Appendix to Plaintiff's Application 8; Pl's Rule 26 Disclosures as to All Defendants; Appendix to Plaintiff's Application 6.) He agreed that it would take some period of time for Mr. Blackburn to be assessed and examined and testing performed in the ER before a CT would be ordered. (Depo. of Keith Allen, M.D.; Appendix to Plaintiff's Application 8 at 63-64.) There is no causal link between the seventeen (17) standard of care opinions set forth by Dr. Sobel during his deposition and any of Dr. Allen's causation opinions. He also testified that if Mr. Blackburn had sought earlier treatment and if the treatment were the same as what was provided when he did present, then he would probably be alive. (*Id.* at 70-71.)

On January 2, 2018, **in accordance with the Amended Agreed Scheduling Order** (drafted and agreed to by Plaintiff), the facts in this

[3] Prior to Dr. Sobel's deposition, on August 25, 2017, Defendants had a Subpoena Duces Tecum issued by the Circuit Court Clerk. Defendants also obtained a Georgia Subpoena for the Production of Evidence; and Request for Issuance of Foreign Supboena. Dr. Sobel was personally served with all documents on September 2, 2017. (Notice of Filing Foreign Subpoena and Additional Documents Served on Richard M. Sobel, M.D., M.P.H.; Appendix. 47.) Dr. Sobel did not produce any of the documents set forth in the subpoena during his deposition. (Depo. of Sobel; App. 9.)

matter, and the testimony of Plaintiff's experts, Defendant, Mark A. McLean, M.D. filed a timely Motion to Amend Answer to Assert the Comparative Fault of Cody Charles Blackburn for failure to seek earlier medical treatment. (Am. Agreed Sch. Order; Appendix 35; Defendant Mark A. McLean, M.D.'s Motion. to Amend Answer; Appendix to Plaintiff's Application 10.) Maury Regional Hospital also filed a Motion to Amend Answer; Appendix 36) Defendants set the Motions to Amend for as soon as possible on February 16, 2018, at 10:30 a.m. (Not. of Hearing on Def's Mot. to Am. Answer; Appendix 37; Notice of Hearing; Appendix 38.) Due to the unavailability of Plaintiff's counsel, Defendants moved the hearing to a special hearing date on March 9, 2018, at 9:00 a.m., so that the matter could be heard as soon as possible. (Am. Not. of Hearing on Def's Mot. to Am. Answer; Appendix 39; Notice of Resetting Hearing; Appendix 40.) The deadline for filing Motions to Amend the Pleadings was never changed in this matter. Plaintiff agreed to the deadline. (Agreed Sch. Order; Appendix 42; Am. Agreed Sch. Order; Appendix 35.)

On January 31, 2018, Dr. McLean filed a Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D. and a Memorandum in Support of the Motion. (Defendant Mark A. McLean, M.D.'s Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D.; Appendix 48; Defendant Mark A. McLean, M.D.'s Mem. of Law in Supp. of Defendant Mark A. McLean, M.D.'s Mot. to Compel Prod. of Documents Subpoenaed from Richard M. Sobel, M.D.; Appendix 49.)

On or about March 7, 2018, two days before the hearing, Plaintiff filed Plaintiff's Response to Defendant Mark A. McLean, M.D.'s Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D. (Pl's Resp. to Def. Mot. to Compel; Appendix 50.)

On or about March 7, 2018, two days before the hearing, Plaintiff filed Plaintiff's Response to Defendants Mark A. McLean, M.D.'s and Maury Regional Hospital d/b/a Maury Regional Medical Center's Motion to Amend Answer. On March 9, 2018, the Court heard argument on and granted Defendants' Motion to Amend Answer to Assert the Comparative Fault of Cody Charles Blackburn for failing to seek earlier medical treatment. (Order Granting Defs' Mot. to Am. Answer; Appendix to Plaintiff's Application 15.) At the hearing, the Court stated that it would be inclined to grant a continuance if Plaintiff so desired. Plaintiff's counsel refused the Court's offer to continue this matter. Plaintiff's counsel did not request any new experts at the time the Court granted Defendant's Motion to Amend. Plaintiff's counsel did not request to reopen discovery when the Court granted Defendant's Motion to Amend. On March 9, 2018, the Court also heard argument on and granted Defendants' Motion to Compel Production of Documents Subpoenaed From Richard M. Sobel, M.D. (Order Granting Defendant Mark A. McLean, M.D.'s Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D.; Appendix 51.)

Importantly, from March 9, 2018 to April 10, 2018, the <u>only activity</u> in this case was the evidentiary deposition of Dr. Joel Phares, Cody Blackburn's treating cardiologist, and the production of Dr. Sobel's

1099s from 2012, 2013, 2014, 2015, 2016, and some additional documentation regarding Dr. Sobel's income from medico- legal matters.

At no time from July 14, 2017 until April 10, 2018 did Plaintiff file a motion requesting any additional experts. At no time before April 10, 2018 did Plaintiff request the opportunity to identify a cardiologist or any additional expert. At no time has Plaintiff requested to amend the Scheduling Order entered in this matter to allow Plaintiff an opportunity to identify additional experts, including those as to the recognized standard of acceptable professional practice required of Defendant.

On April 10, 2018, almost nine (9) months after Defendants disclosed experts, seventeen days (17) before trial, and **one (1) day after the production of Dr. Sobel's 1099s from 2012, 2013, 2014, 2015, 2016** and some additional documentation regarding Dr. Sobel's income from medico-legal matters, Plaintiff filed a Motion for Continuance in this matter. (Pl's Mot. for Continuance; Appendix 52.) Plaintiff alleged that "the late allegations of comparative fault have made it **necessary for Plaintiff to obtain a cardiologist** to testify in this case." (Mem. of Law in Supp. of Pl's Mot. for Cont.; Appendix 53.) Plaintiff also argued that another reason for the continuance was due to the "late and unexpected" evidentiary deposition of Dr. Phares, the treating cardiologist, being taken. The other reason had to do with Dr. Sobel, Plaintiff's standard of care expert. Plaintiff stated in his Memorandum in Support of Plaintiff's Motion for Continuance that Dr. Sobel's production of his 1099s strained the relationship between the expert and Plaintiff's counsel and "Plaintiff may request leave to obtain a new

ER expert if this motion is granted." (*Id.*) Defendants filed a Response in Opposition to Plaintiff's Motion for Continuance. (Defs' Joint Resp. in Opp. to Pl's Motion for Cont.; Appendix 54.)

On April 16, 2018, the Court held a conference call on Plaintiff's Motion for Continuance in this matter. During the conference call, Plaintiff's Motion to Continue was granted based on the Court's granting of the Defendants' Motion to Amend the Defendants' Answers to allege comparative fault. (Order Granting Pl's Mot. for Cont.; Appendix 55.) The Court made clear that the only basis for granting the continuance had to do with the comparative fault issue. Plaintiff's Motion for Continuance was not granted to allow Plaintiff's counsel to obtain a new ER expert to replace Dr. Sobel. Moreover, Plaintiff's Motion for Continuance was not granted to allow Plaintiff an opportunity to obtain all new experts in this matter to testify as to all issues.

Contrary to the Plaintiff's arguments, on April 17, 2018, the Court entered an Order granting Plaintiff's Motion for Continuance of the trial in this matter. (*Id.*) Over the Defendants' objections, the Court continued the trial for eleven (11) months. Despite the fact that the Plaintiff only alleged that the comparative fault allegations made it necessary to obtain a cardiologist, the Court granted Plaintiff the opportunity to obtain a cardiologist or any other expert Plaintiff deemed necessary to respond to the comparative fault allegation. (Order Regarding April 30, 2018 Status Conference; Appendix to Plaintiff's Application 24.)

However, Plaintiff's counsel made clear during the conference call and during the status conference on April 30, 2018 that Plaintiff did not actually just want a cardiologist to address Cody Blackburn's comparative fault, but Plaintiff actually wanted to start the case over from the beginning with all new experts, including standard of care experts against Dr. McLean. During the status conference on April 30, 2018, Plaintiff argued more than once that "they have seven or eight - - seven or eight of their experts saying that McLean didn't violate the standard of care" and "I've got one guy that says he did violate the standard of care." (Hearing Transcript at 97; Appendix to Plaintiff's Application 22.) Plaintiff's counsel went on to argue that he "would just like the Court to let us get back to square one." (*Id.* at 98.)

Although the Court continued the trial and gave Plaintiff the opportunity to disclose additional experts to testify as to the issue raised by the Amendments, Plaintiff failed to disclose any additional experts in this matter. Plaintiff also failed to request or take any supplemental depositions of Defendants' experts regarding the fault of Cody Blackburn.

Plaintiff's Motion for Continuance and Plaintiff's Motion to Alter or Amend the Court's Order Regarding April 30, 2018 Status Conference or in the Alternative for Rule 9 Appeal, not Defendant's Motion to Amend in accordance with the Scheduling Order entered in this matter, is the real "unexpected legal maneuvering". Plaintiff is trying to use the continuance to obtain all new experts to testify as to all issues in this matter, not the issue raised by the amendment, and to replace Dr. Sobel as an expert in this matter. Clearly, disclosure of all

new witnesses or even any new witnesses to testify as to all issues in this matter was not the intention of the Court when granting the Motion for Continuance, is prejudicial to Defendants, and such action was appropriately denied.

During the hearing on April 30, 2018, the Court also granted Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support. (Order Granting Defendant Mark A. McLean, M.D.'s Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support; Appendix to Plaintiff's Application 23) Plaintiff attached the Affidavit of Richard Sobel, M.D. to his Response to the Motion for Summary Judgment, however, Plaintiff cited and relied on only on Paragraph 10 of the Affidavit. (Plaintiff's Response to Defendant Mark A. McLean, M.D.'s Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support; Appendix to Plaintiff's Application 17.) As is seen in the trial court's decision, the court did not grant the Motion for Summary Judgment because it determined that the entire affidavit had not been attached to the response. The trial court granted Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support because Plaintiff failed to produce any expert causation support for Dr. Sobel's seventeen (17) standard of care claims as required by Tennessee law.

The trial court also held a status conference on April 30, 2018. During the status conference, Plaintiff tried to obtain not just an additional cardiologist expert to testify as to the fault of Plaintiff, but

also all new experts to testify as to all issues in this matter. The trial court properly denied Plaintiff's request to obtain all new experts in this matter. The trial court granted Plaintiff additional time to obtain additional experts to address the issue raised by the Defendants' Amended Answers which is the fault of Plaintiff for failing to seek earlier medical attention. (Transcript of Motion Hearing on April 30, 2018; Appendix to Plaintiff's Application 22.)

On June 11, 2018, the Court entered a Third Amended Scheduling Order in this matter. (Third Am. Scheduling Order; Appendix 56.) The trial court allowed Plaintiff to identify any new expert(s) to address the issue of Cody Blackburn's comparative fault only on or before June 30, 2018. The trial court gave Defendants until September 28, 2018 to complete discovery depositions of any new experts. The trial court also allowed Plaintiff until October 5, 2018 to take supplemental depositions of Defendants' experts on the issue of Cody Blackburn's comparative fault only on or before October 5, 2018. *Id.* Plaintiff did not identify any new experts to address the issue of Cody Blackburn's comparative fault. Plaintiff did not request to take or take any supplemental depositions of Defendants' experts on the issue of Cody Blackburn's comparative fault.

On July 2, 2018, Plaintiff served a Motion to Alter or Amend the Court's Order of June 8, 2018 Granting Defendant Mark A. McLean, M.D.'s Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Proof or in the Alternative for Rule 9 Appeal. (Pl's Mot. to Alter or Am. the Court's Order of June 8, 2018 Granting Def. Mark A. McLean, M.D.'s Mot. for Summ. J. as to

Standard of Care Claims for Which There is No Expert Proof or in the Alternative for Rule 9 Appeal; Appendix to Plaintiff's Application 25.) Plaintiff also filed Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conference or in the Alternative for Rule 9 Appeal. (Pl's Mot. to Alter or Am. the Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conf. or in the Alternative for Rule 9 Appeal; Appendix to Plaintiff's Application 27.)

On August 7, 2018, Defendant Mark A. McLean, M.D. filed a Response in Opposition to Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conference and Rule 9 Appeal. (Def. Mark A. McLean, M.D.'s Response in Opp. to Pl's Mot. to Alter or Am. The Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conf. and Rule 9 Appeal; Appendix to Plaintiff's Application 28.) Defendant McLean also filed a Response in Opposition to Plaintiff's Motion to Alter or Amend the Court's Order Granting Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support. (Def. Mark A. McLean, M.D.'s Response in Opp. to Pl's Mot. to Alter or Am. the Court's Order of June 8, 2018 Granting Def. Mark A. McLean, M.D.'s Mot. for Summ. J. as to Std. of Care Claims for Which There is No Expert Support; Appendix to Plaintiff's Application 26.) On August 7, 2018, Defendant MRMC filed Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center (MRMC)'s Notice of Joinder in both of Defendant McLean's Responses to Plaintiff's Motions to Alter or Amend. (Def. Maury Regional Hospital d/b/a Maury Regional Medical Center's (MRMC) Notice of Joinder; Appendix 57.)

On August 13, 2018, the Court heard argument on Plaintiff's Motions to Alter or Amend the Court's Order Granting Defendant McLean's Summary Judgment as to Standard of Care Claims Not Supported by Expert Causation Testimony and the Motion as to the Status Conference. The Court properly denied Plaintiff's Motions to Alter or Amend the Orders. Plaintiff presented no new arguments and no new evidence in support of the Motions to Alter or Amend the Orders. On August 30, 2018, the Court entered Orders denying Plaintiff's Motions to Alter or Amend. (Order Denying Pl's Mot. to Alter or Amend the Court's Order of June 8, 2018 Regarding the April 30, 2018 Status Conf. or in the Alternative for Rule 9 Appeal; Appendix to Plaintiff's Application 32; Order Denying Pl's Mot. to Alter or Amend the Court's Order of June 8, 2018 Granting Defendant Mark McLean's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Proof or in the Alternative for Rule 9 Appeal; Appendix to Plaintiff's Application 31.)

On September 29, 2018, Plaintiff filed a Rule 10 Application for an Extraordinary Appeal of five separate orders from the Maury County Circuit Court. Plaintiff never filed any prior appeal of the Court's Order Granting Defendants' Motion to Amend.

Trial is set to begin in this matter on March 18, 2019.

III. LAW AND ARGUMENT

A. The trial court's actions in this case do not meet the "very narrowly circumscribed" criteria required for extraordinary review.

Plaintiff's Application for Extraordinary Appeal should be denied in its entirety. According to Tennessee Rule of Appellate Procedure 10, an extraordinary appeal is appropriate only "if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or if necessary for complete determination of the action on appeal as otherwise provided in these rules." Tenn. R. App. P. 10(a). The Advisory Commission Comment to Rule 10 expounds upon this language by providing: "The circumstances in which review is available under this rule, however, are very narrowly circumscribed to those situation in which the trial court or the intermediate appellate court has acted in an arbitrary fashion or as may be necessary to permit complete appellate review on a later appeal."

This "very narrowly circumscribed" criteria has been discussed by the Tennessee Supreme Court. In *State v. Willoughboy*, the Tennessee Supreme Court opined that an extraordinary appeal should be granted:

a. Where the ruling of the court below represents a fundamental illegality.
b. Where the ruling constitutes a failure to proceed according to the essential requirements of the law.
c. Where the ruling is tantamount to the denial of either party of a day in court.
d. Where the action of the trial judge was without legal authority.
e. Where the action of the trial judge constituted a plain and palpable abuse of discretion.

f. Where either party has lost a right or interest that may never be recaptured.

594 S.W.2d 388, 392 (Tenn. 1980.) None of these exceptional circumstances exist in this case.

Rule 10 appeals, unlike appeals pursuant to Rule 9, "are reserved only for extraordinary departures from the accepted and usual course of judicial proceedings." *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014). On the other hand, Rule 9 Appeals "may be granted under less egregious circumstances." *Id.* An appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure "may be appropriate when there is a need 'to prevent irreparable injury,' 'to prevent needless, expensive, and protracted litigation,' and 'to develop a uniform body of law.'" *Id.* at 898 (citing Tenn. R. App. P. 9(a)).

The Tennessee Supreme Court held that "[i]t is important for appellate courts to exercise restraint in granting Rule 10 appeals." *Id.* The Court went on to hold that "the appellate courts have no authority to unilaterally interrupt a trial court's orderly disposition of a case unless the alleged error rises to the level contemplated by the high standards of Rule 10." *Id.* The Court noted that "parties who are unsuccessful in obtaining the trial court's permission for a Rule 9 appeal sometimes respond by petitioning the appellate court for permission to appeal under Rule 10. However, unless the trial court's alleged error qualifies for immediate review under the specific criteria indicated by Rule 10, the appellate court must respect the trial court's discretionary decision not to grant permission to appeal under Rule 9 and refrain from granting a Rule 10 appeal." *Id.* at 898-899. Importantly, "[t]hose

alleged errors not rising to the level required by Rule 10 can be reviewed in the normal course of an appeal after a final judgment has been entered." *Id.* at 899.

The trial court in this case has not so far departed from the accepted and usual course of judicial proceedings as to require immediate review. In granting the Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support, the trial court considered the pleadings filed by all parties, reviewed the record, listened to both parties during the hearing, asked questions during the hearing, and rendered well-reasoned rulings with solid legal bases. With respect to all five (5) orders Plaintiff seeks to appeal pursuant to Rule 10, the lower court did not act in an arbitrary fashion, and its rulings do not represent a fundamental illegality. The rulings proceeded according to the essential requirements of the law, and they are supported by legal authority. The action of the trial court does not constitute a plain or palpable abuse of discretion. It is well settled that Tennessee trial courts "possess broad discretionary authority to control their dockets and the proceedings in their courts." *Hessmer v. Hessmer*, 138 S.W.3d 901 (Tenn. Ct. App. 2003)(*citing Hodges v. Attorney General*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000)).

The trial court's rulings are not tantamount to the denial of any party's day in court. Following the trial court's rulings, the Plaintiff was permitted to continue to pursue his case on the merits, and Defendants were permitted to defend the case on its merits. Neither party has lost a right or interest that may never be recaptured. Therefore, the Court should deny Plaintiff's Application for Rule 10 Extraordinary Appeal as

the Plaintiff has failed to show that the trial court's rulings so far departed from the accepted and usual course of judicial proceedings as to require immediate review. Further, Plaintiff has failed to show that an extraordinary appeal of any of the trial court's orders is necessary for complete determination of the action on appeal as otherwise provided in these rules. Granting Plaintiff's Application for Extraordinary Appeal would not be dispositive of the entire case making multiple appeals likely in this matter.

B. Tennessee Code Annotated § 29-26-115 requires a Plaintiff in a healthcare liability action to prove that as a result of the alleged standard of care violation(s) the Plaintiff suffered injuries that would not otherwise have occurred.

In a healthcare liability action, there is neither a presumption of negligence nor of a causal relationship to injuries. *See* Tenn. Code Ann. § 29-26-115(c). To the contrary, the plaintiff bears the burden of proving the statutory elements by a preponderance of the evidence. Those elements are: (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in his or her own community or in a similar community at the time the alleged injury or wrongful action occurred; (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standards; and (3) That as a proximate result of the defendant's negligent acts or omissions, the plaintiff suffered injuries that would not otherwise have occurred. Tenn. Code Ann. § 29-26-115. As a general rule, each of these elements must be proven by competent expert testimony. *Stokes v. Leung*, 651 S.W.2d 704 (Tenn. Ct. App. 1982).

Regarding the first element, a plaintiff bears the burden of proving the standard of care in the profession and specialty thereof, and that the defendant breached that standard. Tenn. Code Ann. § 29-26-115. Regarding the final element, a plaintiff bears the burden of proving that he or she suffered injuries which would not otherwise have occurred but for the alleged negligence. *Id.* According to the Tennessee Supreme Court, this element requires a plaintiff to prove by reliable expert testimony that the alleged negligence "more probably than not" caused the alleged injuries. *See Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993).

Plaintiff's expert, Dr. Richard Sobel, asserted several standard of care claims against Defendants that were not supported by expert proof stating that Defendant's alleged breaches caused any injuries that would not otherwise have occurred. Plaintiff's causation expert, Dr. Keith Allen, failed to support seventeen (17) of Dr. Sobel's standard of care allegations with causation testimony. During his deposition, Dr. Allen did not offer any causation testimony regarding the failure to look at the prehospital EKG, failure to obtain an EKG while Mr. Blackburn was on the gurney, failure to obtain a third EKG, failure to consult a cardiologist or send the patient to the cath lab, failure to reassess the patient, failure to oversee nursing staff and properly guiding them and properly giving orders and properly confirming that the patient is maintained on monitoring equipment and properly instructing the nursing staff that if the patient is going to go on a road trip in a critical situation, it is not without a monitor, it is not without a nurse, and it is at his peril; ordering PRN narcotics, failure to monitor Mr. Blackburn, failure to not realize Mr. Blackburn was not on a central monitor, failure to call a coroner or expecting an autopsy and instead letting Mr. Blackburn go

to the morgue, failure to pull the data off of the monitor to find out what happened to Mr. Blackburn, relying on a D-dimer, failure to go to CT with Blackburn, violating the algorithim of an acute coronary patient, failure to know this was an acute chest emergency and ruling out a STEMI within five minutes, failure to get a portable chest x-ray, and failure to obtain a timely chest x-ray. (Depo. of Keith Allen, M.D.; Appendix to Plaintiff's Application 8.) As a result, there is no causal nexus between Dr. Allen's causation opinion and the seventeen (17) standard of care opinions offered by Dr. Sobel.[4] Prior to the hearing on Defendant's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Proof, Plaintiff had the opportunity to present whatever proof he wanted considered by the Court. Plaintiff did not present an Affidavit from Dr. Allen providing any causal nexus between Dr. Allen's causation opinion and the seventeen (17) standard of care opinions offered by Dr. Sobel. Plaintiff relied only on Paragraph 10 of Dr. Sobel's Affidavit.

During the hearing on April 30, 2018, Plaintiff admitted that failing to call the coroner and failing to request an autopsy **did not cause or contribute to the death of Mr. Blackburn**. (Transcript of Motion Hearing on April 30, 2018 at 81; Appendix to Plaintiff's Application 22). Plaintiff even stated during the hearing that "plaintiff has not claimed that failing to call the coroner or failing to request an autopsy caused or contributed to Mr. Blackburn's death." *Id.* Plaintiff admits in the Application that three of the standard of care opinions do not have a causal connection to the death of Mr. Blackburn. (Application at 15.) However, Plaintiff seeks to have this Court

[4] Plaintiff's expert, Dr. Sobel, offered more than seventeen (17) standard of care allegations against Defendants.

grant an Application for Extraordinary Appeal to review issues with no causal nexus such as claims that Defendant violated the standard of care by failing to call a coroner or expecting an autopsy and instead letting Mr. Blackburn go to the morgue AND failing to pull the data off of the monitor to find out what happened to Mr. Blackburn. The alleged violations of the standard of care have no causal nexus to the death of Mr. Blackburn. In fact, in those two examples, Mr. Blackburn's death had already occurred and there cannot be any possible causal nexus.

Plaintiff now incorrectly asserts in the Application that these seventeen (17) standard of care opinions set forth by Dr. Sobel were just facts and Defendants were using the Motion for Summary Judgment to keep out relevant facts. Dr. Sobel, however, testified that Defendants violated the standard of care in all seventeen (17) ways set forth in Defendants' Motion for Summary Judgment as to Standard of Care Claims. (Depo. of Richard Sobel at 10, 11, 12, 13, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 51, 52, 60.; Appendix to Plaintiff's Application 9.) Plaintiff failed to offer expert causation support for the seventeen (17) standard of care opinions set forth in Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support. Dr. Sobel's Affidavit does not provide causation support for those seventeen (17) standard of care opinions. Dr. Sobel's deposition testimony does not provide the causation support required for those standard of care opinions. Dr. Allen's deposition testimony also fails to provide causation support for the standard of care opinions. In fact, Dr. Sobel testified that he is not and cannot give causation opinions in this matter. Dr. Sobel testified that Mr. Blackburn "died because of delayed treatment." (Depo. Richard Sobel at 100; Appendix to Plaintiff's

Application 9.) He further testified that he preferred not to give causation testimony because his "**opinions are only that there was a loss of opportunity**." *Id.* at 99 (emphasis added). He went on to testify that he **could not "properly tell a jury if this gentleman would have survived with this CT under these circumstances. That would be the purview of the cardiothoracic surgeon**." *Id.* Any loss of opportunity/loss of chance causation testimony by Dr. Sobel is not permitted by Tennessee law. Therefore, there is no causal nexus to the Plaintiff's alleged injury and the Court properly granted Defendants' Motion for Summary Judgment as to these seventeen (17) standard of care opinions while leaving intact Plaintiff's claims with a causal nexus.

C. The Order Granting Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support is consistent with Tennessee law and is not dispositive of the entire case.

On June 8, 2018, the trial court entered an Order Granting Defendant's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support. The Order eliminates Dr. Sobel's seventeen (17) standard of care allegations that are not supported by expert causation testimony as required by Tennessee law. The Order is not dispositive of the entire case. Dr. Sobel and Lori Jaggers Alexander provided numerous other standard of care allegations against Defendants. (Depo. Richard Sobel; Appendix to Plaintiff's Application 9; Depo. Lori Jaggers Alexander.)

Pursuant to Section 29-26-115 of the Tennessee Code Annotated, Plaintiff is required to prove that Defendants violated the standard of care

AND caused or contributed to an injury or death that would not otherwise have occurred. In the present action, Dr. Sobel testified that Defendants violated the standard of care in numerous ways. He did not, however, support the seventeen (17) standard of care opinions with expert causation support as required by Tennessee law. (*See* Aff. of Richard M. Sobel, M.D.; Appendix to Plaintiff's Application 7; *See* Depo. of Richard M. Sobel, M.D.; Appendix to Plaintiff's Application 9; *See* Depo. of Keith Allen, M.D.; Appendix to Plaintiff's Application 8.)

The trial court properly granted Defendants' Motion and did not so far depart from the accepted and usual course of judicial proceedings as to require immediate review. In granting the Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support, the trial court considered the pleadings filed by all parties, reviewed the record, listened to both parties during the hearing, asked questions during the hearing, and rendered a well-reasoned ruling with a solid legal basis.

Plaintiff provides no support for the claim that the trial court so far departed from the accepted course of judicial proceedings by entering these orders. Furthermore, the trial court's rulings are not dispositive of this case and an extraordinary appeal is not necessary to provide Plaintiff an adequate remedy upon entry of a final judgment in this matter.

Dr. Sobel's Affidavit, Dr. Sobel's deposition testimony, and Dr. Allen's deposition testimony failed to create a genuine issue of material fact as to the seventeen (17) standard of care opinions set forth by Dr. Sobel in the Motion for Summary Judgment. Contrary to Plaintiff's argument, Plaintiff relied solely on Paragraph 10 in Dr. Sobel's Affidavit in support of Plaintiff's

response. (*See* Plaintiff's Response to Defendant's Motion for Summary Judgment; Appendix to Plaintiff's Application 16.)

Plaintiff improperly asserts that the trial court incorrectly determined it could not consider the Rule 26 Disclosures of Plaintiff's experts. Plaintiff's Rule 26 Expert Disclosures are not sworn testimony. Rule 26 Disclosures contain statements by counsel regarding what the expert is expected to say in this matter. Pursuant to Tennessee law, documents presented in opposition to a Motion for Summary Judgment must be admissible in evidence. Tenn. R. Civ. P. 56.06. Generally, "an unsigned, unsworn deposition should not be used to support or to oppose a motion for summary judgment." *Langley v. Metropolitan*, 1988 WL 123001 at *4 (Tenn. Ct. App. Nov. 18, 1998). The Court properly did not consider the Plaintiff's Rule 26 Expert Disclosures in determining whether to grant the motion for summary judgment. The Court should deny Plaintiff's Rule 10 Application for Extraordinary Appeal regarding the Court's Order Granting Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support.

D. The trial court did not abuse its discretion in denying Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Summary Judgment as to Standard of Care Claims for Which There is no Expert Support.

According to the Tennessee Supreme Court, "[a] trial court's ruling on a motion to revise pursuant to Rule 54.02 will be overturned only when the trial court has abused its discretion." (*Harris v. Chern*, 33 S.W.3d 741 (Tenn. 2000);(*See Donnelly v. Walter*, 959 S.W.2d 166, 168 (Tenn. Ct. App. 1997)). A trial court's ruling on a motion to alter or amend pursuant to Rule

59.04 "is reviewed under an abuse of discretion standard." *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003).

In the present action, the trial court denied Plaintiff's Motion to Alter or Amend pursuant to both Rule 54.02 and Rule 59.04. (Transcript of Motion Hearing on April 30, 2018; Appendix to Plaintiff's Application 22.) The trial court considered the arguments of counsel, the matters filed in support and opposition to Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support. (Order Denying Plaintiff's Motion to Alter or Amend; Appendix to Plaintiff's Application 31.) Plaintiff's Motion was simply captioned as a Motion to Alter or Amend. Motions to Alter or Amend are governed by Tennessee Rules of Civil Procedure. (Tenn. Civ. P. 59.04; 54.02.)

A motion to alter or amend an order serves a limited purpose and should only be granted for one of three reasons: (1) controlling law changed before the judgment becomes final; (2) when previously unavailable evidence becomes available or; (3) to correct a clear error of law or to prevent injustice. *In Re: M.L.D.* 182 SW3d 890, 895 (Tenn. Ct. App. 2005). No basis for relief on these grounds exists in this case. Alternately, even if the Court analyzed the Plaintiff's motion as a motion to revise an order pursuant to Tenn. R. Civ. P. 54.02, the Court would still deny the Plaintiff's motion.

Importantly, no new evidence was presented in support of Plaintiff's Motion to Alter or Amend the Order Granting Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support. Plaintiff's Motion to Alter or Amend contained the exact same argument and relied upon the exact same evidence as Plaintiff's

Response to Defendants' Motion for Summary Judgment. The Affidavit of Dr. Sobel was considered in its entirety by the Court. The Affidavit does not create a genuine issue of material fact as to the seventeen (17) standard of care opinions.

The Court found that "[a]ll of the evidence asserted in support of the Plaintiff's motion was previously available and, in fact, considered by the Court." (Order Denying Plaintiff's Motion to Alter or Amend the Court's June 8, 2018 Order Granting Defendant Mark McLean's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Proof Or in the Alternative for Rule 9 Appeal; Appendix to Plaintiff's Application 31.) The trial court considered Dr. Sobel's Affidavit during the hearing on Defendants' Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Support.

The trial court assessed the prior ruling and reaffirmed the ruling granting Defendant Mark A. McLean and Maury Regional Hospital's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Proof or in the Alternative for Rule 9 Appeal. (*Id.*)

E. The trial court Order Denying Plaintiff's Motion to Alter or Amend the Court's June 8, 2018 Order Regarding Status Conference is a discretionary ruling that is consistent with Tennessee law.

The trial court's alleged error in denying Plaintiff's Motion to Alter or Amend or in the alternative for Rule 9 Appeal fails to qualify for immediate review under the specific criteria indicated by Rule 10. It is well settled that Tennessee trial courts "possess broad discretionary authority to control their dockets and the proceedings in their courts."

Hessmer v. Hessmer, 138 S.W.3d 901 (Tenn. Ct. App. 2003)(*citing Hodges v. Attorney General*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000)). The Amended Agreed Scheduling Order, drafted by and agreed to by Plaintiff, required Plaintiff to disclose his Rule 26 Experts on or before May 1, 2017. (Agreed Am. Scheduling Order; Appendix 36.) All discovery was required to be completed by December 1, 2017.[5] All motions to amend the pleadings were required to be filed by January 1, 2018. (*Id.*) The trial was scheduled to begin on April 30, 2018 (later changed to April 27, 2018). The Agreed Amended Scheduling Order provides that "[t]his scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties." (*Id.*)

Plaintiff has failed to set forth any support for the theory that the Court committed a "clear error of law" by granting Plaintiff the opportunity to reopen discovery to identify additional experts to address the allegation of comparative fault as set forth in the Amended Answer of Defendant. The cases cited by Plaintiff do not support Plaintiff's argument that the Court may not limit the expert's testimony. The cases cited and emphasized by Plaintiff support limiting the new expert to the new issues presented by the amendment.

The Court has made clear that the purpose for granting Plaintiff the opportunity to disclose additional experts is to address only the fault of Cody Blackburn as set forth in the Amended Answer. Importantly, Plaintiff's counsel made the same arguments about the

5 All discovery was not completed by December 1, 2017. Plaintiff's counsel did not request available dates to take the depositions of Defendant McLean's expert witnesses until November 6, 2017

need for additional experts during the hearing on Plaintiff's Motion for Continuance and during the status conference on April 30, 2018. It is clear that Plaintiff simply wants to start this matter over from the expert disclosure stage. (*See* Transcript of April 30, 2018 Status Conference; Appendix to Plaintiff's Application 22.)

Plaintiff's new argument that to address whether Cody Blackburn was at fault you have to address standard of care and causation is misplaced. First, Cody Blackburn was not a healthcare provider and no standard of care testimony is needed as to him. Second, Plaintiff previously identified an expert in this matter to testify as to the recognized standard of acceptable professional practice required of Defendant McLean. Plaintiff's standard of care expert, Richard Sobel, M.D., testified as to numerous standard of care violations. (Depo. of Richard M. Sobel, M.D.; Appendix to Plaintiff's Application 9.) No new expert witness is needed to testify as to the standard of care required of Defendant McLean. Any new expert witness disclosed to testify as to Cody Blackburn's fault for failing to seek medical attention earlier can easily limit his/her testimony to the fault of Cody Blackburn and whether his failure to seek earlier medical treatment was a cause of his death.

It is interesting that Plaintiff claims he cannot just identify an expert to address one issue in this matter, the fault of Plaintiff, when that is exactly what he previously did. Dr. Keith Allen was identified as an expert in the area of causation. During his deposition, Dr. Allen testified as follows:

Q: Correct. And so based on what you've previously told me would you agree that the opinions that you intend to offer in this case are causation opinions as opposed to standard of care opinions?

A: I believe my role and my understanding of my role is for causation.

(Depo. of Keith Allen, M.D. at 92; Appendix to Plaintiff's Application 8.) Plaintiff simply argues that putting a witness on the stand to testify only that Cody Blackburn's conduct was not negligent will raise new questions in the minds of the jurors. Importantly, Plaintiff's Motion for Continuance requested exactly this: expert testimony to address whether Mr. Blackburn acted reasonably the night before his admission. (Mem. in Support of Pl's Mot. for Continuance; Appendix 52.) The remainder of the Memo addresses the testimony of Dr. Joel Phares, Cody Blackburn's treating physician, during an evidentiary deposition and the issue of Dr. Sobel's production of tax returns that do not support his deposition testimony.

Plaintiff requested that the Court amend the scheduling order to allow Plaintiff to obtain new experts as to all issues in this case and new expert opinions without limitation. Plaintiff does not actually want the Court to alter or amend the Order regarding the April 30, 2018 status conference. Plaintiff wants the Court to allow him to start the case over. This request has nothing to do with the Defendants' Amended Answer asserting the comparative fault of Cody Blackburn for failing to seek earlier medical treatment, but everything to do with the production of Dr. Sobel's 1099s and other documentation regarding his

income from medico-legal matters; and allowing Plaintiff to obtain additional experts due to Dr. Sobel's failure to be honest regarding his income from medico-legal matters. Importantly, Plaintiff never filed a Motion to Amend the Scheduling Order and amending the scheduling order was not before the Court.

Again, Plaintiff's argument that he needs new experts in this matter to address all issues is the actual "unexpected legal maneuvering" in this matter. Plaintiff seeks new experts to address all issues in this matter, including the standard of care required of Defendant McLean, so that he can replace Dr. Sobel. As previously set forth, replacing Dr. Sobel was the true purpose of Plaintiff's Motion for Continuance filed at the 11th hour (and the day after Dr. Sobel produced his tax returns as ordered by this Court).

The cases cited by Plaintiff fail to support his argument that limiting the opinions of a new expert to only the issue raised by the amendment is highly and unfairly prejudicial. Over the objection of Defendants, the Court granted Plaintiff a continuance in this matter to allow Plaintiff to address the fault of Cody Blackburn for his failure to seek earlier medical treatment. The Court granted Plaintiff the opportunity to disclose new experts on the issue of Cody Blackburn's fault for his failure to seek earlier medical treatment. Therefore, the Court has already granted Plaintiff sufficient time to properly prepare for the only issue presented by the amendment.

Plaintiff's argument that "sufficient time **to address the new issue**" requires the Court to allow Plaintiff to hire new experts to address all of the issues in this case is erroneous. Further, the cases

cited by Plaintiff fail to support his argument. The Court has already granted Plaintiff the opportunity to disclose additional experts on the issue raised by the Defendants' Amended Answers. Additionally, the Court has already granted Plaintiff the opportunity to depose Defendants' expert witnesses on the issue raised by the Defendants' Amended Answers. Plaintiff offered no compelling reason to completely reopen discovery in this matter and allow Plaintiff to identify additional experts to testify as to all issues in this case. The deadline for Plaintiff to disclose expert witnesses passed well over a year ago. Plaintiff has never moved the Court for additional time to disclose experts in this matter as to all issues. Even after Defendants disclosed experts in this matter, Plaintiff did not move to disclose additional experts in this matter. Importantly, Plaintiff only moved for a continuance of the trial in this matter the day after Dr. Sobel produced his tax documents. Allowing Plaintiff to start this case over with completely new expert witnesses and reopening discovery is highly and unfairly prejudicial to Defendants. It would result in a significant delay in this matter and unjustified expense to Defendants. Plaintiff has already disclosed experts to testify as to the standard of care required of Defendants and to causation. New experts are not warranted on these issues. New experts were not requested on these issues prior to the continuance in this matter. If Plaintiff wants to start the case over, then he can non-suit this matter as allowed by the Tennessee Rules of Civil Procedure. If Plaintiff truly wants to identify additional experts to address the issue raised by the Amended Answer, then the Court has already provided Plaintiff that opportunity. Plaintiff, however, failed to take

advantage of the Court's ruling granting Plaintiff additional time to disclose additional expert(s) as to the issue raised by the amendment. Plaintiff's Application for Extraordinary Appeal of this Order should be denied.

F. Plaintiff's Rule 10 Application for Extraordinary Appeal Regarding the Order Granting Defendants' Motions to Amend is Untimely.

Although Tennessee Rule of Appellate Procedure 10 does not contain an express time limitation for filing extraordinary appeals, the Tennessee Supreme Court has recognized that some such limitation exists. In *State v. Best*, the Court opined that "T.R.A.P. 10 applications may be denied by the appellate courts, if not pursued within a reasonable time, in the particular circumstances of the case…." 614 S.W.2d 791, 794 (Tenn. 1981). The Court further noted that "[m]ost actions that give rise to T.R.A.P. 10 applications are of such a character that the application is filed and pursued immediately, lest the issue be rendered moot except for its possible viability on appeal from final judgment." *Id.*

Plaintiff failed to pursue an appeal of the trial court's March 28, 2018 Order within a "reasonable time." Almost six months elapsed between the trial court rendering its decision and Plaintiff filing his application for appeal. Plaintiff fails to give any reasons for this delay. If Plaintiff's counsel was unhappy with the trial court's ruling, then he should have moved for an interlocutory appeal at the time instead of just simply sitting on this matter.

In light of the Plaintiff's unexplained delay, the portion of his Application regarding the trial court's March 28, 2018 Order should be denied as untimely. Plaintiff should not be allowed to obtain interlocutory review of an Order entered almost six months earlier.

It is worth noting that Plaintiff failed to appeal the Order Granting Defendants' Motion to Amend pursuant to Tennessee Rule of Appellate Procedure 9. Although "[t]here is no apparent prerequisite to an extraordinary appeal by permission that the applicant first pursue a Rule 9 appeal…, Rule 9 should first be utilized if time and practicability permit." Lawrence A. Pivnick, *2 Tenn. Cir. Ct. Prac.* § 30:10 (2003 ed.). Plaintiff had plenty of time to pursue a Rule 9 appeal if he had elected to do so, and in fact appealed certain other orders. Due to Plaintiff's unexplained delay, the Court should deny Plaintiff's Application for Extraordinary Appeal regarding at least the trial court's Orders Granting Defendants' Motions to Amend.

Furthermore, the Tennessee Supreme Court has recognized that "[t]he rules relating to amendment of pleadings are liberal, vesting broad discretion in the trial court." *Biscan v. Brown*, 160 S.W.3d 462, 471(Tenn. 2005). The Tennessee Court of Appeals has long recognized that "it is within the trial court's discretion to allow the defendant to amend his answer even to assert an affirmative defense, and 'even if such a motion is not made until the time of trial.'" *Small ex rel. Russell v. Shelby County Schools*, 2008 WL 360925 (Tenn. Ct. App. Feb. 12, 2008)(*citing Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 691 (Tenn. Ct. App. 1999); *see generally Steed Realty v. Oveisi*, 823 S.W.2d 195, 197 (Tenn. Ct. App. 1991)). The trial court in this matter did not abuse

its discretion in allowing Defendants to Amend their Answers to conform with the evidence in this matter.

The Tennessee Supreme Court has recognized that "[t]he rules relating to amendment of pleadings are liberal, vesting broad discretion in the trial court." *Biscan v. Brown*, 160 S.W.3d 462, 471 (Tenn. 2005). The Tennessee Court of Appeals has long recognized that "it is within the trial court's discretion to allow the defendant to amend his answer even to assert an affirmative defense, and 'even if such a motion is not made until the time of trial.'" *Small ex rel. Russell v. Shelby County Schools*, 2008 WL 360925 (Tenn. Ct. App. Feb. 12, 2008)(*citing Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 691 (Tenn. Ct. App. 1999); *see generally Steed Realty v. Oveisi*, 823 S.W.2d 195, 197 (Tenn. Ct. App. 1991)). The trial court in this matter did not abuse its discretion in allowing Defendants to Amend their Answers to conform with the evidence in this matter.

IV. CONCLUSION

In light of the foregoing, this Court should deny Plaintiff's Application for Extraordinary Appeal Under Rule 10. The trial court has not so far departed from the accepted and usual course of judicial proceedings as to require any immediate review, and the Plaintiff has failed to show that the trial court has so departed. Likewise, the extraordinary appeal is not necessary for the complete determination of the action on appeal as otherwise provided in the Tennessee Rules of Appellate Procedure, and the record in this case fails to demonstrate any basis for such an assertion. These are the only two (2) enumerated

bases for an extraordinary appeal under T.R.A.P. 10; therefore, Plaintiff's Application should be denied.

Wherefore, Defendants respectfully request that this Court enter an Order Denying the Plaintiff's Application for extraordinary relief.

Respectfully Submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

/s/ Michelle Greenway Sellers
MARTY R. PHILLIPS (BPR #14990)
MICHELLE GREENWAY SELLERS (BPR #20769)
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/s/ James A. Beakes III
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TAYLOR B. MAYES (BPR #19495)
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Taylor.mayes@butlersnow.com
Jim.beakes@butlersnow.com

Attorneys for Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center

CERTIFICATE OF COMPLIANCE

I hereby certify that this Joint Answer in Opposition to the Plaintiff's Application for Extraordinary Appeal complies with the font and volume limitations set forth in Tennessee Supreme Court Rule 46. It contains fourteen-point Century font and the number of words is 11,093.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been sent, via email, to:

Joe Bednarz, Jr.
Joe Bednarz, Sr.
505 East Main Street
Hendersonville, TN 37075
(615) 256-0100
jbj@bednarzlaw.com
joe@bednarzlaw.com

on this the 23rd day of October, 2018.

/s/ James A. Beakes III
James A. Beakes III

44719130.v1

APPENDIX

Appendix to Plaintiff's Application

1. Complaint

2. Answer of Mark A. McLean MD

3. Answer of Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center

4. Deposition of Courtney Michele Blackburn Jeter

5. Deposition of Barry Charles Blackburn

6. Plaintiff's Rule 26 Disclosures as to All Defendants

7. Affidavit of Richard Sobel MD, MPH

8. Deposition of Keith Blaine Allen MD

9. Deposition of Richard Martin Sobel MD

10. Defendant Mark A. McLean, MD's Motion to Amend Answer

11. Plaintiffs' Response to Defendants Mark A. McLean MD's and Maury Regional Hospital d/b/a Maury Regional Medical Center's Motion to Amend Answer

12. Defendant Mark A. McLean MD Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support

13. Memorandum of Law in Support of Defendant Mark A. McLean MD Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support

14. Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center's Notice of Joinder in Dispositive Motions Filed by Defendant Mark A. McLean MD

15. Order Granting Defendant Mark A. McLean MD's Motion to Amend Answer

16. Plaintiff's Response to Defendant Mark A. McLean MD's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support

17. Plaintiff's Response to Defendant Mark A. McLean MD's Statement of Undisputed Facts in Support of Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Causation Support

18. Plaintiff's Statement of Additional Undisputed Material Facts

19. Plaintiff's Supplemental Rule 26 Disclosures of Keith Allen, MD

20. First Amended Answer of Mark A. McLean MD

21. Defendant Maury Regional Hospital, d/b/a Maury Regional Medical Center's First Amended Answer to Complaint

22. Transcript of Motion Hearing on April 30, 2018

23. Order Granting Defendant Mark A. McLean MD's Motion for Summary Judgment As to Standard of Care Claims for Which There is No Expert Support

24. Order Regarding April 30, 2018 Status Conference

25. Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Granting Defendant Mark A. McLean MD's Motion for Summary Judgment as to Standard of Care Claims For Which There is No Expert Proof Or in the Alternative For Rule 9 Appeal

26. Defendant Mark A. McLean MD's Response in Opposition to Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Granting Defendant Mark A. McLean MD's Motion for Summary Judgment as to Standard of Care Claims For Which There is No Expert Proof Or in the Alternative For Rule 9 Appeal

27. Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conference Or In The Alternative For Rule 9 Appeal

28. Defendant Mark A. McLean MD's Response in Opposition to Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conference and Rule 9 Appeal

29. Hearing from Proceeding on August 13, 2018 (Transcript says August 12, 2018)

30. Order – August 13, 2018 Hearing

31. Order Denying Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Granting Defendant Mark McLean's Motion for Summary Judgment as to Standard of Care Claims for Which There is No Expert Proof Or in the Alternative for Rule 9 Appeal

32. Order Denying Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Regarding the April 30, 2018 Status Conference or in the Alternative for A Rule 9 Appeal

33. Order Granting Defendant Mark A. McLean MD's Motions in Limine Numbers 1, 3, 5, 7, 9, 12, 13, 14 and 18

Appendix to Defendants' Joint Answer in Opposition to the Plaintiff's Application for Extraordinary Appeal

34. Order (re: MRMC's Motion to Strike)

35. Amended Agreed Scheduling Order

36. Motion of Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center to Amend Answer

37. Notice of Hearing on Defendant's Motion to Amend Answer

38. Notice of Hearing

39. Amended Notice of Hearing on Defendant's Motion to Amend Answer

40. Notice of Resetting Hearing

41. Plaintiff's Motion to Set

42. Agreed Scheduling Order

43. Defendant Mark A. McLean, M.D.'s Rule 26 Expert Disclosures

44. Rule 26 Disclosure of Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center ("Maury") – Timothy Price, M.D.

45. Rule 26 Disclosure of Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center ("Maury") – Jodi Thurman, MBA, BSN, RN, CEN

46. Rule 26 Disclosure of Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center ("Maury") – Ralph D. Scott, Jr., PhD

47. Notice of Filing Foreign Subpoena and Additional Documents Served on Richard M. Sobel, M.D., MPH

48. Defendant Mark A. McLean, M.D.'s Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D.

49. Memorandum of Law in Support of Defendant Mark A. McLean, M.D.'s Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D.

50. Plaintiff's Response to Defendant's Motion to Compel

51. Order Granting Defendants' Motion to Compel

52. Plaintiff's Motion for Continuance

53. Memorandum of Law in Support of Plaintiff's Motion for Continuance

54. Defendants' Joint Response in Opposition to Plaintiff's Motion for Continuance

55. Order (Granting Plaintiff's Motion for Continuance)

56. Third Amended Scheduling Order

57. Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center's (MRMC) Notice of Joinder

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APPENDIX 34

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

2018 AUG 30 PM 4:49

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
v.	)	NO. 15513
	)	JURY DEMAND
MARK A. McLEAN, M.D., AND MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONALMEDICAL CENTER,	)	
Defendants.	)	

ORDER

This cause came on to be heard before the Honorable J. Russell Parkes, Judge of the Circuit Court for Maury County, Tennessee on August 13, 2018, upon the Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center's (MRMC) Motion to Strike the Plaintiff's Standard of Care Criticisms of Dr. Richard Sobel and Lori Jaggers Alexander, BNP, MSN, RN for which there is not expert causation support. After consideration of MRMC's Motion, the Court's Order of June 8, 2018 granting the Defendant Mark A. McLean, M.D.'s and MRMC's Motion for Partial Summary Judgment dismissing 17 standard of care criticisms of Dr. Richard Sobel which were not supported by expert opinions on causation, statements of counsel, and the entire record in this cause, the Court finds as follows:

1. MRMC joined in the Defendant Mark A. McLean, M.D.'s Motion for Partial Summary Judgment which asked the Court to dismiss 17 specific standard of care criticisms that had been expressed by Dr. Sobel that were not properly supported by expert proof of causation.

2. Some of Dr. Sobel's 17 criticisms were directed to the Defendant Dr. McLean and others were directed to MRMC.

3. By Order entered June 8, 2018, the Court granted Dr. McLean's and MRMC Motion for Partial Summary Judgment dismissing 17 of Dr. Sobel's standard of care criticisms that were not properly supported by expert proof of causation. The Court held that none of Dr. Sobel's 17 opinions referred to in the Defendants' Motion for Partial Summary Judgment could be introduced into evidence against either Defendant.

4. Therefore, the Court's Order of June 8, 2018, dismissed all of Dr. Sobel's 17 standard of care criticisms that were intended to be directed to MRMC.

5. The issue of whether of Nurse Alexander's standard of care criticisms of MRMC were properly supported by expert proof of causation was not before the Court and was not the subject of the Court's Order of June 8, 2018. The Court will consider a properly supported Motion for Partial Summary Judgment regarding Nurse Alexander's standard of care criticisms of MRMC if such a motion is filed.

IT IS SO ORDERED.

ENTERED THIS 30 DAY OF August, 2018.

JUDGE J. RUSSELL PARKES

Order held by Court for 5 Days before entry pursuant to Local Rule 29.01.

APPROVED FOR ENTRY:

BUTLER SNOW LLP

Robert L. Trentham, signed with permission
By: Melissa Ravies

Robert L. Trentham, BPR #2257
Taylor B. Mayes, BPR #19495
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Attorneys for defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via Electronic Mail and by United States mail, postage pre-paid to the following:

Joe Bednarz, Sr., Esq.
Joe Bednarz, Jr., Esq.
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075
Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Michelle Greenway Sellers, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorneys for Mark A. McLean, M.D.

on this ____ day of August, 2018.

Robert L. Trentham signed with permission
By: Melissa Ravies

43682212v1

APPENDIX 35

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN	)	
Plaintiffs,	)	**Case No. 15513**
v.	)	**JURY DEMAND**
MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	
Defendants	)	

2017 APR -7 AM 8:20

AMENDED AGREED SCHEDULING ORDER

The parties as evidenced by the signatures of counsel below consent to the following scheduling order:

1. The Plaintiffs shall identify their Rule 26 experts on or before **May 1, 2017**, and pursuant to Tenn. R. Civ. P. 26.02(4)(A)(i) shall fully disclose the substance of the facts and opinions to which each expert is expected to testify.

2. The Defendants shall disclose their Rule 26 experts on or before **July 1, 2017** and pursuant to Tenn. R. Civ. P. 26.02(4)(A)(i) shall fully disclose the substance of the facts and opinions to which each expert is expected to testify.

3. The parties shall complete the discovery depositions of all expert witnesses on or before **November 1, 2017**. The Defendants shall be allowed to depose the Plaintiffs' experts first.

4. All discovery, written or otherwise, shall be completed on or before **December 1, 2017.**

5. All motions to amend the pleadings shall be filed by **January 1, 2018.**

6. All dispositive motions shall be filed by **March 1, 2018.**

7. All pretrial motions shall be filed by **April 2, 2018** and shall be heard on **April 9, 2018 at 1:00 p.m.**

8. A pretrial conference is set for **April 20, 2018 at 8:30 a.m.**

9. The case is set for a five (5) day trial beginning **April 30, 2018.**

10. This scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties. Failure to abide by this order may result in sanctions as set forth in Tenn. R. Civ. P. 16.06.

IT IS SO ORDERED this the 6th day of April 2017.

JUDGE JOHN RUSSELL PARKES

APPROVED FOR ENTRY:

BEDNARZ & BEDNARZ

By: _____

Joe Bednarz, Sr., #9347
Bednarz & Bednarz
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(615) 256-0100
Attorney for Plaintiffs

RAINEY, KIZER, REVIERE & BELL

By: [signature] w/per. by cole Rogers

Marty R. Phillips, #14990
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Jackson, TN 37302
(731) 424-2414
Attorney for Mark A. McLean, M.D.

BUTLER SNOW LLP

By: [signature] by Cole Rogers w/per.

Robert L. Trentham, # 02257
Taylor B. Mayes, #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
(615) 651-6700
Attorneys for Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via electronic mail and United States mail, postage pre-paid to the following:

Robert L. Trentham, # 02257
Taylor B. Mayes, #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
Attorneys for Maury Regional Medical Center

Marty R. Phillips, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorney for Mark A. McLean, M.D.

on this 31st day of March, 2017.

[signature]
Joe Bednarz, Sr.

APPENDIX 36

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
v.	)	NO. 15513
	)	JURY DEMAND
MARK A. McLEAN, M.D., AND MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER	)	
Defendants.	)	

MOTION OF DEFENDANT MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER TO AMEND ANSWER

The Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center, joins in the Defendant Mark A. McLean, M.D.'s Motion to Amend his answer to the Complaint and moves the Court to allow it to amend its answer to also assert as an affirmative defense the comparative fault of Cody Charles Blackburn in negligently failing to seek timely medical care.

This Defendant also asks the Court for leave to file an amended answer to incorporate the aforesaid affirmative defense.

Respectfully Submitted,

BUTLER SNOW LLP

Robert L. Trentham, BPR #2257
Taylor B. Mayes, BPR #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201

(615) 651-6700 – Telephone
(615) 651-6701 – Fax
Attorneys for defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via electronic mail and United States mail, postage pre-paid to the following:

Joe Bednarz, Sr., Esq.
Bednarz & Bednarz
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Hendersonville, TN 37075
Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Michelle Greenway Sellers, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorneys for Mark A. McLean, M.D.

on this 4 day of January, 2018.

Robert L. Trentham

40019908.v1

APPENDIX 37

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiff,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D. and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

NOTICE OF HEARING

TO: Barry Charles Blackburn and his attorney
Joe Bednarz, Sr.
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075

Please take notice that Defendant, Mark A. McLean, M.D., by and through counsel, will appear before the Hon. Russell Parkes, Judge of the Circuit Court of Maury County, Tennessee, on Friday, February 16, 2018, at 10:30 a.m. for hearing on Defendant Mark A. McLean, M.D.'s Motion to Amend Answer.

Respectfully Submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

MARTY R. PHILLIPS (BPR #14990)
MICHELLE GREENWAY SELLERS (BPR #20769)
105 S. Highland Avenue
Jackson, TN 38301
731.423.2414
Mphillips@raineykizer.com
Msellers@raineykizer.com

Attorneys for Defendant Mark A. McLean, M.D.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Joe Bednarz, Jr. (BPR #18540)
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075
615.256.0100

Attorney for Plaintiff

Robert L. Trentham (BPR #2257)
Taylor B. Mayes (BPR #19495)
Butler Snow, LLP
150 Third Avenue South, Suite 1600
Nashville, TN 37201
615.651.6700

Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

This the 8th day of February, 2018.

APPENDIX 38

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
v.	)	NO. 15513
	)	JURY DEMAND
MARK A. McLEAN, M.D., STEPHEN CALEB BARR, M.D. AND MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

NOTICE OF HEARING

Please take notice that the Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center (MRMC), by and through counsel, will appear before the Honorable Russell Parkes, Judge of the Circuit Court of Maury County, Tennessee on Friday, February 16, 2018 at 9:00 a.m. for a hearing on Defendant's Motion to Amend Answer.

Respectfully Submitted,

BUTLER SNOW LLP

Robert L. Trentham, BPR #2257
Taylor B. Mayes, BPR #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
(615) 651-6700 – Telephone
(615) 651-6701 – Fax

Attorneys for defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via United States mail, postage pre-paid to the following:

Joe Bednarz, Jr., Esq.
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075
Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorneys for Mark A. McLean, M.D.

on this 8 day of February, 2018.

Robert L. Trentham

40574125.v1

APPENDIX 39

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiff,

v.

MARK A. McLEAN, M.D. and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

FILED
SANDY HOLLAND CIRCUIT CLERK
MAURY COUNTY, TN
2018 FEB 20 PM 2:51

No. 15513
JURY DEMANDED

AMENDED NOTICE OF HEARING

TO: Barry Charles Blackburn and his attorney
Joe Bednarz, Sr.
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075

Please take notice that Defendant, Mark A. McLean, M.D., by and through counsel, will appear before the Hon. Russell Parkes, Judge of the Circuit Court of Maury County, Tennessee, on Friday, March 9, 2018, at 9:00 a.m. for hearing on Defendant Mark A. McLean, M.D.'s Motion to Amend Answer.

Respectfully Submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

MARTY R. PHILLIPS (BPR #14990)
MICHELLE GREENWAY SELLERS (BPR #20769)
105 S. Highland Avenue
Jackson, TN 38301
731.423.2414
Mphillips@raineykizer.com
Msellers@raineykizer.com

Attorneys for Defendant Mark A. McLean, M.D.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Joe Bednarz, Jr. (BPR #18540)
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075
615.256.0100

Attorney for Plaintiff

Robert L. Trentham (BPR #2257)
Taylor B. Mayes (BPR #19495)
Butler Snow, LLP
150 Third Avenue South, Suite 1600
Nashville, TN 37201
615.651.6700

Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

This the 16th day of February, 2018.

APPENDIX 40

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
v.	)	NO. 15513
	)	JURY DEMAND
MARK A. McLEAN, M.D., STEPHEN CALEB BARR, M.D. AND MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

NOTICE OF RESETTING HEARING

Please take notice that the Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center (MRMC), by and through counsel, will appear before the Honorable Russell Parkes, Judge of the Circuit Court of Maury County, Tennessee on Friday, March 9, 2018 at 9:00 a.m. for a hearing on Defendant's Motion to Amend Answer.

Respectfully Submitted,

BUTLER SNOW LLP

Robert L. Trentham, BPR #2257
Taylor B. Mayes, BPR #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
(615) 651-6700 – Telephone
(615) 651-6701 – Fax
Attorneys for defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via United States mail, postage pre-paid to the following:

Joe Bednarz, Jr., Esq.
Bednarz & Bednarz
505 East Main Street
Hendersonville, TN 37075
Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorneys for Mark A. McLean, M.D.

on this 21 day of February, 2018.

Robert L. Trentham

40755154.v1

APPENDIX 41

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	**No. 15513**
v.	)	**JURY DEMAND**
MARK A. McLEAN, M.D., and REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

PLAINTIFFS' MOTION TO SET

Come now the Plaintiffs, by and through counsel, and move this Honorable Court for an Order setting this case for trial. In support of this motion, Plaintiff's counsel would show that the attorneys have been trying to set this case for trial for a couple of months however they are unable to agree on a trial date and need the Court's guidance. Because the Court only has one week available each month for civil trials, it may be necessary to ask the Court to assign a Special Judge.

Respectfully submitted,

BEDNARZ & BEDNARZ

JOE BEDNARZ, JR., #18540
Attorney for Plaintiffs
100 Bluegrass Commons Blvd.
Suite 330
Hendersonville, TN 37075
(615) 256-0100

THIS MOTION IS EXPECTED TO BE HEARD ON FEBRUARY 3, 2017 at 9:00 A.M.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been mailed, via First Class prepaid postage and via email, to:

Bob Trentham, Esq.
BUTLER SNOW, LLP
150 3rd Avenue South, Suite 1600
Nashville, TN 37201
bob.trentham@butlersnow.com

Marty Phillips, Esq.
RAINEY, KIZER REVIERE
& BELL, PLC
105 S. Highland Avenue
Jackson, TN 38301
mphillips@raineykizer.com

on this the 27th day of January, 2017.

JOE BEDNARZ, JR.

Addressee	Start Time	Time	Prints	Result	Note
9313751114	01-27 16:06	00:01:07	003/003	OK	

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX, PBG:Page Separation TX, MIX:Mixed Original TX, CALL:Manual TX, CSRC:CSRC, FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, SP:Special Original, FCODE:F-code, RTX:Re-TX, RLY:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax, IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF, TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer, Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over, POVR:Receiving page Over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error, DSN:DSN Response Error, PRINT:Compulsory Memory Document Print, DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): Sandy McLain, Maury County Circuit Court Clerk

WITH (COURT): Maury County Circuit Court - Civil

CLERK'S FAX NUMBER: (931) 375-1114

CASE NAME: Blackburn v. Barr, et al

DOCKET NUMBER: 15513

TITLE OF DOCUMENT: Plaintiff's Motion to Set

FROM (SENDER): Joe Bednarz, Jr.

SENDER'S ADDRESS: 100 Bluegrass Commons Blvd, Suite 330, Hendersonville, TN 37075

SENDER'S VOICE TELEPHONE NUMBER: (615) 256-0100

SENDER'S FAX TELEPHONE NUMBER: (615) 256-4130

DATE: 9/9/2016 TOTAL PAGES, INCLUDING COVER PAGE: 3

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ten (10) pages, including the cover page, shall not be filed by the clerk.

APPENDIX 42

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN	)	
Plaintiffs,	)	**Case No. 15513**
v.	)	
MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	**JURY DEMAND**
Defendants.	)	

2017 FEB 23 PM 1:22

STANDY [illegible]

AGREED SCHEDULING ORDER

The parties as evidenced by the signatures of counsel below consent to the following scheduling order:

1. The Plaintiffs shall identify their Rule 26 experts on or before **April 1, 2017**, and pursuant to Tenn. R. Civ. P. 26.02(4)(A)(i) shall fully disclose the substance of the facts and opinions to which each expert is expected to testify.

2. The Defendants shall disclose their Rule 26 experts on or before **June 1, 2017** and pursuant to Tenn. R. Civ. P. 26.02(4)(A)(i) shall fully disclose the substance of the facts and opinions to which each expert is expected to testify.

3. The parties shall complete the discovery depositions of all expert witnesses on or before **October 1, 2017**. The Defendants shall be allowed to depose the Plaintiffs' experts first.

4. All discovery, written or otherwise, shall be completed on or before **December 1, 2017.**

5. All motions to amend the pleadings shall be filed by **January 1, 2018.**

6. All dispositive motions shall be filed by **March 1, 2018.**

7. All pretrial motions shall be filed by **April 2, 2018** and shall be heard on April 9th, 2018 at 1:30 pm.

8. A pretrial conference is set for April 20th, 2018 at 8:30 Am.

9. This case is scheduled for a five (5) day trial beginning **April 30, 2018.**

10. This scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties. Failure to abide by this order may result in sanctions as set forth in Tenn. R. Civ. P. 16.06.

IT IS SO ORDERED this the 22nd day of Feb, 2017.

JUDGE JOHN RUSSELL PARKES

APPROVED FOR ENTRY:

BEDNARZ & BEDNARZ

By: Joe Bednarz Sr. (by RLT w/ permission/MAR)
Joe Bednarz, Sr., #9347
Bednarz & Bednarz
100 Bluegrass Commons Blvd., Suite 330
Hendersonville, TN 37075
(615) 256-0100
Attorney for Plaintiffs

RAINEY, KIZER, REVIERE & BELL

By: Marty R. Phillips (by RLT w/permission/MRR)
Marty R. Phillips, #14990
P.O. Box 1147
Jackson, TN 37302
(731) 424-2414
Attorney for Mark A. McLean, M.D.

BUTLER SNOW LLP

By: Robert L. Trentham (w permission Melissa Mayes)
Robert L. Trentham, # 02257
Taylor B. Mayes, #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
(615) 651-6700
Attorneys for Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via electronic mail and United States mail, postage pre-paid to the following:

Joe Bednarz, Sr., Esq.
Bednarz & Bednarz
100 Bluegrass Commons Blvd., Suite 330
Hendersonville, TN 37075
Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorneys for Mark A. McLean, M.D.

on this 9th day of Februry, 2017.

Robert L. Trentham by MAM w/permission
Robert L. Trentham

APPENDIX 43

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiffs,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

DEFENDANT MARK A. MCLEAN, M.D.'S RULE 26 EXPERT DISCLOSURES

Defendant, Mark A. McLean, M.D., pursuant to the Amended Scheduling Order in this case and the Tennessee Rules of Civil Procedure, sets forth his Expert Disclosures concerning the experts he may call to testify at the trial of this matter. These disclosures are not testimony of the expert witnesses and are merely general summaries of expected opinions prepared by Defendant's counsel based upon discussions with the experts. Defendant reserves the right to amend and supplement these disclosures upon receipt of additional information via the discovery process, including, but without limitation, additional medical records, depositions, and pleadings.

LARKIN DANIELS, M.D.

Larkin Daniels, M.D. ("Dr. Daniels") is a physician specializing in cardiothoracic surgery. Dr. Daniels practices cardiothoracic surgery in Mobile, Alabama. His practice address is 1855 Spring Hill Avenue, Mobile, Alabama, 36607. He is licensed to practice

medicine in Alabama. He was licensed and practicing medicine in the State of Alabama during the year of and year preceding the alleged malpractice in this case. He is being offered as an expert in the fields of cardiothoracic surgery, standard of care, causation, and damages. A detailed description of his qualifications is contained in the Curriculum Vitae attached hereto as **Exhibit A**.

As grounds for his opinions, Dr. Daniels relies upon the pleadings, medical records, depositions, as well as his training, education, background and experience. Dr. Daniels has reviewed or may review the following documents in this matter:

1. Complaint;
2. Answer of Defendant Mark A. McLean, M.D.;
3. Medical Records of Maury Regional Medical Center;
4. Deposition of Stephen Barr, M.D.;
5. Deposition of Mark A. McLean, M.D.;
6. Deposition of Jennifer Owens, RN;
7. Deposition of Barry Charles Blackburn;
8. Deposition of Courtney Blackburn Jeter;
9. Deposition of Crystal Blackburn;
10. Deposition of Jennifer Gill; and
11. Plaintiff's Rule 26 Disclosures as to all Defendants.

Dr. Daniels may also review other lay and expert depositions and affidavits, and/or other documents that have been or will be taken, generated, filed, or provided in the case.

If called as an expert witness, Dr. Daniels is expected to testify regarding the recognized standard of acceptable professional practice for cardiothoracic surgeons practicing in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Daniels is also expected to testify regarding the recognized standard of acceptable professional practice for a physician such as Dr. McLean in treating a patient like Mr. Blackburn, the health and medical conditions of Mr. Blackburn, causation, damages, issues raised by Plaintiff's expert witnesses, and other issues raised in the records, depositions, and/or other materials he has reviewed. Dr. Daniels may also summarize and explain Mr. Blackburn's medical records. Dr. Daniels is expected to testify as follows:

Dr. Daniels is familiar with the recognized standard of acceptable professional practice for a cardiothoracic surgeon and a physician such as Dr. McLean in treating a patient like Mr. Blackburn in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Daniels is expected to testify that Dr. McLean acted reasonably and did not violate the recognized standard of acceptable professional practice required of him in his care and treatment of Mr. Blackburn. Dr. Daniels is expected to testify that Dr. McLean did not negligently cause or contribute to any injury to Mr. Blackburn or to his death.

Dr. Daniels disagrees with the standard of care, causation, and damage opinions by Keith Allen, M.D. and Richard M. Sobel, M.D. set forth in Plaintiff's Expert Disclosure. He is expected to comment upon and rebut the expected opinions and criticisms of Plaintiff's expert witness.

Dr. Daniels is expected to testify that the "Background" set forth in Plaintiff's Expert Disclosures does not accurately reflect Mr. Blackburn's condition or the care and treatment provided.

Dr. Daniels is expected to testify that the signs and symptoms Mr. Blackburn presented to the Maury Regional Medical Center ER with were not consistent with aortic dissection or aortic aneurysm. He is expected to testify that Mr. Blackburn had a massive ascending aortic aneurysm not an aortic dissection. Dr. Daniels is expected to testify that Mr. Blackburn's complaints changed from chest pain to abdominal pain to epigastric pain and he was appropriately and timely worked up for those complaints. Dr. Daniels is expected to testify that there are a number of things that can cause chest pain, abdominal pain, and epigastric pain.

Dr. Daniels is expected to testify that Dr. McLean formulated a good differential diagnosis. He is expected to testify that the standard of care did not require Dr. McLean to place aortic dissection as a probable and prominent potential diagnosis. However, dissection was part of Dr. McLean's differential.

Dr. Daniels is expected to testify that there was no significant difference between the EKG obtained by EMS and the EKG performed in the ER. The EKGs were non-specific. He is expected to testify that the EKG does not indicate that there is ST elevation myocardial infarction. He is expected to testify that the EKG is not diagnostic of a heart attack. He is expected to testify that the EKG is not diagnostic of any problem with the aorta. He is expected to testify that the standard of care did not require Dr. McLean to promptly order a cardiac consult. Dr. Daniels is expected to testify that there was no indication to consult a cardiologist based on the EKGs.

Dr. Daniels is expected to testify that a CT scan was timely and appropriately ordered by Dr. McLean when indicated. He is expected to testify that Dr. McLean's work up of Mr. Blackburn was appropriate based on the facts and circumstances present at the time of his care and treatment.

Dr. Daniels is expected to testify that Dr. McLean's orders were appropriate. He is expected to testify that Dr. McLean did not negligently delay any testing of Mr. Blackburn. Dr. Daniels is expected to testify that Mr. Blackburn was stable and Dr. McLean had no reason to transfer him until Mr. Blackburn coded and Dr. McLean received the results of the CT. Dr. Daniels is expected to testify that Dr. McLean was not required to suspect that Mr. Blackburn had an aortic dissection or aortic aneurysm based on the facts and circumstances present at the time of his care and treatment of Mr. Blackburn. He is expected to testify that Mr. Blackburn did not have an aortic dissection. He is expected to testify that Dr. McLean complied with the standard of care regarding the manner in which he treated Mr. Blackburn.

Dr. Daniels is expected to testify that there was no indication that Mr. Blackburn required surgery prior to the time Dr. McLean obtained the results of the CT. Dr. Daniels is expected to testify that no cardiothoracic surgeon or cardiovascular surgeon was available at Maury Regional Medical Center on September 17, 2014. He is expected to testify that Mr. Blackburn would require transfer to Vanderbilt or another facility capable of performing surgery before the rupture considering the size of his ascending aortic aneurysm. He is expected to testify with the time to transfer he likely would not have survived had earlier diagnosis of the ascending aortic aneurysm taken place on September 17, 2014. Dr. Daniels is expected to testify that it would be

speculative to say that Mr. Blackburn could work and function normally even if he had survived surgery to repair the ascending aortic aneurysm. He is expected to testify that Mr. Blackburn would be at risk of future problems even if he had survived surgery to repair the ascending aortic aneurysm. Dr. Daniels is expected to testify that it would be speculative to say that Mr. Blackburn would not have deficits if he survived the surgery to repair the ascending aortic aneurysm.

Dr. Daniels is expected to testify that the massive ascending aortic aneurysm found in Mr. Blackburn is very unusual in a 35 year old man, without Marfan's syndrome, without any history of connective tissue disease, without any known history of hypertension, and without any family history of aortic aneurysm. Dr. Daniels is expected to testify about the morbidity and mortality of a massive ascending aortic aneurysm like Mr. Blackburn had.

Dr. Daniels is expected to testify that no negligent act or omission by Dr. McLean caused or contributed to Mr. Blackburn's death. Dr. Daniels is expected to testify that no negligent act or omission or lack of due care on the part of Dr. McLean caused or contributed to any injury to Mr. Blackburn. He is expected to testify that the ascending aortic aneurysm ruptured into Mr. Blackburn's pericardium causing his death.

Dr. Daniels is expected to comment upon and refute the expected opinions of Plaintiff's expert witnesses.

This is simply a summary of Dr. Daniels' expected testimony and opinions. Dr. Daniels may have other opinions to express in this case and he reserves the right to express further opinions. Dr. Daniels will testify to a reasonable degree of medical certainty.

ARTHUR GRIMBALL, M.D.

Arthur Grimball, M.D. ("Dr. Grimball") is a physician specializing in cardiothoracic surgery. Dr. Grimball practices cardiothoracic surgery in Jackson, Tennessee. His practice address is Cardiothoracic Surgery Center/Heart Rhythm, 27A Medical Center Drive, Jackson, Tennessee, 38301. He is licensed to practice medicine in the State of Tennessee. He was licensed and practicing medicine in the State of Tennessee during the year of and year preceding the alleged malpractice in this case. He is being offered as an expert in the fields of cardiothoracic surgery, standard of care, causation, and damages. A detailed description of his qualifications is contained in the Curriculum Vitae attached hereto as **Exhibit B**.

As grounds for his opinions, Dr. Grimball relies upon the pleadings, medical records, depositions, as well as his training, education, background and experience. Dr. Grimball has reviewed or may review the following documents in this matter:

1. Complaint;
2. Answer of Defendant Mark A. McLean, M.D.;
3. Medical Records of Maury Regional Medical Center;
4. Deposition of Stephen Barr, M.D.;
5. Deposition of Mark A. McLean, M.D.;
6. Deposition of Jennifer Owens, RN;
7. Deposition of Barry Charles Blackburn;
8. Deposition of Courtney Blackburn Jeter;
9. Deposition of Crystal Blackburn;
10. Deposition of Jennifer Gill; and

11. Plaintiff's Rule 26 Disclosures as to all Defendants.

Dr. Grimball may also review other lay and expert depositions and affidavits, and/or other documents that have been or will be taken, generated, filed, or provided in the case.

If called as an expert witness, Dr. Grimball is expected to testify regarding the recognized standard of acceptable professional practice for cardiothoracic surgeons practicing in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Grimball is also expected to testify regarding the health and medical conditions of Mr. Blackburn, causation, damages, issues raised by Plaintiff's expert witnesses, and other issues raised in the records, depositions, and/or other materials he has reviewed. Dr. Grimball may also summarize and explain Mr. Blackburn's medical records. Dr. Grimball is expected to testify as follows:

Dr. Grimball is familiar with the recognized standard of acceptable professional practice for a cardiothoracic surgeon in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Grimball is expected to testify that Dr. McLean did not negligently cause or contribute to any injury to Mr. Blackburn or to his death.

Dr. Grimball disagrees with the standard of care, causation, and damage opinions by Keith Allen, M.D. set forth in Plaintiff's Expert Disclosure. He is expected to comment upon and rebut the expected opinions and criticisms of Plaintiff's expert witness.

Dr. Grimball is expected to testify that the "Background" set forth in Plaintiff's Expert Disclosures does not accurately reflect Mr. Blackburn's condition or the care and treatment provided.

Dr. Grimball is expected to testify that the signs and symptoms Mr. Blackburn presented to the Maury Regional Medical Center ER with were not consistent with aortic dissection or aortic aneurysm. Dr. Grimball is expected to testify that Mr. Blackburn had a massive ascending aortic aneurysm, not an aortic dissection. Dr. Grimball is expected to testify that Mr. Blackburn's complaints changed from chest pain to abdominal pain to epigastric pain and he was worked up for those complaints. Dr. Grimball is expected to testify that a massive ascending aortic aneurysm is very unusual in a 35 year old man, without Marfan's syndrome, without any known history of connective tissue disease, and no family history of aortic aneurysm. Dr. Grimball is expected to testify about the morbidity and mortality of a massive ascending aortic aneurysm like Mr. Blackburn had.

Dr. Grimball is expected to testify that there was no significant difference between the EKG obtained by EMS and the EKG performed in the ER. The EKGs were non-specific. He is expected to testify that the EKG does not indicate that there is ST elevation myocardial infarction. Dr. Grimball is expected to testify that the EKG is not diagnostic of a heart attack. He is expected to testify that the EKG is not diagnostic of any problem with the aorta. Dr. Grimball is expected to testify that there was no indication to consult a cardiologist based on the EKGs.

Dr. Grimball is expected to testify that any alleged delay in testing of Mr. Blackburn did not cause any harm to Mr. Blackburn. Dr. Grimball is expected to testify

that Mr. Blackburn was stable and Dr. McLean had no indication to transfer him until he arrested and Dr. McLean received the results of the CT. Dr. Grimball is expected to testify that Dr. McLean was not required to suspect that Mr. Blackburn had an aortic dissection or aortic aneurysm based on the facts and circumstances present at the time of his care and treatment of Mr. Blackburn. He is expected to testify that Mr. Blackburn did not have an aortic dissection.

Dr. Grimball is expected to testify that no cardiothoracic surgeon or cardiovascular surgeon was available at Maury Regional Medical Center on September 17, 2014. He is expected to testify that Mr. Blackburn would require transfer to Vanderbilt or another facility capable of performing surgery before the rupture considering the size of his ascending aortic aneurysm. Dr. Grimball is expected to testify that it would be speculative to say that Mr. Blackburn could work and function normally even if he had survived surgery to repair the ascending aortic aneurysm. He is expected to testify that Mr. Blackburn would be at risk of future problems even if he had survived surgery to repair the ascending aortic aneurysm. Dr. Grimball is expected to testify that it would be speculative to say that Mr. Blackburn would not have deficits if he survived surgery to repair the ascending aortic aneurysm.

Dr. Grimball is expected to testify that there was no indication that Mr. Blackburn required surgery prior to the time the results of the CT were obtained. He is expected to testify that there a number of things that can cause chest pain, epigastric pain, and abdominal pain. He is expected to testify that patients typically do not complain of abdominal pain with an aortic aneurysm.

Dr. Grimball is expected to testify that no negligent act or omission by Dr. McLean caused or contributed to Mr. Blackburn's death. Dr. Grimball is expected to testify that no negligent act or omission or lack of due care on the part of Dr. McLean caused or contributed to any injury to Mr. Blackburn. He is expected to testify that the ascending aortic aneurysm ruptured into Mr. Blackburn's pericardium causing his death.

Dr. Grimball is expected to comment upon and refute the expected opinions of Plaintiff's expert witnesses.

This is simply a summary of Dr. Grimball's expected testimony and opinions. Dr. Grimball may have other opinions to express in this case and he reserves the right to express further opinions. Dr. Grimball will testify to a reasonable degree of medical certainty.

TARAL N. PATEL, M.D., FACC, FSCAI

Taral N. Patel, M.D. ("Dr. Patel") is a physician specializing in interventional cardiology. Dr. Patel practices medicine in Hermitage, Tennessee and Nashville, Tennessee. He was licensed and practicing medicine in the State of Tennessee during the year of and year preceding the alleged malpractice in this case. He is being offered as an expert in the fields of cardiology, standard of care, causation, and damages. A detailed description of his qualifications is contained in the Curriculum Vitae attached as **Exhibit C**.

As grounds for his opinions, Dr. Patel relies upon the pleadings, medical records, depositions, as well as his training, education, background and experience. Dr. Patel has reviewed or may review the following documents in this matter:

1. Complaint;

2. Answer of Defendant Mark A. McLean, M.D.;

3. Medical Records of Maury Regional Medical Center;

4. Deposition of Stephen Barr, M.D.;

5. Deposition of Mark A. McLean, M.D.;

6. Deposition of Jennifer Owens, RN;

7. Deposition of Barry Charles Blackburn;

8. Deposition of Courtney Blackburn Jeter;

9. Deposition of Crystal Blackburn;

10. Deposition of Jennifer Gill; and

11. Plaintiff's Rule 26 Disclosures as to all Defendants.

Dr. Patel may also review other lay and expert depositions and affidavits, and/or other documents that have been or will be taken, generated, filed, or provided in the case.

If called as an expert witness, Dr. Patel is expected to testify regarding the recognized standard of acceptable professional practice for a cardiologist practicing medicine in Columbia, Maury County, Tennessee and/or in similar communities as it existed during the time frame applicable to this case and at the present time. He is also expected to testify as to the recognized standard of acceptable professional practice for a physician such as Dr. McLean in treating a patient like Mr. Blackburn in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Patel is expected to testify that Dr. McLean acted reasonably and did not violate the recognized standard of acceptable professional practice required of him in his care and treatment of Mr. Blackburn. Dr.

Patel is expected to testify that Dr. McLean did not negligently cause or contribute to any injury to Mr. Blackburn. Dr. Patel is expected to testify as to the health and medical conditions of Mr. Blackburn, causation, damages, issues raised by Plaintiff's expert witnesses, and other issues raised in the records, depositions, and/or other materials he has reviewed. Dr. Patel may also summarize and explain Mr. Blackburn's medical records.

Dr. Patel is expected to testify that Dr. McLean was not required to order a cardiac consult. He is expected to testify that ordering a cardiac consult would not have changed the outcome in this matter. Dr. Patel is expected to testify that based on the signs and symptoms Mr. Blackburn had on presentation he did not need to see a cardiologist. He is expected to testify that if he had been consulted he would not have done anything differently based on Mr. Blackburn's presentation.

Dr. Patel is expected to testify that the "Background" set forth in Plaintiff's Expert Disclosures does not accurately reflect Mr. Blackburn's condition or the care and treatment provided.

Dr. Patel is expected to testify that the signs and symptoms Mr. Blackburn presented to the Maury Regional Medical Center ER with were not consistent with aortic dissection or aortic aneurysm. Dr. Patel is expected to testify that Mr. Blackburn had a massive ascending aortic aneurysm, not an aortic dissection. He is expected to testify that Mr. Blackburn's complaints changed from chest pain to abdominal pain to epigastric pain and he was appropriately and timely worked up for those complaints. Dr. Patel is expected to testify that a massive ascending aortic aneurysm is very unusual in a 35 year old man, without Marfan's syndrome, without any known history of connective

tissue disease, and no family history of aortic aneurysm. Dr. Patel is expected to testify about the morbidity and mortality of a massive ascending aortic aneurysm like Mr. Blackburn had.

Dr. Patel is expected to testify that Dr. McLean formulated a good differential diagnosis. He is expected to testify that the standard of care did not require Dr. McLean to place aortic dissection as a probable and prominent potential diagnosis. However, dissection was part of Dr. McLean's differential.

Dr. Patel is expected to testify that there is no significant difference between the EKG obtained by EMS and the EKG performed in the ER. The EKGs were non-specific. He is expected to testify that the EKG does not indicate that there is ST elevation myocardial infarction. Dr. Patel is expected to testify that the EKG is not diagnostic of a heart attack. He is expected to testify that the EKG is not diagnostic of any problem with the aorta. Dr. Patel is expected to testify that there was no indication to consult a cardiologist based on the EKGs.

Dr. Patel is expected to testify that a CT scan was timely and appropriately ordered by Dr. McLean when indicated. He is expected to testify that Dr. McLean's work up of Mr. Blackburn was appropriate based on the facts and circumstances present at the time of his care and treatment.

Dr. Patel is expected to testify that Dr. McLean's orders were appropriate. He is expected to testify that Dr. McLean did not negligently delay any testing of Mr. Blackburn. Dr. Patel is expected to testify that Mr. Blackburn was stable and Dr. McLean had no reason to transfer him until he arrested and Dr. McLean received the results of the CT. Dr. Patel is expected to testify that Dr. McLean was not required to

suspect that Mr. Blackburn had an aortic dissection or aortic aneurysm based on the facts and circumstances present at the time of his care and treatment of Mr. Blackburn. He is expected to testify that Dr. McLean complied with the standard of care regarding the manner in which he treated Mr. Blackburn.

Dr. Patel is expected to testify that no cardiothoracic surgeon or cardiovascular surgeon was available at Maury Regional Medical Center on September 17, 2014. He is expected to testify that Mr. Blackburn would require transfer to Vanderbilt or another facility capable of performing surgery before the rupture considering the size of his ascending aortic aneurysm. Dr. Patel is expected to testify that it would be speculative to say that Mr. Blackburn could work and function normally even if he had survived surgery to repair the ascending aortic aneurysm. He is expected to testify that Mr. Blackburn would be at risk of future problems even if he had survived surgery to repair the ascending aortic aneurysm. Dr. Patel is expected to testify that it would be speculative to say that Mr. Blackburn would not have deficits if he survived surgery to repair the ascending aortic aneurysm.

Dr. Patel is expected to testify that earlier diagnosis and treatment of Mr. Blackburn's massive ascending aortic aneurysm by Dr. McLean would not have prevented his death. Dr. Patel is expected to testify that there was no indication that Mr. Blackburn required surgery prior to his arrest and the results of the CT were obtained. Mr. Blackburn had a massive aneurysm.

Dr. Patel is expected to testify that Dr. McLean did not negligently cause or contribute to any injury to Mr. Blackburn or to his death.

Dr. Patel disagrees with the standard of care, causation, and damage opinions by Keith Allen, M.D. and Richard M. Sobel, M.D. set forth in Plaintiff's Expert Disclosure. He is expected to comment upon and rebut the expected opinions and criticisms of Plaintiff's expert witnesses.

Dr. Patel is expected to testify that no negligent act or omission by Dr. McLean caused or contributed to Mr. Blackburn's death. Dr. Patel is expected to testify that no negligent act or omission or lack of due care on the part of Dr. McLean caused or contributed to any injury to Mr. Blackburn. He is expected to testify that the ascending aortic aneurysm ruptured into Mr. Blackburn's pericardium causing his death.

This is simply a summary of Dr. Patel's expected testimony and opinions. Dr. Patel may have other opinions to express in this case and he reserves the right to express further opinions. Dr. Patel will testify to a reasonable degree of medical certainty.

BRYAN SHARPE, M.D.

Bryan Sharpe, M.D. ("Dr. Sharpe") is a physician specializing in emergency medicine. Dr. Sharpe practices emergency medicine in Hermitage, Tennessee. He is licensed to practice medicine in the State of Tennessee. He was licensed and practicing medicine in the State of Tennessee during the year of and year preceding the alleged malpractice in this case. He is being offered as an expert in the fields of emergency medicine, standard of care, causation, and damages. A detailed description of his qualifications is contained in the Curriculum Vitae attached hereto as **Exhibit D**.

As grounds for his opinions, Dr. Sharpe relies upon the pleadings, medical records, depositions, as well as his training, education, background and experience. Dr. Sharpe has reviewed or may review the following documents in this matter:

1. Complaint;
2. Answer of Defendant Mark A. McLean, M.D.;
3. Medical Records of Maury Regional Medical Center;
4. Deposition of Stephen Barr, M.D.;
5. Deposition of Mark A. McLean, M.D.;
6. Deposition of Jennifer Owens, RN;
7. Deposition of Barry Charles Blackburn;
8. Deposition of Courtney Blackburn Jeter;
9. Deposition of Crystal Blackburn;
10. Deposition of Jennifer Gill; and
11. Plaintiff's Rule 26 Disclosures as to all Defendants.

Dr. Sharpe may also review other lay and expert depositions and affidavits, and/or other documents that have been or will be taken, generated, filed, or provided in the case.

If called as an expert witness, Dr. Sharpe is expected to testify regarding the recognized standard of acceptable professional practice for an emergency room physician such as Dr. McLean in treating a patient like Mr. Blackburn, the health and medical conditions of Mr. Blackburn, causation, damages, issues raised by Plaintiff's expert witnesses, and other issues raised in the records, depositions, and/or other

materials he has reviewed. Dr. Sharpe may also summarize and explain Mr. Blackburn's medical records. Dr. Sharpe is expected to testify as follows:

Dr. Sharpe is familiar with the recognized standard of acceptable professional practice required of a physician practicing emergency medicine such as Dr. McLean in the care and treatment of patients in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Sharpe is expected to testify that Dr. McLean acted reasonably and did not violate the recognized standard of acceptable professional practice required of him in his care and treatment of Mr. Blackburn. Dr. Sharpe is expected to testify that Dr. McLean did not negligently cause or contribute to any injury to Mr. Blackburn.

Dr. Sharpe disagrees with the standard of care, causation, and damage opinions by Keith Allen, M.D. and Richard M. Sobel, M.D. set forth in Plaintiff's Expert Disclosure. He is expected to comment upon and rebut the expected opinions and criticisms of Plaintiff's expert witnesses.

Dr. Sharpe is expected to testify that the "Background" set forth in Plaintiff's Expert Disclosures does not accurately reflect Mr. Blackburn's condition or the care and treatment provided.

Dr. Sharpe is expected to testify that Dr. McLean's differential diagnosis was appropriate. He is expected to testify that the standard of care did not require Dr. McLean to place aortic dissection as a probable and prominent potential diagnosis. However, dissection was part of Dr. McLean's differential.

He is expected to testify that that there is no significant difference between the EKG obtained by EMS and the EKG performed in the ER. He is expected to testify that

the EKG does not indicate that there is ST elevation myocardial infarction. He is expected to testify that the standard of care did not require Dr. McLean to order a cardiac consult.

Dr. Sharpe is expected to testify that Dr. McLean timely ordered a CT based on the facts and circumstances present at the time of his care and treatment of Mr. Blackburn. He is expected to testify that Dr. McLean's work up of Mr. Blackburn was appropriate based on the facts and circumstances present at the time of his care and treatment. He is expected to testify that Dr. McLean's orders were appropriate. He is expected to testify that Dr. McLean did not negligently delay any testing of Mr. Blackburn. Dr. Sharpe is expected to testify that Mr. Blackburn was stable and Dr. McLean had no reason to transfer him until he coded and Dr. McLean received the results of the CT. Dr. Sharpe is expected to testify that Dr. McLean was not required to suspect that Mr. Blackburn had an aortic dissection based on the facts and circumstances present at the time of his care and treatment of Mr. Blackburn. Dr. Sharpe is expected to testify that Dr. McLean complied with the standard of care regarding the manner in which he treated Mr. Blackburn.

Dr. Sharpe is expected to testify that no negligent act or omission by Dr. McLean caused or contributed to Mr. Blackburn's death. Dr. Sharpe is expected to testify that no negligent act or omission or lack of due care on the part of Dr. McLean caused or contributed to any injury to Mr. Blackburn.

Dr. Sharpe is expected to comment upon and refute the expected opinions of Plaintiff's expert witnesses.

This is simply a summary of Dr. Sharpe's expected testimony and opinions. Dr. Sharpe may have other opinions to express in this case and he reserves the right to express further opinions. Dr. Sharpe will testify to a reasonable degree of medical certainty.

KEVIN BONNER, M.D.

Kevin Bonner, M.D. ("Dr. Bonner") is a physician specializing in emergency medicine. Dr. Bonner practices emergency medicine in Nashville, Tennessee. He is licensed to practice medicine in the State of Tennessee. He was licensed and practicing medicine in the State of Tennessee during the year of and year preceding the alleged malpractice in this case. He is being offered as an expert in the fields of emergency medicine, standard of care, causation, and damages. A detailed description of his qualifications is contained in the Curriculum Vitae attached hereto as **Exhibit E**.

As grounds for his opinions, Dr. Bonner relies upon the pleadings, medical records, depositions, as well as his training, education, background and experience. Dr. Bonner has reviewed or may review the following documents in this matter:

1. Complaint;
2. Answer of Defendant Mark A. McLean, M.D.;
3. Medical Records of Maury Regional Medical Center;
4. Deposition of Stephen Barr, M.D.;
5. Deposition of Mark A. McLean, M.D.;
6. Deposition of Jennifer Owens, RN;
7. Deposition of Barry Charles Blackburn;
8. Deposition of Courtney Blackburn Jeter;

9. Deposition of Crystal Blackburn;

10. Deposition of Jennifer Gill; and

11. Plaintiff's Rule 26 Disclosures as to all Defendants.

Dr. Bonner may also review other lay and expert depositions and affidavits, and/or other documents that have been or will be taken, generated, filed, or provided in the case.

If called as an expert witness, Dr. Bonner is expected to testify regarding the recognized standard of acceptable professional practice for an emergency medicine physician such as Dr. McLean in treating a patient like Mr. Blackburn, the health and medical conditions of Mr. Blackburn, causation, damages, issues raised by Plaintiff's expert witnesses, and other issues raised in the records, depositions, and/or other materials he has reviewed. Dr. Bonner may also summarize and explain Mr. Blackburn's medical records. Dr. Bonner is expected to testify as follows:

Dr. Bonner is familiar with the recognized standard of acceptable professional practice required of a physician practicing emergency medicine such as Dr. McLean in the care and treatment of patients in Columbia, Maury County, Tennessee and/or in a similar community during the time frame applicable to this case and at the present time. Dr. Bonner is expected to testify that Dr. McLean acted reasonably and did not violate the recognized standard of acceptable professional practice required of him in his care and treatment of Mr. Blackburn. Dr. Bonner is expected to testify that Dr. McLean did not negligently cause or contribute to any injury to Mr. Blackburn.

Dr. Bonner disagrees with the standard of care, causation, and damage opinions by Keith Allen, M.D. and Richard M. Sobel, M.D. set forth in Plaintiff's Expert Disclosure.

He is expected to comment upon and rebut the expected opinions and criticisms of Plaintiff's expert witnesses.

Dr. Bonner is expected to testify that the "Background" set forth in Plaintiff's Expert Disclosures does not accurately reflect Mr. Blackburn's condition or the care and treatment provided.

Dr. Bonner is expected to testify that Dr. McLean's differential diagnosis was appropriate. He is expected to testify that the standard of care did not require Dr. McLean to place aortic dissection as a probable and prominent potential diagnosis. However, dissection was part of Dr. McLean's differential. He is expected to testify that there is no significant difference between the EKG obtained by EMS and the EKG performed in the ER. He is expected to testify that the EKG does not indicate that there is ST elevation myocardial infarction. He is expected to testify that the standard of care did not require Dr. McLean to order a cardiac consult. Dr. Bonner is expected to testify that Dr. McLean timely ordered a CT based on the facts and circumstances present at the time of his care and treatment of Mr. Blackburn. He is expected to testify that Dr. McLean's work up of Mr. Blackburn was appropriate based on the facts and circumstances present at the time of his care and treatment. He is expected to testify that Dr. McLean's orders were appropriate. He is expected to testify that Dr. McLean did not negligently delay any testing of Mr. Blackburn. Dr. Bonner is expected to testify that Mr. Blackburn was stable and Dr. McLean had no reason to transfer him until he coded and Dr. McLean received the results of the CT. Dr. Bonner is expected to testify that Dr. McLean was not required to suspect that Mr. Blackburn had an aortic dissection based on the facts and circumstances present at the time of his care and treatment of

Mr. Blackburn. Dr. Bonner is expected to testify that Dr. McLean complied with the standard of care regarding the manner in which he treated Mr. Blackburn.

Dr. Bonner is expected to testify that no negligent act or omission by Dr. McLean caused or contributed to Mr. Blackburn's death. Dr. Bonner is expected to testify that no negligent act or omission or lack of due care on the part of Dr. McLean caused or contributed to any injury to Mr. Blackburn.

Dr. Bonner is expected to comment upon and refute the expected opinions of Plaintiff's expert witnesses.

This is simply a summary of Dr. Bonner's expected testimony and opinions. Dr. Bonner may have other opinions to express in this case and he reserves the right to express further opinions. Dr. Bonner will testify to a reasonable degree of medical certainty.

KEITH TONKIN, M.D.

Keith Tonkin, M.D. ("Dr. Tonkin") is a physician specializing in radiology. Dr. Tonkin practices diagnostic radiology and interventional radiology in Germantown, Tennessee; Memphis, Tennessee; Collierville, Tennessee; Southaven, Mississippi; and Arkansas. His field of expertise is cardiovascular imaging. He is licensed to practice medicine in Tennessee, Arkansas, Mississippi, and California. He was licensed and practicing medicine in the State of Tennessee during the year of and year preceding the alleged malpractice in this case. He is being offered as an expert in the fields of radiology, causation, and damages. A detailed description of his qualifications is contained in the Curriculum Vitae attached hereto as **Exhibit F**.

As grounds for his opinions, Dr. Tonkin relies upon the pleadings, medical records, depositions, as well as his training, education, background and experience. Dr. Tonkin has reviewed or may review the following documents in this matter:

1. Complaint;
2. Answer of Defendant Mark A. McLean, M.D.;
3. Medical Records of Maury Regional Medical Center;
4. Deposition of Stephen Barr, M.D.;
5. Deposition of Mark A. McLean, M.D.;
6. Deposition of Jennifer Owens, RN;
7. Deposition of Barry Charles Blackburn;
8. Deposition of Courtney Blackburn Jeter;
9. Deposition of Crystal Blackburn;
10. Deposition of Jennifer Gill; and
11. Plaintiff's Rule 26 Disclosures as to all Defendants.

Dr. Tonkin may also review other lay and expert depositions and affidavits, and/or other documents that have been or will be taken, generated, filed, or provided in the case.

If called as an expert witness, Dr. Tonkin is expected to testify regarding the health and medical conditions of Mr. Blackburn, issues raised by Plaintiff's expert witnesses, and other issues raised in the records, depositions, and/or other materials he has reviewed. Dr. Tonkin may also summarize and explain Mr. Blackburn's medical records. Dr. Tonkin is expected to testify as follows:

Dr. Tonkin is expected to testify regarding the chest x-ray obtained while Mr. Blackburn was in the ER. Dr. Tonkin is expected to testify that Mr. Blackburn was rotated when the chest x-ray was taken. He is expected to testify as to the significance of a patient being rotated when a chest x-ray is obtained. He is expected to testify that there is nothing on the chest x-ray to alert Dr. McLean or any other provider that Mr. Blackburn had a cardiac or aortic issue.

Dr. Tonkin is expected to testify regarding the CT that was obtained while Mr. Blackburn was in the ER. He is expected to testify that Mr. Blackburn had a massive 7.9 cm ascending aortic aneurysm and blood in the pericardium. Dr. Tonkin is expected to testify that Mr. Blackburn's ascending aortic aneurysm is one of the largest that he has ever seen. He is expected to testify that a massive ascending aortic aneurysm is not common for a 35 year old man with no known history of connective tissue disease, history of hypertension, or family history of aortic aneurysm.

This is simply a summary of Dr. Tonkin's expected testimony and opinions. Dr. Tonkin may have other opinions to express in this case and he reserves the right to express further opinions. Dr. Tonkin will testify to a reasonable degree of medical certainty.

TREATING PHYSICIANS

Although not expert witnesses defined by Tennessee law, to avoid any claim of surprise by Plaintiff, Defendant gives notice to Plaintiff that he may call one or more of Mr. Blackburn's treating physicians and healthcare providers, including, but not limited to, Stephen Barr, M.D.; James S. Dean, M.D.; Joel M. Phares, M.D.; Kevin Maquiling,

M.D.; Gary Podgorski, M.D.; Brice T. Boughner, M.D.; Brian McCandless, EMT-P; and Jeffrey Sharp, EMT-IV.

If called as a witness to testify, Cody Blackburn's treating medical providers are expected to testify consistently with their medical records and their deposition testimony. They may also address issues regarding proximate causation. This testimony is expected to be given to a reasonable degree of medical certainty.

MARK A. MCLEAN, M.D.

Mark A. McLean, M.D. ("Dr. McLean") is an emergency medicine physician practicing in Columbia, Maury County, Tennessee at the time of the alleged malpractice. Dr. McLean will be offered as an expert on the recognized standard of acceptable professional practice required of an emergency medicine physician practicing in Columbia, Maury County, Tennessee or a similar community, causation, and damages. A copy of Dr. McLean's CV will be supplied upon request.

Dr. McLean was licensed to practice medicine in the State of Tennessee and actually practiced his specialty of emergency medicine during the year of and year preceding the alleged malpractice in this case. Dr. McLean is familiar with and knows the recognized standard of acceptable professional practice for an emergency medicine physician practicing in Columbia, Maury County, Tennessee or a similar community during all times relevant to this matter.

Dr. McLean is expected to testify that he fully complied with the recognized standard of acceptable professional practice required of him in this case. Dr. McLean is expected to testify that he did not negligently cause or contribute to any injury to Mr. Blackburn. Dr. McLean is expected to testify that Mr. Blackburn's massive ascending

aortic aneurysm ruptured into the pericardium causing his death. Dr. McLean is expected to testify that he did not have an aortic dissection.

Dr. McLean is expected to rebut the opinions of Plaintiff's expert witnesses. As grounds for his opinions, Dr. McLean will rely upon his education, training, experience, the medical records, and the depositions taken in this matter. Dr. McLean will testify to a reasonable degree of medical certainty.

EXPERTS OF CO-DEFENDANTS

Dr. McLean incorporates by reference, the experts disclosed by the Co-Defendant to the extent that they are not adverse to him.

PLAINTIFF'S EXPERTS

Defendant may call the experts of the Plaintiff to establish standard of care violations and causation on the part of the Defendants who may be dismissed or who may settle before trial. Defendant incorporates by reference the Plaintiff's Rule 26 Expert Disclosure to the extent it is not adverse to him.

Respectfully Submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

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MICHELLE GREENWAY SELLERS (BPR #20769)
105 S. Highland Avenue
Jackson, TN 38301
731.423.2414
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Msellers@raineykizer.com

Attorneys for Defendant Mark A. McLean, M.D.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Joe Bednarz, Jr. (BPR #18540)
Bednarz & Bednarz
100 Bluegrass Commons Blvd, Suite 330
Hendersonville, TN 37075
615.256.0100

Attorney for Plaintiffs

Robert L. Trentham (BPR #2257)
Taylor B. Mayes (BPR #19495)
Butler Snow, LLP
150 Third Avenue South, Suite 1600
Nashville, TN 37201
615.651.6700

Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

This the 14th day of July, 2017. Michelle Sellers

LARKIN J. DANIELS, M.D.

Cardio-Thoracic & Vascular Surgical Associates, P.C.
1855 Springhill Avenue • Mobile, Al 36607
(251) 471-3544 • *FAX (251) 476-7254*

CURRENT POSITION

CARDIO-THORACIC AND VASCULAR SURGEON — *August,2002 - present*
Cardio-Thoracic & Vascular Surgical Associates, P.C. — *Mobile, Alabama*

UNDERGRADUATE EDUCATION

BACHELOR OF SCIENCE, BIOLOGY — *1987*
Birmingham-Southern College — *Birmingham, Alabama*

MEDICAL EDUCATION

MEDICAL DOCTORATE — *1992*
University of Alabama School of Medicine — *Birmingham, Alabama*

POST GRADUATE TRAINING

CARDIO-THORACIC SURGERY RESIDENCY — *2000-2002*
Duke University Medical Center — *Durham, North Carolina*

CHIEF RESIDENT - GENERAL SURGERY — *1999-2000*
Duke University Medical Center — *Durham, North Carolina*

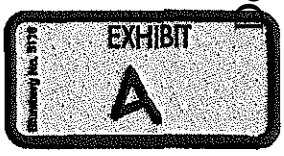
SENIOR ASSISTANT SURGICAL RESIDENT — *1997-99*
Duke University Medical Center — *Durham, North Carolina*

PHD STUDENT IN IMMUNOLOGY — *1994-97*
RESEARCH FELLOW
Duke University — *Durham, North Carolina*
Comprehensive Exams completed — *April, 1997*

JUNIOR ASSISTANT SURGICAL RESIDENT — *1993-94*
Duke University Medical Center — *Durham, North Carolina*

GENERAL SURGICAL INTERNSHIP — *1992-93*
Duke University Medical Center — *Durham, North Carolina*

HARVARD SURGICAL RESEARCH FELLOW — *1989-90*
Massachusetts General Hospital — *Boston, Massachusetts*



SCHOOL AWARDS, HONORARIES

COLLEGE

Eagle Scout Scholarship
Oak Ridge National Laboratory Research Scholarship
Omicron Delta Kappa
Magma Cum Laude upon Graduation

MEDICAL SCHOOL

- *Fellow - Stanley J. Sarnoff Foundation for Research in Cardiovascular Disease (1989-90),*
- *Harvard University Surgical Research Fellow, Department of Surgery Massachusetts General Hospital (1989-90).*
- *Recognized for Outstanding Achievement - Board of Trustees, Birmingham-Southern College (1989).*

POST GRADUATE

- *Nominated as Best Housestaff Teacher by Duke Medical Students* — *1994, 1998, 1999, 2000*

SPECIALTY CERTIFICATION & LICENSURE

AMERICAN BOARD OF THORACIC SURGERY — *Certificate # 6778*
Recertification 2012, Certificate Expires 2023

NATIONAL BOARD OF MEDICAL EXAMINERS
Part I-Passed, June, 1989, Part II Passed September, 1991, Part III Passed April, 1993.

AMERICAN BOARD OF SURGERY — *Certificate # 057530*

STATE OF ALABAMA — *License # 00024489*
STATE OF NORTH CAROLINA — *License #54442*

TEACHING

INSTRUCTOR, ACS COURSE — *1993-2002*
Advanced Trauma Life Support

TEACHING RESIDENT - SURGERY — *1994*
Duke University Medical Center — *Durham, North Carolina*

PROFESSIONAL ASSOCIATIONS

AMERICAN COLLEGE OF SURGEONS
GENERAL THORACIC SURGICAL CLUB
MEDICAL SOCIETY OF MOBILE COUNTY, INC.
MEDICAL ASSOCIATION OF THE STATE OF ALABAMA
SABISTON SURGICAL SOCIETY
SOUTHERN THORACIC SURGICAL ASSOCIATION

PERSONAL INFORMATION

DATE OF BIRTH:	April 27, 1965
BIRTHPLACE:	Mobile, Alabama
HOME ADDRESS:	4827 Audubon Drive
	Mobile, Alabama 36619
HOME PHONE:	251-666-1329
MARITAL STATUS:	Married
WIFE:	Kimberly C. Daniels
CHILDREN:	Allison Caroline Daniels , *born 11/10/98*
	John Collins Daniels, *born 10/17/02*

RESEARCH FUNDING

Academic Surgery Research Training Grant-National Heart, Lung, and Blood Institute-Sabiston Jr., D.C. (P.I.), #5 T32HL07691, 1994-96.

Procoagulant Membrane Activity in Xenotransplantation. Daniels, L.J. National Research Service Award-National Heart, Lung, and Blood Institute, #1 F32 HL09633-01, 1996-97.

JOURNAL PUBLICATIONS

Daniels, L.J., Balderson, S.S., Onaitis, M.W. and D'Amico, T.A. Thoracoscopic Lobectomy as a Safe and Effective Strategy for Clinical Stage I Lung Cancer. *Annals of Thoracic Surgery* 74:860-864,,2002

Brody, F., Chekan, E., **Daniels**, L., Pappas, T., and Eubanks S. Conversion Factors for Laparoscopic Splenectomies for Immune Thrombocytopenia Purpura. *Journal of Endoscopic Surgery, 1998.*

Lin, S.S, Weidner, B.C., Byrne, G.W., Diamond, L.E., Lawson, J.H., Hoopes, C.W., **Daniels, L.J.**, Daggett, C.W., Parker, W., Harland, R.C., Davis, R.D., Bollinger, R.R., Logan J.S., Platt J.L.: The Role of Antibodies in Acute Vascular Rejection of Pig-to-Baboon Cardiac Transplants. *J. Clin.Invest*. **101**, 1745-1756, 1998.

Lawson, J.H., **Daniels, L.J.**, and Platt J.L. : Thrombomodulin Activity in Isolated Blood Vessels: Species Specificity and Implication for Porcine to Human Xenotransplantation. *Circulation*, 1998

Daniels, L.J., and Platt.J.L. Hyperacute Xenograft Rejection as an Immunologic Barrier to Xenotransplantation. *Kidney International* **51**, Suppl. 58: S-28-S-35, 1997.

JOURNAL PUBLICATIONS *(Continued)*

Lawson, J.H., **Daniels, L.J.**, Hoopes, C.W., Lin, S.S., Weidner, B.C., McCurry, K.R., Davis, R.D., Bollinger, R.R., Harland, R.C., Logan, J., Diamond, L.E., Martin, M., Byrne G., and Platt, J.L.: The Role of Transgenic Expression of Human Complement Regulatory Proteins in Discordant Xenotransplantation. *Surgical Forum*, XLVIII, 487-489, 1997.

Lawson, J.H., **Daniels, L.J.**, and Platt, J.L. The Evaluation of Thrombomodulin Activity in Porcine to Human Xenotransplantation. *Transplantation Proceedings* **28**, 884-885, 1997.

Lin, S.S., Kooyman, D.L., **Daniels, L.J.**, Daggett, C.W., Parker, W., Lawson, J.H., Hoopes, C.W. Gullotto, C., Li, L., Birch, P. The Role of Natural anti-Gala 1-3 Gal antibodies in hyperacute rejection of pig-to-baboon cardiac xenotransplants. *Transplant Immunology* **5**: 212-218, 1997.

McCurry, K.R., Parker, W., Cotterell, A.H., Weidner, B.C., Lin, S.S., **Daniels, L.J.** Holzknecht, Z.E. and Platt, J.L. Humoral Responses in Pif-to-Baboon Cardiac Transplantation: Implications for the Pathogenesis and Treatment of Acute Vascular Rejection and for Accommodation. *Human Immunology* 58: 91-105, 1997.

Shugart, L.S., McCarthy, J.N., Jiminez, B.L., **Daniels, L.J.**, Analysis of Adduct Formation in the Bluegill Sunfish Between Benzo(a)pyrene and DNA of the Liver and Hemoglobin of the Erythrocyte. *Aquatic Toxicology* 9(6): 319-332, 1987.

ABSTRACTS

Daniels, L.J., Balderson, S.S., Onaitis, M.W., and D'Amico, T.A. Thoracoscopic Lobectomy as a Safe and Effective Strategy for Clinical Stage I Lung Cancer. 48th Meeting of the Southern Thoracic Surgical Association 2001.

Daniels, L.J., Brody, F., Chekan, E., Pappas, T.,and Eubanks, S. Conversion Factors for Laparoscopic Splenectomies for Immune Thrombocytopenia Purpura. American College of Surgeons, North Carolina Chapter Meeting, 1998.

Lawson, J.H., **Daniels, L.J.**, Hoopes, C.W., Lin, S.S., Weidner, B.C., McCurry, K.R., Davis, R.D., Bollinger, R.R., Harland, R.C. Logan, J., and Platt J.L.: The Role of Transgenic Expression of Human Complement Regulatory Proteins in Discordant Xenotransplantation. *Surgical Forum*, 1997

Lawson, J.H., Diamond, L.E., Martin, M.J., Hoopes, C.W., Weidner, B.C., Lin, S.S., **Daniels, L.J.**, Harland, R.C., Bollinger, R.R., Logan, J., and Platt, J.L.: Expression of Human Complement Regulatory Proteins CD59 and Decay Accelerating Factor (DAF) Prolongs Graft Survival and Physiologic Function in Pig-to-Baboon Kidney Transplantation. 4th International Congress for Xenotransplantation, 1997.

Lin, S.S., Byrne, G.W., Diamond, L.E., Weidner, B.C., Hoopes, C.H. **Daniels, L.J.**, Lawson, J.H., Daggett, C.W., McCurry,K.R., Parker, W., Aujero, M., Harland, R.C., Davis, R.D., Bollinger R.R., Logan, J.S., and Platt J.L. : The Role of Antibodies in the Pathogenesis of Acute Vascular Xenograft Rejection. 4th International Congress for Xenotransplantation, 1997.

ABSTRACTS *(Continued)*

Lawson, J.H., **Daniels, L.J.**, Sorrell, R.D., Kalady, M.F., Morowitz, M.J., and Platt, J.L.: Molecular Discordance of Porcine Thrombomodulin with Human Protein C and Human Thrombin. 4th International Congress for Xenotransplantation, 1997.

Lin, S.S., Kooyman, D.L., **Daniels, L.J.**, Daggett, C.W., Parker, W., Hoopes, C.W., Lawson, J.H. Li, L., Birch, P., Velardo, M.A., Gullotto, C., Aujero, M., Davis, R.D., Logan, J., and Platt, J.L.: The Role of Natural Anti-Gal □ 1-3Gal Antibodies in Hyperacute Xenograft Rejection. 4th International Congress for Xenotransplantation, 1997.

Daniels, L.J., Lawson, J.H., Morowitz, M.J., and Platt, J.L.: Discordant Vascularized Xenograft Thrombosis: A Study of Endothelial Cell Membrane Activation Indicative of a Shift to a Procoagulant Phenotype. Society of University Surgeons, 1997.

Lawson, J.H., Diamond, L.E., Lin, S.S., Hoopes, C.H., **Daniels, L.J.**, Morowitz, M.J., Kalady, M.F., Martin, M.J., Davis, R.D., Logan, J.S., and Platt, J.L.: Human Membrane Cofactor Protein (CD46) Prevents Hyperacute Xenograft Rejection in Porcine-to-Baboon Cardiac Xenotransplantations. *Circulation*, **D194**, I-566, 1997.

Lawson, J.H., **Daniels, L.J.**, and Platt., J.L.: Thrombomodulin Activity in Isolated Blood Vessels: Vascular Distribution, Species Specificity and Implications for Porcine to Human Xenotransplantation. *Circulation*, **94**, I-636, 1996.

Daniels, L.J., Lawson, J.H., and Plat, J.L. : Human Complement Activation Supports the Induction of Prothrombinase Activity in a Model of Porcine to Human Xenotransplantations.*Circulation*, **94**, I-636, 1996.

Daniels, L.J., Lawson, J.H., and Platt, J.L.: Human Complement Activation Supports the Induction of Porcine Endothelial Cell Prothrombinase Activity in a Model of Pig to Human Xenotransplantation. Gordon Research Conference on Hemostasis, 1996.

Lawson, J.H., **Daniels, L.J.**, and Platt, J.L. : The Evaluation of Thrombomodulin Activity in Porcine to Human Xenotransplantation. XVI International Congress of the Transplantation Society. Barcelona, Spain 1996.

Hagmaier, R.M., Nelson, G.A., **Daniels, L.J.**, Riker, A.I. : Successful Removal of a Giant Intrathoracic Lipoma: A Case Report and Review of the Literature. Cases J. 2008 Aug 12; 1(1): 87. [Epub ahead of print

POSTER PRESENTATIONS

Daniels, L.J., O'Halloran, E.K., Onaitis, M.W., Eubanks, S. Laparoscopic Heller Myotomy as an Effective and Durable Treatment for Achalasia. Digestive and Disease Week, 2001.

Daniels,, L.J., Lawson, J.H., and Platt, J.L.: Human Complement Activation Support the Induction of Porcine Endothelial Cell Prothrombinase Activity in a Model of Pig to Human Xenotransplantation. Gordon Research Conference on Hemostasis, 1996.

TEXTBOOK CHAPTERS

Daniels, L.J. Transplantation., in *Surgical Intensive Care Handbook.* Milano C. and Clary, B. Fifth Edition, Mosby (2000).

Daniels, L.J. and Chekan E.G. Laparoscopic Cholecystectomy, in *Atlas of Laparoscopic Surgery*, Second Edition, Pappas, T.N., Cheken, E.G. and Eubanks, S., Appleton & Lange (1999).

INVITED LECTURES

Mobile Infirmary Medical Center/USA Medical Center Combined Grand Rounds
August 23, 2005
"Current Role of Surgery in The Treatment of Lung Cancer"

Mobile Infirmary Medical Center Grand Rounds
December 19, 2007
"Aortic Dissection and Rupture"

Mobile Infirmary Nursing Staff
June 2, 2008
"Primer on Lung Cancer"

USA Mitchell Cancer Institute
Oncology Outlook 2008
August 3, 2008
"Surgical Management of Lung Cancer"

USA Mitchell Cancer Institute
Oncology Outlook 2010
April 24, 2010
"Surgical Treatment of Lung Cancer"

Mobile County Health Department
Public Forum on Smoking Ban for Mobile County Restaurants
April 30, 2010
"Effects of Secondhand Smoke on Cardiovascular System"

Springhill Medical Center Cancer Conference
April 18, 2011
"Mediastinoscopy"

AORN of South Alabama
University of South Alabama Nursing School
August 20, 2011
"Updates in Thoracic Surgery"

USA Mitchell Cancer Institute
Oncology Outlook 2013
March 15,2013
"The Role of Mediastinoscopy for Lung Cancer"

Mobile Infirmary Health Grand Rounds
January 17, 2017,
"daVinci Robotic Speciality Procedure"

CONSULTING

Consultant for Maquet Cardiovascular, LLC
November, 2010 (Single Interaction)

HOSPITAL AFFILIATIONS

Mobile Infirmary Medical Center
Mobile, Alabama

Providence Hospital
Mobile, Alabama

Springhill Medical Center
Mobile, Alabama

Thomas Hospital
Fairhope, Alabama

University of South Alabama Mitchell Cancer Institute
Mobile, Alabama

ARTHUR GRIMBALL, M.D.

CURRICULUM VITAE

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(731) 424-5080

EDUCATION:

1978	M.D.	Medical University of South Carolina
1974	B.A.	University of Virginia

PROFESSIONAL TRAINING:

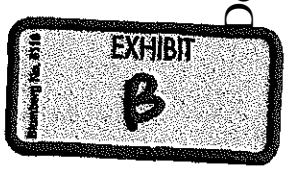
1983-1985:	Residency University of Kentucky Lexington, Kentucky
1979-1983:	Residency Vanderbilt University Medical Center Nashville, TN General Surgery
1978-1979:	Internship Vanderbilt University Medical Center Nashville, TN General surgery

LICENSES AND CERTIFICATIONS:

American Board of Surgery	#29817	September 11, 1984
American Board of Thoracic Surgery	#4369	May 24, 1986
Tennessee Medical License	#MD020743	

WORK HISTORY:

1985-1990:	Bradham, Locklair and Grimball Charleston, South Carolina Private Practice Cardiac, Thoracic & Vascular Surgery
1990-1992:	Cardiovascular Surgery Center Jackson, TN Cardiothoracic Surgeon
1993-Present:	CardioThoracic Surgery Center, P.L.C Jackson, TN Cardiothoracic Surgeon



PUBLICATIONS:

"Traumatic Aortic Valve Rupture", Journal of South Carolina Medical Association, February 1987, pp. 62-64 (with R.R. Bradham and P.R. Locklair, Jr.)

"Utility of Lesser Saphenous Vein As a Substitute Conduit", Journal of South Carolina Medical Association, May 1989, pp. 226-227 (with R.R. Bradham and P.R. Locklair, Jr.)

"Descending Thoracic Aorta to Femoral Artery Bypass", Journal of South Carolina Medical Association, June 1989, pp. 283-285 (with R.R. Bradham and P.R. Locklair, Jr.)

PROFESSIONAL ASSOCIATIONS:

Southern Thoracic Surgical Association
Society of Thoracic Surgeons
H. William Scott, Jr. Society
Tennessee State Medical Association
West Tennessee Consolidated Medical Assembly
American College of Surgeons

STAFF APPOINTMENTS:

Jackson-Madison County General Hospital, Jackson, TN

Taral N Patel, MD FACC FSCAI

3816 Crystal Spring Lane
Hermitage, TN 37076

Education:

1990 - 1995	University of Maryland, College Park, MD BS Aerospace Engineering, May 1995
1995 - 2000	Mount Sinai School of Medicine, New York, NY MD, June 2000

Postdoctoral Training:

6.2000 – 7.2001	Intern, Internal Medicine, Duke University Medical Center, Durham, NC.
7.2001 – 7.2003	Assistant Resident, Internal Medicine, Duke University Medical Center, Durham, NC.
7.2003 – 7.2006	Clinical Fellow, Cardiovascular Medicine, Cleveland Clinic Foundation, Cleveland, OH.
7.2006 – 7.2007	Clinical Fellow, Coronary and Peripheral Vascular Intervention, St. Luke's Hospital Mid-America Heart Institute, Kansas City, MO.

Certification:

2004	ABIM - Diplomate in Internal Medicine
2006	ABIM - Diplomate in Cardiovascular Disease
2009	ABIM - Diplomate in Interventional Cardiology
2009	CBNC - Diplomate of the Certification Board of Nuclear Cardiology
2009	ABVM - Diplomate in Endovascular Medicine

Licensure:

2007	Georgia – License # 59491
2009	South Carolina – License # 31957
2009	North Carolina – License # 2009-01797
2013	Tennessee – License # 49462

Employment History:

7.2007 - 7.2009	Staff Interventional Cardiologist (coronary and peripheral vascular), Kennestone Heart Physicians, Marietta, GA.
7.2009 - 10.2012	Staff Interventional Cardiologist (coronary and peripheral vascular), Carolina Heart Physicians, Lancaster, SC.
10.2012 - Present	Locum Tenens Interventional Cardiology, Moonlighting Solutions, Greensboro, NC.

1.2013 - Present Staff Interventional Cardiologist (coronary and peripheral vascular), Centennial Heart Cardiovascular Consultants, Hermitage, TN.

Honors:

Medical School:

Alpha Omega Alpha

Alpha Omega Alpha Research Fellowship, March 1999

American Digestive Health Foundation Research Fellowship, April 1999

American Gastroenterological Association/Wyeth-Ayerst Resident and Fellows Reporter Program Award, May 1999

Mount Sinai Summer Research Fellowship, Summer 1998

Undergraduate School:

Tau Beta Pi Engineering Honor Society

Sigma Gamma Tau Aerospace Engineering Honor Society

Dean's List, Fall 1992-Spring 1995

Publications:

1. Frutkin AD, Mehta SK, Patel TN, Menon P, Safley DM, House J, Barth CW, Grantham AJ, Marso SP. Outcomes of 1090 Consecutive, Elective, Non-selected Percutaneous Coronary Interventions at a Community Hospital Without Onsite Cardiac Surgery. Am J Cardiol 2007;100:1114-1118.

2. Patel TN, Shishehbor, MH, Bhatt DL. A Review of High-Dose Statin Therapy – Targeting Cholesterol and Inflammation in Atherosclerosis. Eur Heart J. 2007;664-672.

3. Shishehbor MH, Patel TN, Bhatt DL. Treating Inflammation with Statins in Acute Coronary Syndromes – Are We There Yet?. Clev Clinic J Med 2006;73:760-766.

4. Patel TN, Kreindel M, Lincoff AM. Use of Ticlopidine and Cilostazol after Intracoronary Drug-Eluting Stent Placement in a Patient with Previous Clopidogrel-Induced Thrombotic Thrombocytopenic Purpura: A Case Report. J Invasive Cardiol 2006;18:E211-213.

5. Patel TN, Bavry AA, Kumbhani DJ, Ellis SG. A Meta-Analysis of Randomized Trials of Rescue Percutaneous Coronary Intervention After Failed Fibrinolysis. Am J Cardiol 2006;97:1685-1690.

6. Patel TN, Goldberg KC. Use of Aspirin and Ibuprofen Compared With Aspirin Alone and the Risk of Myocardial Infarction. Arch Intern Med 2004;164:852-856.

Book Chapters:

1. Patel TN, Bhatt DL. Coronary Artery Disease Demographics and Incidence, In: Topol EJ, Griffin BG, Rimmerman CM. The Cleveland Clinic Cardiology Board Review. Vol 1. Philadelphia: Lippincott Williams & Wilkins, 2006

2. Patel TN. Intraaortic Balloon Counterpulsation, In: Shishehbor MH, Christofferson R, Wang T, Penn MS, Topol EJ. Management of the Patient in the Coronary Care Unit. Philadelphia: Lippincott Williams & Wilkins, 2007.

Abstracts:

1. Rao S, Dadi D, Mehta S, Patel T, Marso S, Peterson E, Sanborn T, Klein L. Impact of Randomized Trials on Antithrombin Use Among Patients with non ST-Segment Elevation Acute Coronary Syndromes Undergoing Percutaneous Coronary Intervention in Clinical Practice: Data from the American College of Cardiology National Cardiovascular Data Registry (ACC-NCDR). American Heart Association Scientific Sessions 2007.

2. Kaminski M, Shishehbor M, Patel T, Anwaruddin S, Gorodeski E, Huang J, Askari A. Association of Peripheral Arterial Disease and All-Cause Mortality in Patients with Rheumatoid Arthritis. American College of Cardiology Annual Scientific Session. March 2007.

3. Patel T, Bavry A, Khumbhani D, Ellis S. Resuce Percutaneous Coronary Intervention after Failed Fibrinolysis: A Meta-Analysis of Randomized Controlled Trials. American College of Cardiology Annual Scientific Session. March 2006.

4. Patel T, Gurm H. Impact of Cyclooxygenase-2 Inhibition on Outcomes in the Setting of Percutaneous Coronary Intervention. American Heart Association Annual Scientific Sessions. November 2004.

5. Patel T, Goldberg K. Use of Aspirin and Ibuprofen Compared to Aspirin Alone American Heart Association Scientific Sessions. November 2003.

6. Babyatsky M, Jiang P, Lin J, Patel T, Chen A, Sauter B, Itzkowitz S. Cell Lineage-Specific Expression of Intestinal Trefoil Factor in Colon Carcinoma Cell Lines. Digestive Diseases Week, May 1999.

7. Lin J, Holzman I, Kozuma K, Patel T, Jiang P, Babyatsky M. Intestinal Trefoil Factor Gene Expression in Intestinal Epithelial Cell is not Regulated by Glucocorticoids. Society for Pediatric Research Annual Meeting, May 1999.

8. McLaughlin M, Phillips RA, Patel TN, Siu AL, David O, Buckley S, Marra T, Goldman ME. Prevalence and Treatment Patterns of Diastolic Filling Abnormalities in the Elderly. 5th World Congress on Heart Failure – Mechanisms and Management, May 11-14 1997.

9. Gopal AS, Babaeva SM, Patel TN, Roychoudry D, Butkevich A, Velarde G, King DL, Eng C, Desnick RJ, Goldman ME. 3D Echocardiography is Superior to 1D and 2D Echocardiography in Detecting Cardiac Infiltration in Fabry's Disease. 8th Annual Scientific Sessions – American Society of Echocardiography, June 18-20, 1997.

Research:

1. Site Co-Investigator – Atlantic C-PORT randomized trial, 2007-2009.
2. Site Co-Investigator – Champion-PCI randomized trial, 2008-2009.

Professional Associations:

American College of Cardiology
Alpha Omega Alpha
Society of Cardiac Angiography and Interventions
American Board of Vascular Medicine

July 1985—July 1987	*University of Tennessee, Chattanooga Unit, Erlanger Medical Center*	*Chattanooga, Tennessee*

Resident in General Surgery
Two year program completed

Education

Degrees

June 1981—July 1985	*University of Tennessee Health Sciences Center*	*Memphis, Tennessee*

Doctor - Medicine

Sept 1975— May 1979	*Carson Newman College*	*Jefferson City, Tennessee*

Bachelor of Arts

May 1979 to June 1981 was spent doing extra course work at Carson Newman College while also working on the Oncology Unit at University of Tennessee Medical Center, Knoxville, Tennesseee

Awards

Physician of the Year, Air Training Command, 1989
Attending of the Year, Malcolm Grow Medical Center, 1995
Physician of the Quarter, TriStar Summit Medical Center, Spring 2012
Frist Humanitarian Award Nominee, TriStar Summit Medical Center, 2015

Professional and Community Memberships

Board Certified, American Board of Emergency Medicine

Curriculum Vitae
Kevin Joseph Bonner, M.D.

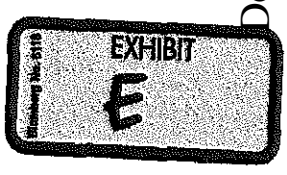
Education:	Undergraduate Dalhousie University, 1972
	Medical Degree Dalhousie University, 1978
Training:	Rotating Internship Dalhousie University, 1978
Licensure:	State of Tennessee September, 1979
Certification:	American Board of Emergency Medicine November, 1986
Re-Certification:	American Board of Emergency Medicine December 2006 thru December 31, 2016

PROFESSIONAL SOCIETIES:

- American College of Emergency Physicians 1981-2007
- Tennessee Chapter of American College of Emergency Physicians 1986-2007
- Southern Medical Association
- American Academy of Emergency Medicine 2007-2013
- Tennessee Chapter American Academy of Emergency Medicine 2007-2013

PROFESSIONAL ACTIVITIES:

- Medical Director - 1988 thru December 2000
  Saint Thomas Health Services
  Emergency/Trauma Services
- Board Member of Tennessee Chapter of Emergency Physicians 1991-1993
- Former member E.M.S. Committee
  Nashville Academy of Medicine 1992-1998
- Medical Director of Saint Thomas Health Emergency/Trauma Services 1988-2000
  Responsible for medical direction, departmental policies, quality assurance and overall strategic plans in conjunction with nursing administration.
- Former Chairman of Emergency Services Committee



- Former member of Surgical CIC; Former member of Cardiac CIC; Mortality Review Committee, Chest Pain Center Committee, Surgical Advisor Committee and Joint Transport Committee
- Former member of Nashville Academy of Medicine Emergency Services
- Former member Clinical Faculty Department of Emergency Medicine, Vanderbilt University Hospital
- Assistant Clinical Professor of Emergency Medicine – appointment thru 2003, Vanderbilt University Hospital
- Staff Physician Baptist Hospital, Nashville, TN 2001-2013
- Staff Physician Middle Tennessee Medical Center, Murfreesboro, Tennessee 2001-2013
- Appointed by Mayor Phil Bredesen to serve on Committee investigating an inmate death within the criminal justice system of Davidson County, Nashville, TN. Reviewed policies and procedures related to incarceration, injury and subsequent death. Reviewed those policies and procedures of Metropolitan General Hospital. March, 1997
- Served as Physician Contractor for Saint Thomas Hospital, Emergency/Trauma Services from 1981 to 2000. Worked an average of 150-160 hours a month in direct patient care as well as administrative duties. Saint Thomas is a tertiary care hospital specializing in Cardiac and Vascular care.

Keith Allen Tonkin

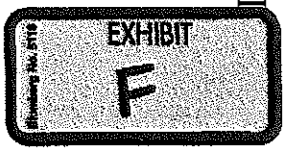
Education

2008-2009	University of California at Los Angeles Clinical Instructor and Fellow in Diagnostic Cardiovascular Imaging
2004-2008	Baptist Memorial Hospital, Memphis, Tennessee Diagnostic Radiology Residency
2003-2004	Internal Medicine Internship, University of Tennessee Health Science Center, Memphis, Tennessee
1999-2003	University of Tennessee College of Medicine Memphis, Tennessee, M.D.
1993-1997	Williams College, Williamstown, Massachusetts B.A., Art History

Honors, Awards and Services

2016-present	Board Officer, Secretary, Mid-South Imaging
2014-present	Board of Directors Mid-South Imaging
2013-present	Program Director Baptist Radiology Residency
2011-2013	Associate Program Director Baptist Radiology Residency
2006-2007	Chief Resident, Residency Class of 2008
1999-2003	Into the Streets Program Community Action Program - community service projects around inner city Memphis
1996	NCAA All-American, tennis - for finishing top 16 in the country
1997	*Tennis Magazine*/ITA Arthur Ashe Award winner - national award for leadership and sportsmanship
1997	Williams College Tennis Team Captain
1995-1997	Most Valuable Player – Williams College Tennis Team
1993-1994	Most Improved Player – Williams College Tennis Team
1993	*Commercial Appeal* "Best of the Preps", winner, tennis
1993	Tennessee Junior Davis Cup Team

Employment



2009-Present	Mid-South Imaging, P.A.
1997-1999	Memphis University School, Memphis, Tennessee Assistant High School Tennis Coach
1997-1999	ATP Tour, Europe and North America Professional Tennis Player
1998	Racquet Club of Memphis, Memphis, Tennessee Teaching Pro
1994-1995	Whitehaven Tennis Center, Memphis, Tennessee Teaching Pro with AKWA(All Kids With Aspirations)

Examinations

American Board of Radiology Oral Examination – 06/2008 – Passed
American Board of Radiology Written Examination – 09/2007 – Passed
American Board of Radiology Physics Examination – 09/2006 – Passed

USMLE Step 3	04/2004	Passed
USMLE Step 2	08/2002	Passed
USMLE Step 1	06/2001	Passed

Licensure

California State Medical License - Active
Mississippi State Medical License – Active
Tennessee State Medical License – Active
Arkansas State Medical License- Active

Professional Memberships/Certificates

2004 -- Present	RSNA
2004 -- Present	American Roentgen Ray Society
2004 -- Present	Memphis Medical Society
2004 -- Present	Tennessee Medical Association
1999 -- Present	American Medical Association
2007 -- Present	Society of Cardiovascular Magnetic Resonance
2008 -- Present	North American Society of Cardiac Imaging
2009 – Present	Society of Cardiovascular Computed Tomography
2010 – Present	American College of Radiology
2011 – Present	Level III SCCT Cardiovascular CT Certification
2013 – Present	Memphis Roentgen Society- Treasurer

Publications/Presentations

- Grand Rounds Baptist Hospital Memphis "Cardiovascular MRI:

Current Applications" Dec 2, 2010

- Javan R, Duszak R, Tonkin K. Spontaneous Pneumonmediastinum Due to Achalasia: An unusual Benign Cause. The Journal of Radiology Case Reports. 2010; Vol 4 Number 11:32-37.
- Andrew K, Tonkin K, Cardaic "pseudomass" on CTA chest. Memphis Roentgen Society. Best Case Report winner Fall 2014.
- Weston M, Tonkin K, Left Atrial Appendage Herniation Through Pericardial Defect. Memphis Roentgen Society. Case Report Fall 2014.
- Dillard A, Tonkin K, Abnormal PA by Echocardiogram: ALCAPA. Memphis Roentgen Society. Case Report Spring 2016.
- Xu J, Tonkin K, Important Roles MRI Plays in Diagnosing Cardiac Amyloidosis. Memphis Roentgen Society. Case Report Spring 2016.
- Yeckley T, Tonkin K, Case Report: Case Report Unusual Presentation of Sublingual Tonsil Hypertrophy. Memphis Roentgen Society. Case Report Fall 2016

APPENDIX 44

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN	)	
Plaintiffs,	)	**Case No. 15513**
v.	)	
MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	**JURY DEMAND**
Defendants	)	

RULE 26 DISCLOSURE OF DEFENDANT MAURY REGIONAL HOSPITAL d/b/a MAURY REGIONAL MEDICAL CENTER ("MAURY")

Pursuant to Rule 26.02(4) of the Tennessee Rules of Civil Procedure, the Defendant, Maury, discloses the following person who may be called to testify as an expert witness at the trial of this case.

TIMOTHY G. PRICE M.D.,
1304 HOBBS LANE
FISHERVILLE, KENTUCKY 40023

This disclosure of the above-listed individual is subject to the definition of a Rule 26.02(4) expert as set forth in *Alessio v. Crook* 633 S.W.2d 770 (Tenn. App. 1982). Although not expert witnesses as defined by Tennessee law, to avoid any claim of surprise, Maury hereby gives notices that it may call one or more treating physicians, nurses, EMS personnel or other individuals who provided medical or hospital services to Mr. Blackburn to testify and render opinions regarding their care and treatment of Mr. Blackburn. If called to testify, these treating medical providers are expected to testify consistently with their medical records and/or

deposition testimony in this case. Maury reserves the right to supplement this disclosure pursuant to the Tennessee Rules of Civil Procedure.

CROSS DESIGNATION OF EXPERTS

Maury also reserves the right to cross designate and call as expert witnesses any Rule 26 expert disclosed by the Defendant, Mark A McLean, M.D., whose opinions are not adverse to Maury.

FACTUAL SUMMARY

The following description of Cody Charles Blackburn's ("Mr. Blackburn") clinical course at Maury on September 17, 2014 is provided as a summary of the facts and grounds for the opinions of the expert identified above. This summary is not intended to be an exhaustive recitation of all facts relied upon by this witness.

MAURY REGIONAL MEDICAL CENTER, SEPTEMBER 17, 2014

On the morning of September 17, 2014, Maury's EMS responded to a call to 404 Hatcher Lane in Columbia, Tennessee. Upon arrival at approximately 9:42 AM, EMS personnel found Mr. Blackburn, a white male age 35, in acute distress, complaining of midsternal chest pain, which he described as sharp and non-radiating. Mr. Blackburn stated that his pain was an 8 on a 0 – 10 scale. His skin was diaphoretic. Mr. Blackburn stated that his pain had started after he had smoked half of a marijuana cigarette which he described as a daily activity. He stated that he had a similar incident the night before after eating at a Chinese buffet but that it had gone away. He had self-medicated with three 325 mg aspirin tablets that he had taken prior to EMS's arrival. Mr. Blackburn stated that the only relief he could get from the pain was when he belched.

Mr. Blackburn's vital signs were BP 89/66, HR 104, R 21 and 02 SAT 89%. Mr. Blackburn was hooked to a monitor which showed sinus rhythm without any ectopy (disturbance of the cardiac rhythm). Mr. Blackburn was placed on O2 and walked without assistance to the

stretcher where he was secured in a semi-Fowler's position with five straps. Mr. Blackburn was then transported to Maury's emergency department. During the transfer, he was monitored and reassessed with no significant changes.

At Maury, after a delay due to crowding of the emergency department, Mr. Blackburn was taken to trauma room 2 where he moved to the bedside on his own power. Mr. Blackburn's admitting physician was Mark A. McLean, M.D. His admitting diagnosis was chest pain. Mr. Blackburn's triage vital signs at 10:22 AM were T 98.5, P 100, R 13, BP 110/74, pulse ox 95 on room air. Mr. Blackburn reported that his chest pain had started at 5:30 PM the night before after he had eaten lunch at a Chinese restaurant. He reported that his pain was persistent and that it seemed to have moved into his upper stomach and some into his lower stomach. He stated that his pain was worse with deep breaths and that he had some shortness of breath. He stated that his chest pain seemed to be better but that his abdominal pain was worse. He could not pinpoint the exact location of his abdominal pain.

After triage, Maury's nurses implemented Maury's Acute Coronary Syndrome (ACS): Chest Pain Center Protocols for the treatment of patients presenting with signs/symptoms of ACS. Triage nurse's orders were issued pursuant to said protocols. An EKG at 10:25 AM, just after Mr. Blackburn's arrival, showed artifact with some very minimal nonspecific ST changes and no significant ischemic changes or arrhythmias. A G.I. cocktail was given and a chest x-ray obtained.

Dr. McLean performed a complete physical examination as set forth in the medical record. Mr. Blackburn was given morphine and Zofran. After morphine did not alleviate his pain Mr. Blackburn was given Dilaudid. Mr. Blackburn's white cell count was 21,000. He had a

mildly elevated d-dimer. He remained in stable condition. A CT of his chest and abdomen was ordered.

Shortly after Mr. Blackburn returned from his CT examination, his sister reported that he sat up in the bed complaining of pain and became unresponsive. Dr. McLean was notified and saw Mr. Blackburn immediately. Narcan 2 mg IV was administered with no significant change. Mr. Blackburn was intubated. Mr. Blackburn did not have a pulse. Chest compressions were begun immediately. ACLS protocol was initiated.

Dr. McLean's differential diagnosis included a pulmonary embolus versus a dissection. During CPR, radiology was asked to immediately interpret Mr. Blackburn's CT scan. The radiologist called back shortly thereafter to report that Mr. Blackburn had a large ascending aortic aneurysm with what appeared to be blood and fluid in the pericardial sac. Dr. McLean performed a pericardiocentesis and obtained some fluid. An ultrasound was obtained. Dr. McLean performed a limited bedside echogram which showed significant pericardial effusion with very limited cardiac contractility. Dr. Maquilang from cardiology arrived. Multiple rounds of epinephrine were given with Mr. Blackburn remaining in PEA (pulseless electrical activity). He was also given sodium bicarbonate, calcium gluconate and vasopressin. He remained in PEA. Vanderbilt was called for possible transfer to a cardiothoracic surgeon if a pulse was obtained.

After an extensive code, Mr. Blackburn was pronounced deceased.

MATERIALS REVIEWED

In order to assist him in formulating his opinions, Dr. Price has been provided with the following materials:

1. The Complaint;
2. Maury's Answer to the Complaint;

3. Maury's medical records pertaining to the care that Cody Charles Blackburn received from Maury's EMS and its emergency department on September 17, 2014;
4. The Plaintiffs' Rule 26 Disclosures;
5. Demographic information pertaining to Maury County and information about Maury Regional Medical Center;
6. Maury's implementing protocol and chest pain protocols for its emergency department; and
7. The following depositions:
    a. Barry Charles Blackburn;
    b. Courtney Jeter;
    c. Jennifer Gill;
    d. Crystal Blackburn;
    e. Mark A. McLean, M.D.;
    f. Stephen Caleb Barr, M.D.; and
    g. Jennifer Owens, RN.

Dr. Price believes that he has been furnished with all of the information necessary to enable him to form his opinions with regard to the standard of care applicable to the nurses who provided nursing care to Mr. Blackburn in Maury's Emergency Department on September 17, 2014. Dr. Price's opinions are based on the medical records and other materials that he has reviewed. His opinions are also based on his knowledge, skill, experience, education and training. All of Dr. Price's opinions are to a reasonable degree of medical certainty.

Dr. Price will review and respond to any opinions within his expertise offered by other Rule 26 witnesses in depositions. He may review and comment on the depositions of any parties or treating healthcare providers taken in this case, as well as additional materials as appropriate.

DISCLOSURE

Dr. Price is a physician who has been continuously licensed to practice medicine in Kentucky for many years. Dr. Price is board certified by the American Board of Emergency Medicine. Dr. Price's professional address is:

University of Louisville School of Medicine
Department of Emergency Medicine, Louisville, KY 40292

From July of 2002 until the present, Dr. Price has served as an Associate Professor in the Department of Emergency Medicine at the University of Louisville School of Medicine. From July of 2014 to the present, Dr. Price has been Chief of the Division of Emergency Medical Services at the University of Louisville School of Medicine. Dr. Price is a specialist in emergency medicine.

Dr. Price has held multiple academic appointments with the University of Louisville School of Medicine and has had privileges to practice emergency medicine in many hospital emergency departments in the Louisville, Kentucky medical community. A copy of Dr. Price's CV more fully setting forth his professional qualifications is attached as Exhibit 1.

Dr. Price was actively practicing his specialty of emergency medicine in Louisville, Kentucky in September of 2014 when the hospital care which is the subject of this lawsuit was provided to Mr. Blackburn in Maury's emergency department in Columbia, Tennessee.

Over his many years of practice, Dr. Price has attended hundreds of patients who have presented to hospital emergency departments with complaints of chest and abdominal pain as Mr. Blackburn did when he presented to Maury's emergency department on September 17, 2014.

Dr. Price has supervised hundreds of hospital emergency department nurses who were providing nursing care to patients like Mr. Blackburn and is personally familiar with the standards of acceptable professional practice for nurses attending patients like Mr. Blackburn in September of 2014 in hospital emergency departments in Louisville, Kentucky and similar medical communities.

Dr. Price is personally familiar with hospital emergency department protocols and policies and procedures pertaining to the care and treatment of patients presenting to hospital emergency departments in September of 2014 with signs and symptoms similar to Mr. Blackburn's in Louisville, Kentucky and similar medical communities.

Dr. Price has been furnished with demographic information pertaining to Maury County, Tennessee and information pertaining to Maury which provides hospital care to the Maury County community in many different healthcare specialties, including emergency medicine. Maury is fully accredited by the Joint Commission on the Accreditation of Health Care Organizations as are the hospitals where Dr. Price has practiced emergency medicine over the years.

Based on the information that Dr. Price has been provided, he is of the opinion that the Maury County, Tennessee medical community is similar to the medical communities that are contiguous to Louisville, Kentucky that Dr. Price is familiar with. By virtue of his many years of clinical experience working in various hospital emergency departments and by virtue of his assisting in the medical and clinical training of physicians who have practiced emergency medicine in Louisville, Kentucky as well as in hospital emergency departments in the smaller medical communities that are contiguous to Louisville, Kentucky, Dr. Price believes that Maury and Maury County, Tennessee are similar to the hospitals and medical communities that Dr.

Price is personally familiar with insofar as the standards of care applicable to Maury and its nursing staff in this case are concerned.

OPINIONS

Dr. Price is expected to testify that the hospital and nursing care provided to Mr. Blackburn on September 17, 2014 by Maury complied fully with the recognized standard of acceptable professional practice and that no deviation from the standard of care on the part of any of Maury's nurses caused any injuries to Mr. Blackburn that otherwise would not have occurred.

Dr. Price is also expected to express the opinion that Maury's emergency department policies and procedures and more specifically, Maury's implementing protocols for the emergency department and Maury's Acute Coronary Syndrome (ACS): Chest Pain Center Protocols for the treatment of patients presenting with signs/symptoms of ACS were appropriate and within the applicable standard of care for hospital emergency departments and that Maury's nurses complied with the recognized standard of care by implementing and following those protocols in their care and treatment of Mr. Blackburn.

Based upon his review of the medical records in this case, Dr. Price is of the opinion that Mr. Blackburn's symptoms were caused by a large ascending aortic aneurysm which ruptured and caused his death. This was a very rare event for a young man of Mr. Blackburn's age. Unfortunately it was not able to be diagnosed and treated in time to save Mr. Blackburn's life despite the fact that appropriate diagnostic studies were ordered.

Nurses do not make medical diagnoses. Dr. Price is of the opinion that there was nothing that Maury's nurses could have done that would have resulted in an earlier diagnosis and treatment of Mr. Blackburn's condition and that Maury's nurses complied with the standard of

care applicable to them by implementing the triage nursing orders according to protocol and by following the physician orders that they were given.

Dr. Price is expected to testify that Maury's nurses who were involved with the code and the efforts to resuscitate Mr. Blackburn also complied with the standard of care applicable to them.

Dr. Price has reviewed the Plaintiffs' Rule 26 disclosures containing the opinions of Keith Allen, M.D., Richard M. Sobel, M.D., and Lori Jaggers Alexander, DNP, MSN, RN.

While Dr. Price is not a cardiac thoracic surgeon, he expects to disagree with Dr. Allen to the extent that Dr. Allen's opinions may be critical of the Hospital and nursing care that was provided to Mr. Blackburn in Maury's Emergency Department and to the extent that Dr. Allen may express any opinions that Maury and/or its nursing staff were negligent in failing to obtain a C.T. scan earlier than was done or by failing to have Mr. Blackburn transferred to another facility.

Dr. Price also disagrees with Dr. Sobel's opinion that Nurse Owens violated the standard of care by not performing proper assessments of Mr. Blackburn and communicating the results to Dr. McLean. To the contrary, the medical records and depositions reviewed by Dr. Price indicate that Maury's nurses assessed Mr. Blackburn at appropriate intervals, documented their assessments as required by the standard of care and communicated their assessments to Dr. McLean who was present in the Emergency Department and monitoring Mr. Blackburn throughout Mr. Blackburn's admission to the Emergency Department.

Dr. Price also disagrees with Nurse Alexander's criticisms of the nursing care provided to Mr. Blackburn which are not supported by the medical records or the depositions of Dr. McLean or Nurse Owens. The medical records and depositions reviewed by Dr. Price indicate that

Maury's nurses assessed Mr. Blackburn at appropriate intervals, documented their assessments properly and informed Dr. McLean of their assessments. Dr. Price can find no evidence to support Nurse Alexander's assertion that Nurse Owens "altered/edited" her notes in an effort to minimize Mr. Blackburn's complaints after he expired. ED nurses often make temporary notes as they care for patients and "catch up" on their charting when they can. Nurse Owens completed her charting on Mr. Blackburn before her shift ended which is all the standard of care required.

The medical records do not support Nurse Alexander's assertion that Maury's nurses did not follow up on Mr. Blackburn's complaints of pain and discomfort. The nursing staff gave Mr. Blackburn a G.I. cocktail, two doses of morphine and two doses of Dilaudid and reassessed Mr. Blackburn after each dose.

Dr. Price will testify that Mr. Blackburn was appropriately monitored using telemetry while he was in the emergency department. The standard of care did not require Maury and its nurses to preserve all of the continuous telemetry monitor strips that were generated during Mr. Blackburn's admission. Only those portions of the strips that are considered to be especially pertinent to the patient's care are routinely preserved and scanned into the patient's medical records as was done in Mr. Blackburn's case.

COMPENSATION

Dr. Price charges $250 an hour for records review, $350 per hour for deposition testimony and $500 per hour for trial testimony as well as reimbursement for travel and lodging expenses.

TESTIMONIES

Dr. Price testified in the Circuit Court of Davidson County Tennessee in the case styled *Manning v. MaGoun*. Dr. Price has given a deposition in a spinal cord injury case in Pike County, KY which is still pending.

Respectfully submitted,

BUTLER SNOW LLP

By: _____

Robert L. Trentham, #023257
Taylor B. Mayes, #19795
The Pinnacle at Symphony Place
150 3rd Avenue South, Suite 1600
Nashville, TN 37201
Phone: (615) 651-6700

Attorneys for Maury Regional Hospital

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via United States mail, postage pre-paid to the following:

Joe Bednarz, Sr., Esq.
Bednarz & Bednarz
100 Bluegrass Commons Blvd., Suite 330
Hendersonville, TN 37075
Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Michelle Sellers, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302
Attorneys for Mark A. McLean, M.D.

on this 14 day of July, 2017.

Robert L. Trentham

34741627v1

Exhibit 1

Curriculum Vitae
February 2, 2015

TIMOTHY G. PRICE, M.D.

Personal

Date of Birth:	February 23, 1963
Place of Birth:	Louisville, Kentucky
Marital Status:	Leigh T. Price, MD
Office Address:	University of Louisville School of Medicine Department of Emergency Medicine Louisville, Kentucky 40292
Home Address:	1304 Hobbs Lane Fisherville, Kentucky 40023
Telephone #:	Cell: (502) 296-1454
E-mail Address:	drtprice@bellsouth.net

Board Certifications

1997-2027	American Board of Emergency Medicine, # 960395
2013-2023	Emergency Medical Services, #25447

Academic Appointments

7/01/14-present	Chief, Division of Emergency Medical Services
7/1/02-present	Associate Professor Department of Emergency Medicine University of Louisville School of Medicine

Society Memberships

Fellow, American College of Emergency Physicians
American Medical Association
Society for Academic Emergency Medicine
Fellow, American Academy of Emergency Medicine
National Association of Emergency Medical Services Physicians
Kentucky Chapter, American College of Emergency Physicians
Kentucky Medical Association
Greater Louisville Medical Society
Association of United States Army Flight Surgeons

Selected Boards and Committees

Commonwealth of Kentucky

2008-2012	State Medical Advisor Kentucky Board of EMS Versailles, Kentucky

National

2010	External Defibrillator Improvement Workshop Invited Expert Participant United States Food and Drug Administration

2008-2012	Medical Directors Council National Association of State EMS Officials
2008	Performance Measures Advisory Committee EMSC National Resource Center

Louisville Metro

2011	Emergency Services Subcommittee Mayor's Merger 2.0 Committee
2004	EMS Merger Transition Team Member
2003	EMS Task Force Member

Kentucky Chapter ACEP

2015- present	Chair, EMS Committee
2001-2005	Chair, EMS Committee
1996-2005	Board of Directors
1996-2001	Chair, Education Committee
1996-2001	Education Committee

Other Professional Activity

2011 and 2014	Co-Chair Medical Committee PGA Championship Valhalla Golf Club
2008	Program Committee 2008 Annual Scientific Meeting National Association of EMS Physicians
2008	Medical Director The Ryder Cup Valhalla Golf Club Louisville, Kentucky
2001-2003	Co-Chai Operation Stroke American Stroke Association Louisville, Kentucky
2000-2001	Chair, Medical Committee Operation Stroke American Stroke Association Louisville, Kentucky
1998-present	Emergency Medicine Consultant Kentucky Board of Medical Licensure Louisville, Kentucky

APPENDIX 45

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
v.	)	NO. 15513
	)	JURY DEMAND
MARK A. McLEAN, M.D., AND MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

RULE 26 DISCLOSURE OF DEFENDANT MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER ("MAURY")

Pursuant to Rule 26.02(4) of the Tennessee Rules of Civil Procedure, the Defendant Maury discloses the following person who may be called to testify as an expert witness at the trial of this case.

Jodi Thurman, MBA, BSN, RN, CEN
208 Carmack Drive
White House, TN 37188

The disclosure of the above listed individual is subject to the definition of a Rule 26.02(4) expert as set forth in *Alessio v. Crook*, 633 S.W.2d 770 (Tenn. App. 1982). Although not expert witnesses as defined by Tennessee law, to avoid any claim of surprise, Maury hereby gives notice that it may call one or more treating physicians, nurses, EMS personnel, or other individuals who provided medical or hospital care to Mr. Blackburn to testify and render opinions regarding their care and treatment of Mr. Blackburn. If called to testify, these treating medical providers are expected to testify consistently with their medical records and/or

deposition testimony in this case. Maury reserves the right to supplement this disclosure pursuant to the Tennessee Rules of Civil Procedure'

CROSS DESIGNATION OF EXPERTS

Maury also reserves the right to cross designate and call as expert witnesses any Rule 26 expert disclosed by the Defendant Mark A. McLean, M.D. whose opinions are not adverse to Maury.

FACTUAL SUMMARY

The following description of Cody Charles Blackburn's ("Mr. Blackburn") clinical course at Maury on September 17, 2014 is provided as a summary of the facts and grounds for the opinions of the expert identified above. This summary is not intended to be an exhaustive recitation of all facts relied upon by this witness.

Maury Regional Medical Center September 17, 2014

On the morning of September 17, 2014, Maury's EMS responded to a call to 404 Hatcher Lane in Columbia, Tennessee. Upon arrival at approximately 9:42 AM, EMS personnel found Mr. Blackburn, a white male age 35, in acute distress complaining of midsternal chest pain which he described as sharp and nonradiating. Mr. Blackburn stated that his pain was an 8 on a 0 to 10 scale. His skin was diaphoretic. Mr. Blackburn stated that his pain had started after he had smoked half of a marijuana cigarette which he described as a daily activity. He stated that he had a similar incident the night before after eating a Chinese buffet, but that it had gone away. He had self-medicated with three 325 mg aspirin tablets that he had taken prior to EMS's arrival. Mr. Blackburn stated that the only relief he could get from the pain was when he belched.

Mr. Blackburn's vital signs were BP 89/66, P 104, R 21 and O_2 sat 89%. Mr. Blackburn was hooked to a cardiac monitor which showed sinus rhythm without any ectopy (disturbance of

the cardiac rhythm). Mr. Blackburn was placed on O_2 and walked without assistance to the stretcher, where he was secured in the Semi-Fowler's position with five straps. Mr. Blackburn was then transported to Maury's Emergency Department. During the transfer, he was monitored and reassessed with no significant changes.

At Maury, after a delay due to crowding of the Emergency Department, Mr. Blackburn was taken to Trauma Room 2, where he moved to the bedside on his own power. Mr. Blackburn's admitting physician was Mark A. McLean, M.D. His admitting diagnosis was chest pain. Mr. Blackburn's triage vital signs at 10:22 AM were T 98.5, P 100, R 13, BP 110/74, pulse ox 95 on room air. Mr. Blackburn reported that his chest pain had started at 5:30 PM the night before, after he had eaten lunch at a Chinese restaurant. He reported that his pain was persistent and it seemed to have moved into his upper stomach and some into his lower stomach. He stated that his pain was worse with deep breathes and that he had some shortness of breath. He stated that his chest pain seemed to be better but that his abdominal pain was worse. He could not pinpoint the exact location of his abdominal pain.

After triage, Maury's nurses implemented Maury's acute coronary syndrome (ACS): Chest Pain Center protocols for the treatment of patients presenting the signs/symptoms of ACS. Triage nurse's orders were issued pursuant to said protocols. An EKG at 10:25 AM, just after Mr. Blackburn's arrival, showed artifact with some very minimal nonspecific ST changes and no significant ischemic changes or arrhythmias. A GI cocktail was given and a chest x-ray obtained.

Dr. McLean performed a complete physical examination as set forth in the medical record. Mr. Blackburn was given morphine and Zofran. After morphine did not alleviate his pain, Mr. Blackburn was given Dilaudid. Mr. Blackburn's white cell count was 21,000. He had

a mildly elevated d-dimer. He remained in stable condition and a CT of his chest and abdomen was ordered after his creatinine level was obtained to determine if he could receive contrast for the exam.

Shortly after Mr. Blackburn returned from his CT examination, his sister reported that he sat up in the bed complaining of pain and became unresponsive. Dr. McLean was notified and saw Mr. Blackburn immediately. Mr. Blackburn was noted to be unresponsive to painful or verbal stimuli, but still had a pulse at this time. Narcan 2 mg IV was administered with no significant change. Mr. Blackburn was intubated. Mr. Blackburn did not have a pulse. Chest compressions were begun immediately. ACLS protocol was initiated.

Dr. McLean's differential diagnosis included a pulmonary embolus versus a dissection. During CPR, Radiology was asked to immediately interpret Mr. Blackburn's CT. The radiologist called back shortly thereafter to report that Mr. Blackburn had a large ascending aortic aneurysm with what appeared to be blood and fluid in the pericardial sac. Dr. McLean performed a pericardiocentesis and obtained some fluid. An ultrasound was obtained and Dr. McLean performed a limited bedside echogram, which showed significant pericardial effusion with very limited cardiac contractility. Dr. Maquilang from Cardiology arrived. Multiple rounds of epinephrine were given, with Mr. Blackburn remaining in PEA (pulseless electrical activity). He was also given sodium bicarbonate, calcium gluconate, and vasopressin. He remained in PEA. Vanderbilt was called for a possible transfer to a cardiothoracic surgeon if a pulse was obtained.

After an extensive code, Mr. Blackburn was pronounced deceased.

MATERIALS REVIEWED

In order to assist her in formulating her opinions, Nurse Thurman has been provided with the following materials:

1. Complaint;
2. Maury's Answer to the Complaint;
3. Maury's medical records pertaining to the care that Mr. Blackburn received from Maury EMS and its Emergency Department on September 17, 2014;
4. Plaintiff's Rule 26 Disclosures;
5. Demographic information pertaining to Maury County and information about Maury;
6. Maury's implementing protocols and chest pain protocols for its Emergency Department; and
7. The following depositions
    a. Barry Charles Blackburn;
    b. Courtney Jeter;
    c. Jennifer Gill;
    d. Crystal Blackburn;
    e. Mark A. McLean M.D.; and
    f. Jennifer Owens, RN.

Nurse Thurman believes that she has been furnished with all of the information necessary to enable her to form her opinions with regard to the standard of care applicable to Maury's nurses who provided nursing care to Mr. Blackburn in Maury's Emergency Department on September 17, 2014. Her opinions are based on the medical records and other materials that she

has reviewed. Her opinions are also based on her knowledge, skill, experience, education and training. All of nurse Thurman's opinions are to a reasonable degree of nursing certainty.

Nurse Thurman will review and respond to any opinions within her expertise offered by other Rule 26 witnesses and deposition. She may review and comment on the depositions of any parties or treating health care providers taken in this case, as well as additional materials as appropriate.

DISCLOSURE

Nurse Thurman is a registered nurse who has been continuously licensed to practice her profession as an Emergency Department nurse in Tennessee since 2006. Nurse Thurman is currently the Director of Emergency Services for Tri-Star Skyline Medical Center in Nashville, Tennessee, which is a fully accredited 233 bed medical facility offering a full array of acute care services, including Emergency Department services. Tri-Star Skyline Medical Center is an accredited Chest Pain Center with PCI and a leading provider in emergency heart care.

Nurse Thurman has 15 years of Emergency Department experience, including time as a Nurse Tech, Unit Secretary, Staff Nurse, Charge Nurse, Clinical Coordinator, Associate Director and now Director of Emergency Services.

Nurse Thurman graduated from Cumberland University with a BS degree in 2006. She obtained a Master's degree in Business Administration (Health Care Administration) from Western Governors University in 2014.

Nurse Thurman has the following nursing certifications:

- Certified Emergency Nurse (CEN);
- Basic Life Support (BLS);
- Advanced Cardiac Life Support (ACLS);

- Pediatric Advanced Life Support (PALS); and
- Trauma Nurse Core Curriculum (TNCC).

Nurse Thurman has been a member of the Emergency Nurses Association since 2014. Nurse Thurman's current CV is attached as Exhibit 1.

GENERAL QUALIFICATIONS/LOCALITY RULE INFORMATION

Nurse Thurman has many years of clinical experience as an Emergency Department nurse. During September of 2014 and during the preceding year, Nurse Thurman was practicing her specialty as an Emergency Department nurse at Skyline Medical Center in Davidson County, Tennessee.

Nurse Thurman has provided Emergency Department nursing services to patients like Mr. Blackburn on many occasions over the years of her practice and has attended many patients who presented for Emergency Department care with signs and symptoms similar to Mr. Blackburn's.

Nurse Thurman is familiar with Maury County, Tennessee, which is in close proximity to Davidson County and Dickson County, Tennessee. Columbia, Tennessee where Maury is located is approximately 40 miles south of Nashville, Tennessee. Over Nurse Thurman's years of practice, she has become personally familiar with the Maury County nursing community by virtue of having participated in many continuing nursing education and other professional meetings that have been attended by E.D. nurses who were practicing their professions all across the state of Tennessee, including in Maury County, Tennessee. Many of those professional meetings have included instruction and training in providing proper nursing care to patients like Mr. Blackburn.

Nurse Thurman has worked with and supervised many E.D. nurses who have worked in emergency departments in hospitals located throughout the middle Tennessee area, including Maury County, Tennessee.

By virtue of Nurse Thurman's professional education, background and training, and her years of clinical experience, Nurse Thurman believes that she is personally familiar with the recognized standard of acceptable professional practice for E.D. nurses practicing their profession in Maury County, Tennessee in September of 2014, as well as in medical communities that are similar to Maury County, Tennessee.

Nurse Thurman has been furnished with demographic information pertaining to Maury County, Tennessee and information pertaining to Maury which provides hospital care to the Maury County community in many different health care specialties, including emergency department services. Maury is fully accredited by the Joint Commission on Accreditation of Health Care Organizations as are the hospitals were Nurse Thurman has practiced her profession over the years.

Based upon her personal knowledge, and based upon the information that Nurse Thurman has been furnished about Maury County, Tennessee and Maury, Nurse Thurman is of the opinion that Maury County, Dickson County and Davidson County, Tennessee are similar medical communities in terms of the recognized standards of care applicable to E.D. nurses attending patients like Mr. Blackburn at Maury on September 17, 2014.

Nurse Thurman is familiar with the ACS and chest pain protocols, triage guidelines and standing orders that are regularly used in Emergency Departments to provide proper nursing care to patients like Mr. Blackburn.

EXPERT OPINION

The following is a summary of Nurse Thurman's opinions as required by Rule 26.02(4) of the Tennessee Rules of Civil Procedure. However, it is not intended to be an exhaustive recitation of all facts relied upon. In her deposition or at trial, Nurse Thurman may discuss or refer to more detailed facts contained in the medical records, depositions or other materials that she has reviewed, whereas broad descriptions are made herein.

Summary of Nurse Thurman's Opinions

Nurse Thurman is of the opinion that Maury's E.D. nurses who were involved in Mr. Blackburn's care on September 17, 2014 complied with the recognized standards of care applicable to them. More specifically, Nurse Thurman is of the opinion that Maury's E.D. nurses followed proper triage guidelines, ACLS protocol, chest pain protocols, and standing orders in providing care to Mr. Blackburn and that they appropriately assessed and monitored Mr. Blackburn in the Emergency Department, keeping Mr. Blackburn's attending physician, Dr. McLean, appropriately informed while carrying out the orders that Dr. McLean gave them for Mr. Blackburn's care.

More specifically, Nurse Thurman is expected to express the opinion that Maury's Emergency Department policies and procedures, Maury's implementing protocols for its Emergency Department and it's ACS Chest Pain Center protocols for the treatment of patients presenting with signs/symptoms of ACS were appropriate and within the applicable standard of care for hospital emergency departments and that Maury's nurses complied with the standard of care by following those protocols and standing orders in their care and treatment of Mr. Blackburn.

Nurse Thurman will testify that nurses do not make medical diagnoses and that there was nothing that Maury's nurses could have done that would have resulted in an earlier diagnosis and

treatment of Mr. Blackburn's condition. Maury's nurses complied with the standard of care by following the physician orders that they were given.

Nurse Thurman has reviewed the Plaintiff's Rule 26 Disclosures, including the opinions of Lori Jaggers Alexander, DMP, MSN, RN. Nurse Thurman disagrees with Nurse Alexander's criticisms of the nursing care provided to Mr. Blackburn. Nurse Alexander's criticisms are not supported by the medical records or the depositions of Dr. McLean or Nurse Owens. To the contrary, the medical records and depositions reviewed by Nurse Thurman indicate that Maury's nurses assessed Mr. Blackburn at appropriate intervals, documented their assessments appropriately, and properly communicated their assessments to Dr. McLean, who was present and monitoring Mr. Blackburn throughout Mr. Blackburn's admission to the Emergency Department.

Nurse Thurman can find no evidence to support Nurse Alexander's assertion that Nurse Owens "altered/edited her notes" in an effort to minimize Mr. Blackburn's complaints after he expired. In Emergency Departments, patient care is the first priority and E.D. nurses often make temporary notes as they care for their patients and "catch up" on their charting when they can. Nurse Owens completed her charting on Mr. Blackburn before the end of her shift, which is all that Maury's policies and procedures the standard of care applicable to Nurse Owen's required as far as her charting was concerned.

The medical records do not support Nurse Alexander's other criticisms. For example, Nurse Alexander accuses Nurse Owens of not following up on Mr. Blackburn's complaints of pain and discomfort, when in fact the records reflect that Maury's nurses gave Mr. Blackburn a GI cocktail, two doses of morphine and two doses of Dilaudid and reassessed him after each dose was given. In addition, some of Nurse Alexander's criticisms appeared to relate to the

existence or non-existence of a patient care plan. Patient care plans are not used in Emergency Departments.

Nurse Thurman will also express the opinion that Mr. Blackburn was appropriately monitored using telemetry while he was in the Emergency Department. The standard of care did not require Maury and/or its nurses to preserve all of the continuous telemetry monitor strips that were generated during Mr. Blackburn's admission. Only portions of those strips that are considered to be especially important to the patient's care are routinely preserved and scanned into the patient's medical records, as was done in Mr. Blackburn's case.

COMPENSATION

Nurse Thurman is charging $100 per hour for her time spent reviewing records and $150 per hour for deposition or trial testimony, as well as reimbursement for any travel expenses.

TESTIMONIES

Nurse Thurman has not testified as an expert witness by deposition or at trial during the last 4 years.

Respectfully Submitted,

BUTLER SNOW LLP

Robert L. Trentham, BPR #2257
Taylor B. Mayes, BPR #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
(615) 651-6700 – Telephone
(615) 651-6701 – Fax

Attorneys for defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via electronic mail and United States mail, postage pre-paid to the following:

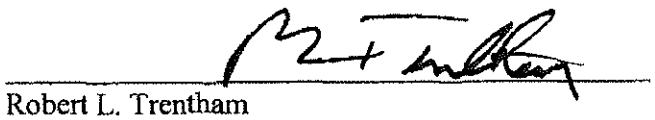
Joe Bednarz, Jr., Esq.
Bednarz & Bednarz
100 Bluegrass Commons Blvd., Suite 330
Hendersonville, TN 37075

Attorneys for Plaintiffs

Marty R. Phillips, Esq.
Michelle Sellers, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302

Attorneys for Mark A. McLean, M.D.

on this 14th day of July, 2017.



Robert L. Trentham

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Exhibit 1

Jodi Thurman
104 Cuvee Court, White House, TN 37188
jodi_marie83@yahoo.com (615) 594-9988

DIRECTOR OF EMERGENCY SERVICES

Fifteen years of emergency department experience, including time as a nurse tech, unit secretary, staff nurse, charge nurse, clinical coordinator, Associate Director, and now Director, has provided a great foundation for my nursing leadership in the emergency department. Seeking a position in an HCA Emergency Department Director role where I can utilize my strategic operation, leadership, and relationship building talents. I am known for the ability to create a highly engaged workforce, aligning employees and teams to deliver on objectives which positively impact the patient experience, ensuring quality patient care, and highly effective Emergency Department operations management.

Summary of key areas of expertise:

- Productivity Management
- Regulatory Compliance
- ED Playbook Tactics
- Project Management
- Growth Strategy
- EMTALA

PERFORMANCE MILESTONES

- Participated in the development and transition to a Level II trauma center
- Developed and successfully rolled-out low acuity strategy decreasing low acuity length of stay, overall department length of stay, and arrival to greet to meet company goals.
- Participated in a multi-disciplinary team that successfully obtained primary stroke center accreditation.
- Participated in a multi-disciplinary team that successfully obtained the first Comprehensive Stroke Center accreditation in the state of Tennessee.

CAREER SUMMARY

HCA, Summary **2002 - Present**

Director of Emergency Services **2017-Present**
TriStar Skyline Medical Center

Director of Emergency Services **2015-2017**
South Bay Hospital

- Successfully implemented patient experience tactics that brought our Press Ganey scores from 35th percentile to the 91st percentile, number one in the West Florida Division for Overall since July, and in the Top Ten of HCA since July.

- Successfully re-implemented the ED Playbook tactics with significant improvement in ED metrics and throughput as evidenced by a 12 minute decrease in Admitted LOS, 9 minute decrease in Discharged LOS, and 32 minute decrease in Low Acuity LOS all YOY.

- Successfully implemented a Long Bone Fracture process for the Outpatient Pain Core Measure resulting in 28 minute decrease in arrival to pain medication for all long bone fracture.

- Successfully implemented a Code Stroke process to decrease Door to Needle with a goal of less than 60 minutes and year to date the average has decreased from 109 to 48 minutes.

Emergency Services Director Development Program
Associate Director of Emergency Services, TriStar Horizon Medical Center **2014-Present**

- Successfully developed, led, and implemented the low acuity strategy decreasing the low acuity length of stay by 11 minutes, overall department length of stay by 12 minutes, and arrival to greet down to 10 minutes, meeting company goals.
- Participated in the development and opening of a free standing emergency department including operations, equipment, and policy and procedure development
- Successfully implemented Facility Scheduler for the Emergency Department
- Participated in the development of Level III trauma designation to include education and policy and procedure development
- Successfully implemented Studer initiatives to include employee rounding, patient rounding, pre-shift huddles and monthly ED monthly steering committee meetings
- Chaired ED operations steering committee, which reviews key operating and clinical metrics with senior leadership, ED leadership, and physician leadership.

TriStar Skyline Medical Center **2002-2014**

Emergency Department Clinical Coordinator **2012-2014**

- Integral role in the development and successful implementation of Level II trauma center designation. Provisional Level II designation was received in June 2014.
- Participated on a multi-disciplinary team that successfully obtained the first Comprehensive Stroke Center designation in the state of Tennessee
- Career at TriStar Skyline began in 2002 as a nurse technician. Initial experience included time as the unit secretary, nurse tech, and waiting room coordinator
- Started as a registered staff nurse in the emergency department after obtaining BSN in 2006.
- Assigned a weekend charge nurse position in 2008 which I maintained until becoming clinical coordinator 2012
- The clinical coordinator role offered the opportunity to help run the emergency department operation at a higher level, focusing on staffing, metrics, and the team in general

EDUCATION & PROFESSIONAL DEVELOPMENT — EXPIRATION

Master's in Business Administration (Healthcare Administration), Western Governor's University 2014

Bachelors in Science, Cumberland University 2006

Certified Emergency Nurse, CEN	2018
Basic Life Support, BLS	2019
Advanced Cardiac Life Support, ACLS	2018
Pediatric Advanced Life Support, PALS	2018
Trauma Nurse Core Curriculum, TNCC	2020

PROFESSIONAL AFFILIATION

Member, Emergency Nurses Association	2014 - present

SELECTED COMMUNITY CONTRIBUTIONS AND PERSONAL INTERESTS

Member, World Vision

Member, Mecha Club

Member, Child Fund

37190691v1

APPENDIX 46

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN	)	
Plaintiffs,	)	**Case No. 15513**
v.	)	
MARK A. McLEAN, M.D., STEPHEN CALEB BARR, M.D. and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	**JURY DEMAND**
Defendants	)	

RULE 26 DISCLOSURE OF DEFENDANT MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONAL MEDICAL CENTER ("MAURY")

Pursuant to Rule 26.02(4) of the Tennessee Rules of Civil Procedure the Defendant Maury discloses the following person who may be called to testify as an expert witness at the trial of this case.

Ralph D. Scott, Jr., PhD
6 Richland Hills Cove
Conway, AR 72034

Dr. Scott is a professor of economics in the department of economics and business at Hendrix College in Conway, Arkansas. Dr. Scott is also President of a consulting firm, Economic and Financial Consulting Group, Inc. in Conway, Arkansas.

Dr. Scott graduated with a BA degree from Hendrix College in 1973 majoring in economics and business. Dr. Scott graduated from the Tulane University School of Economics with a PhD in 1983.

In addition to his teaching responsibilities over the years, Dr. Scott has extensive experience as a consultant in personal injury and wrongful death suits working with both plaintiffs and defendants. Dr. Scott has been qualified as an expert witness in many federal and state jurisdictions. By virtue of his educational background, training and many years of experience as an economist, Dr. Scott has expertise in calculating lost future earnings, loss of future earning capacity and other economic losses similar to those of Cody Charles Blackburn. A copy of Dr. Scott's CV is attached hereto as Exhibit 1.

Dr. Scott's opinions are based upon his education, experience, background, training and knowledge of economic and governmental reports and other statistics reasonably relied upon by experts in his field of economics, including data on inflation, cost of money, interest rates, discount rates, employment data, salaries and other relevant information which support his opinions in this case.

Dr. Scott has reviewed Dr. Gilbert Mathis' appraisal of Mr. Blackburn's lost earning capacity dated March 24, 2017 which was attached to the Plaintiff's expert witness disclosure of Dr. Mathis' anticipated testimony. Dr. Scott notes that no federal income tax returns of Mr. Blackburn or other documents have been produced to document Mr. Blackburn's earnings prior to his death which would be useful in estimating Mr. Blackburn's lost future earnings.

Dr. Scott's opinions differ from those of Dr. Mathis. Dr. Scott will testify consistently with his written report which is attached hereto as Exhibit 2.

Dr. Scott reserves the right to testify to additional opinions after reviewing additional deposition testimony, including the discovery deposition of Dr. Mathis, if taken, and may offer additional opinions at his discovery deposition in response to questions from Plaintiff's counsel. Dr. Scott's report may be supplemented for trial.

COMPENSATION

Dr. Scott's fee schedule is attached as Exhibit 3.

PRIOR TESTIMONIES

A list of the prior cases that Dr. Scott has testified in as an expert is attached as Exhibit 4.

Respectfully Submitted,

BUTLER SNOW LLP

Robert L. Trentham, BPR #2257
Taylor B. Mayes, BPR #19495
150 Third Avenue South, Suite 1600
Nashville, TN 37201
(615) 651-6700 – Telephone
(615) 651-6701 – Fax
Attorneys for defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been mailed via first class, prepaid postage, and via email to the following:

Joe Bednarz, Sr., Esq.
Bednarz & Bednarz
100 Bluegrass Commons Blvd., Suite 330
Hendersonville, TN 37075
joe@bednarzlaw.com

Attorney for Plaintiffs

Marty R. Phillips, Esq.
Michelle Sellers, Esq.
Rainey, Kizer, Reviere & Bell
P.O. Box 1147
Jackson, TN 37302

Attorneys for Mark A. McLean, M.D.

on this 14 day of July, 2017.

Robert L. Trentham

37298830v1

Exhibit 1

RALPH D. SCOTT, JR., Ph.D.

6 RICHLAND HILLS COVE
CONWAY, ARKANSAS 72034
(501) 327-5826

Professor of Economics
Department of Economics and Business
Hendrix College
Conway, Arkansas 72032
(501) 450-1306 (voice and fax)

President
Economic and Financial
Consulting Group, Inc.
Conway, Arkansas 72034

EDUCATION

Ph.D., Tulane University School of Economics, New Orleans, Louisiana (1983)

B.A., Hendrix College, Conway, Arkansas (1973)
Major in Economics and Business

ECONOMIC BACKGROUND

Primary Area of Interest: Macroeconomics, Monetary Theory

Field Examinations: Taken and passed in Microeconomics, Macroeconomics, Mathematical Economics, Statistics, International Economics, Monetary Theory and Econometrics

Dissertation Title: *Rational Expectations, Aggregate Supply and Fiscal Policy*

In my dissertation, I integrated fiscal parameters into the Lucas-Rapping theory of labor supply to obtain a theory of aggregate supply in which the effectiveness of fiscal policy could be analyzed. In addition I developed and estimated an empirical model for the aggregate economy incorporating developments in expectational theory into supply and demand side relationships to analyze the effectiveness of fiscal policy within a broader context.

TEACHING EXPERIENCE

Professor of Economics (tenured), Hendrix College, Conway, Arkansas 1979 to present

Instructor, Tulane University, New Orleans, Louisiana, Summer 1978-Spring 1979

Instructor, St. Mary's Dominican College, New Orleans, Louisiana, Fall 1977-Summer 1978

Current Teaching Responsibilities: I teach several sections of introductory level Microeconomics and Macroeconomics as well as upper level theory courses in Microeconomics, Macroeconomics, Money Banking and Credit and International Economics. I have also taught courses and directed independent study projects in Mathematical Economics, Finance, Monetary Theory, and Investment Analysis.

CONSULTING EXPERIENCE

Consultation in economic and financial matters is conducted through the Economic and Financial Consulting Group, Inc., of which I am a principal. Over the past 20 years, I have developed extensive experience in personal injury and wrongful death lawsuits. I have been called on by defense as well as plaintiff attorneys in this regard and have been qualified as an expert witness in Federal, State and Local Courts in Arkansas and adjacent states.

Additional consulting expertise entails business and franchise evaluations. My qualifications also extend to statistical and econometric analysis, as well as financial analysis.

List of deposition and courtroom testimony, client list and professional references available upon request.

SEMINARS AND PUBLICATIONS

Evaluation of Damages in Personal Injury Lawsuits, presented in conjunction with the Professional Education Systems, Inc.'s seminar and subsequent publication: *How to Evaluate and Settle Personal Injury Claims in Arkansas*, November 1989.

The Role of the Economist in Personal Injury Lawsuits, seminar presented to the Pulaski County Bar Association, Little Rock, Arkansas, October 1989.

Presentation to CLE seminar on recent developments in the evaluation of economic loss in personal injury lawsuits. Little Rock, Arkansas, April 1999.

OTHER ACTIVITIES

Assistant men's and women's tennis coach, Hendrix College, Conway, Arkansas.

PERSONAL

Married to Robin M. Scott and father of Ralph D. Scott, III and Kathryn Elise Scott.

Exhibit 2

ECONOMIC AND FINANCIAL CONSULTING GROUP, INC.

6 RICHLAND HILLS COVE • CONWAY, AR 72034 • (501) 450-1306

July 13, 2017

Mr. Robert L. Trentham
Attorney at Law
Butler Snow
150 3rd Avenue South, Suite 1600
Nashville, TN 37201

RE: **Cody Charles Blackburn**

Dear Mr. Trentham:

At your request, I have examined the report prepared by Dr. Gilbert L. Mathis ("Mathis") concerning the economic loss sustained by the estate of Cody Charles Blackburn ("Blackburn") as a result of his alleged wrongful death. My comments are below:

1) Mathis' lost earning capacity computations are alternatively based on the average statistical earnings of plumbers or male high school graduates. Blackburn was 35 years old at the time of his death and should have had an established earnings history. Based on information provided by your office, it is my understanding that you have made unsuccessful repeated efforts to obtain tax returns for Blackburn both through the discovery process and the IRS. It appears that there is a strong likelihood that Blackburn had not filed tax returns on a regular basis. I am not aware that any alternative documentation exists for Blackburn's historical earnings. Given this situation, it is not clear how much income Blackburn had historically generated or if he had even worked on a regular basis. Certainly there is no documentation that would provide a foundation for Mathis' computations.
2) Mathis calculated lost fringe benefits at 24.17% of income. Given the discussion in (1), this is a meaningless computation since there is no historical basis for the income to which the percentage is ultimately applied. Likewise, I am not aware of any documentation that has been provided concerning the actual employer provided benefits that Blackburn received. The difficulty encountered in obtaining documentation for earnings suggests that Blackburn might have been self-employed when and if he was actually working. If that

was the case, then he would not have received fringe benefits and Mathis' computations are inappropriate.

3) Mathis' lost household services computations are projected over Blackburn's life expectancy. It is my understanding that Blackburn's surviving son would have been the primary (only?) beneficiary of these services. After the son reaches majority (approximately 6 years), there would be no additional loss. Mathis acknowledges that his computations are based on households with "no children under age 18". Consequently, it is inappropriate to project lost household services for which the son would have been the beneficiary, over a time period in which the son would not have been in the household. This error is compounded by relying on data that specifically assumes that Blackburn would have been the only household resident.

Please do not hesitate to contact me if you have questions or if I can be of further service in this matter.

Yours very truly,

Ralph D. Scott, Jr.

RALPH D. SCOTT, JR., Ph.D.

Exhibit 3

RALPH SCOTT FEE SCHEDULE

All consulting services are billed at a rate of **$300.00** per hour. Statements generated address testimony, preparation of reports, document review, consultations, travel and any other consulting activities.

Exhibit 4

STYLE	ATTORNEY	FED/STATE	LOCATION	DATE	CASE NUMBER	COUNTY	STATE
Estate Kena Ratliff (Medical Malpractice)	Melody Piazza	State Court	Monticello, AR	1/26/2011	CV-2007-2750	Drew	AR
Kristian Parks Personal Injury	Daniel Seward Will Wyatt (Dep.)	State Court	Memphis, TN	2/1/2011			
Terri Lynn Smith v. UP	Nelson Wolff George Mufrican (Dep. 2/2/2011)	State Court	Chickasha, OK	4/21/2011	CJ2009-724	Grady	OK
Estate of Lela Kaye Smith	Hugh Crisp	State Court	Little Rock, AR	2/8/2011	CV2010-177	Boone	AR
Bradshaw v. FFE Transportation Services	Nathan Chaney	Federal Court	Hot Springs, AR	2/17/2011	09-CV-6045	Western District	AR
Bradshaw v. FFE Transportation Services	Nathan Chaney	Federal Court	Hot Springs, AR	1/13/2012	09-CV-6046	Western District	AR
Fred McClard (Med. Malpractice)	Jim Keever Phil Malcom (Dep.)	State Court	Conway, AR	2/25/2011	CV 2009-360-111	Garland	AR
Estate of Karon Lynn Jackson	Todd Rose	State Court	Dyersburg, TN	2/23/2011			
Stormes v. Hammons	Randy Shock Roger Fitzgibbon (Dep.)	State Court	Fort Smith, AR	3/17/2011	CV2009-678 Div.5	Sebastian	AR
Estate of Jennifer Chaddick v. Rex Luttrell	Bobby Odom, Aaron Martin Adam Wells (Dep.)	State Court (Pulaski Co)	Conway, AR	3/30/2011	CV-2007-13711-2	Pulaski	AR
Kathy Farlin Personal Injury	Paul Ford	State Court	Fayetteville, AR	4/6/2011			
Shepherd v. Arkansas Missouri RR	Bobby Odom Joel Johnson (Dep.)	Federal Court	Conway, AR	5/3/2011	CV-2010-10-5058	Western District	AR
Wendy Sue Peters (Personal Injury)	Thomas Greer Jay Atkins (Dep.)	State Court (Memphis, TN)	Conway, AR	4/25/2011	CT-005460-05	Shelby	TN
Clyde Sparks v. LR Western RR	Robert Cortinez Mark Wampum (Dep.)	State Court	Little Rock, AR	4/28/2011	4:10CV12BSM	Eastern District	AR
Smith v. BNSF RR	Kenneth Barnes	State Court (MO ?)	Conway, AR	5/2/2011	CT-003700-09	Shelby	TN
Teresa Santoro Personal Injury	Mattie Taylor John Kizer (Dep.)	State Court	Little Rock, AR	5/11/2011	0931-CV18742	Greene	MO
Noah Hernandez v. St. Edward Mercy Medical Center	Lamar Porter David Glover (Dep.)	State Court	Little Rock, AR	5/12/2011	CV-07-1666	Sebastian	AR
Denise Bailey Gray Personal Injury	Chris Anderson	State Court	Berryville, AR	5/16/2011			
APS v. Donley	John Ogles	State Court	Little Rock, AR	5/25/2011	CV08-6799	Pulaski	AR
Estate of Shaquandwa Cox (Med. Malpractice)	Dewey Fitzhugh Julie Hancock (Dep.)	State Court	North LR, AR	5/26/2011	CV 2008-57-6	Dallas	AR
Estate of Christine Riley	Gerry Rhoden Ed Lowther (Dep.)	State Court	Little Rock, AR	6/1/2011	CV-2008-68 (VH)	Mississippi	AR
Pyron et al. v.	Craig Cook, Ron Metcalf	State Court	Fort Smith, AR	6/17/2011			
Estate of Trent Lee Keith	Louis Chiozza	State Court	Memphis, TN	6/23/2011	CT-000073-08 Div. III	Shelby	TN
Estate of Kendrick Davis v. Tipton Co., TN	Hershel Rosenberg Brandon Gibson (Dep.)	Federal Court	Memphis, TN	6/24/2011	08-2772 SHM dkv	West. Dist., West. Div.	TN
Ray Nathan Personal Injury	Mike Crockett Kathryn Pryor (Dep.)	State Court	Little Rock, AR	6/21/2011			
Estate of Rita Couch v. Rose Drug	Peter Miller	State Court	Dardanelle, AR	7/2/2011	209475	Yell	AR
Adams v. Pilgrim's Pride	Mark Brodeur	Federal Court	Marshall, TX	7/6/2011	2:09-CV-00397-TJW-CE	Eastern District	TX
Jon Sanders Personal Injury	David Hodges Allen R. Jones, II (Dep.)	State Court	Little Rock, AR	6/28/2011	CIV-2010-132	Phillips	AR
Hobson v. Entergy	Gill Rogers Charles Schlumberger (Dep.)	State Court	Little Rock, AR	7/21/2011	CV 10641	Pulaski	AR
Donna K. Hale-Davis Personal Injury	Wayne Mills Stacy Accord (Dep.)	State Court	Oklahoma	8/1/2011	CJ-2007-863	Canadian	OK
Estate of Lyle Scott Wilson	Matt Adlong Tracey Dennis (Dep.)	State Court	Conway, AR	8/2/2011			
Nathaniel Finley Personal Injury	Patrick Cowan Brooks Kostakis (Dep.)	State Court	Memphis, TN	8/3/2011			
Estate of Katelyn Fuchs	Chris Averitt, Tony Wilcox	Federal Court (Moody)	Little Rock, AR	8/9/2011			
Dawn Atkins v. Fred's Stores of TN	Jesse Gibson	Federal Court (Barnes)	Texarkana, AR	8/10/2011			
Kimberly Hendrix Personal Injury	Brandon Lacy Richard Sonn (Dep.)	State Court	Jonesboro, AR	8/11/2011	CV-2010-166(JF)	Greene	AR
David Mark Lamb Personal Injury	Mark Albert Stephen L. Olson	State Court	Oklahoma City, OK	8/24/2011	C-J-2009-15		
Richard L. Hopper v. BNSF	Patrick Cowan Kenneth Peterson (Dep.)	State Court	North LR, AR	8/25/2011			
Diane Mitchell-Turner Personal Injury	Lamar Porter Allen Wooten (Dep.)	State Court	Little Rock, AR	8/26/2011	CV-09-823	Sebastian	AR
Estate of Jennifer Chaddick v. Rex Luttrell	Bobby Odom, Aaron Martin	State Court (Pulaski Co)	Little Rock, AR	8/29/2011	CV-2007-13711-2	Pulaski	AR
Jamie Kirk Personal Injury	Louis Chiozza Maggie Cooper (Dep.)	State Court	Memphis, TN	8/31/2011			
Dena Roberts v. Mark A. Bingham	Terry Dugger Mark Wampun (dep.)	State Court	Little Rock, AR	9/1/2011	200551	Pulaski	AR
Lora L. Plumlee	Paul Bennett David Jones (Dep.)	State Court	Conway, AR	9/6/2011			

Estate of Lauro Gamez	David Kearney Scott Jackson (Dep.)	State Court	Oklahoma City, OK	9/7/2011	CJ-2008-486	Canadian	OK
Estate of Alfred Dulworthy, St. John's Mercy Health Sys.	Doreen Graham Olivia Watters (Dep.)	State Court	St. Louis, MO	9/12/2011	09AB-CC00137	Franklin	MO
Estate of James VanLeer v. St. John's Mercy Health Sys.	Doreen Graham Olivia Watters (Dep.)	State Court	St. Louis, MO	9/12/2011	10AB-CC00161	Franklin	MO
Teton Investments et. Al. v. James Blankenship, et al.	Ben Brenner Jim Penisc	State Court	Little , Rock, AR	9/14/2011	CV 2009-5914-2	Pulaski	AR
Greg Sheppard Personal Injury	Bobby Odom Buecker	Federal Court	Fayetteville (Hendron)	9/20/2011	CV-2010-10-5058	Western District	AR
Estate of Beverly A. Tucker and Aretha Rosby	Jeremy Buecker Katherine Pryor (Dep.)	State Court	Little Rock, AR	9/25/2011	CV 2007-21-1	Monroe	AR
Dena Roberts v. Mark A. Bingham	Terry Dugger	State Court	Little Rock, AR	10/5/2011	CV 2009-9667	Pulaski	AR
Jennifer Mittlestat v. Heartland Express	Melody Piazza	State Court	Searcy, AR	10/5/2011	CV-2010-626-3	White	AR
Ericka Culver v. Harrah's Casino	James Harper Angie Davis (Dep.)	Federal Court	Memphis, TN	10/21/2011	2:10cv180-P-A	Northern Distc	MS
Phillip Roberts Personal Injury	Nathan Chaney Michael Huckabay, Jr. Dep		Conway, AR	11/4/2011			
Nancy Mailer (Estate of Thomas Terrell v. Richard Jordan, M.D.	Bill Wade Ericka Roberts (Dep.)	State Court	Conway, AR	11/7/2011	CT-004572-08	13th District Memphis Shelby Co.	TN
Salma Elkott v. St. Luke's Episcopal-Presbyterian Hospitals	Chris Wright Maureen Bryan (Dep.)	State Court	Conway, AR	11/9/2012	09SL-CC05513	St. Louis Co.	MO
Anthony Volner v. Union Pacific Railroad	Jered Medlock Jeffrey Fields (Dep.)	State Court	Fort Smith, AR	11/18/2011	11-003-JHP	10th Circuit Court of Appeals #11-7061	
Alechia Richardson (Estate of Sandy Osburn) v. Navistar, Inc.	Todd Jones Michael Wang (Dep.)	Federal Court	Little Rock, AR	11/21/2011	1:10-CV-00042	Eastern District Northern Division	AR
Diane Mitchell-Turner v. Jeffrey K. Evans, M.D.	Lamar Porter	State Court	Fort Smith, AR	12/2/2011	CV 09-823	Sebastian Co.	AR
John Daniel v. David Newton White	Buddy Slate Scott Provencher (Dep.)	State Court	Little rock, AR	12/9/2011	CV2010-833-1	Garland Co.	AR
Estate of Nancy Washington	Robert Bridewell Greg Jones (Dep.)	State Court	Little Rock, AR	12/22/2012			AR
Woodall v. Randeep Mann	Phil Milligan Doug Peters (Dep.)	State Court	Little Rock, AR	12/22/2012		Dardanelle, AR	AR
Richard Brewer v. Naples	Phil Milligan Barrett Deacon (dep.)	State Court	Conway, AR	1/5/2012		Fort Smith, AR Sebastian Co.	AR
David Morecraft v. Farmers Insurance Company, Inc	George Mullican Steve Stephens (dep.)	Federal Court	Conway, AR	1/12/2012		Northern District OK	OK
Estate of John Frost	Bruce McMath Andy Vines (Dep.)	Federal Court	Little Rock, AR	1/18/2012	4:08CV001824 GTE	Eastern District	AR
Dawn Phillips v. Northport Health Services of Arkansas	Jason Boyeski Brooke Nixon (Dep.)	Federal Court	Fort Smith, AR	1/19/2012	2:11-CV-2053-PKH	Western District AR	AR
Harold Hite	Monte Sheriis Don Taylor (Dep.)		Conway, AR	1/26/2012			AR
John L. Mouton, Jr.	Rob Neal			2/14/2012			
Nathan S. McGregor v. Illinois Central RR. Co.	Patrick Cowan Camille Reifers (Dep.)	State	Conway, AR	2/26/2012	Ct. 004227-08 Div. 8	13th Judicial District, Memphis, TN	TN
Future Fuel Chemical Co.v. Piping Industrial Co.	Chuck Gibson Bob Stroud (Dep.)	State	Little Rock, AR	3/13/2012	CV-2008-114-4	Independence Co.	AR
Jody Clark v. Union Pacific RR	Gene Napier Jamie Jones (Dep.)	Federal	Little Rock, AR	3/15/2012	5-11-CV-97-Sww	Eastern District AR	AR
Frank M. Griffin v. Synthes USA Sales, LLC	David Blair Kennedy Simpson (Dep.)	Federal	Little Rock, AR	3/26/2012	2:11-CV-02157-PKH	Western District AR	AR
Estate of Victor Love	Phillip Votaw	State	Fort Smith, AR	3/27/2012		Sebastian Co.	AR
Mclane Estate v. Rich Transport et al.	Don Elliott, Melody Piazza Christy Comstock (Dep.)	Federal	Little Rock, AR	3/28/2012	CV 11-101	Eastern District AR	AR
Charles Brown v. Wesco Distribution, Inc.	Ashley Peoples Carrie Kinsella (Dep.)	Federal	Little Rock, AR	3/30/2012	4:11-cv-00503 SWW	Eastern District AR	AR
Estate of Sharon Duke	Brent Neighbors Emily Kitch (Dep.)	State	Ft. Smith, AR	4/3/2012	CJ-2011-3715	Oklahoma Co.	OK
Estate of Ralph J. Friedman V. Julia Blackwell	Gordon Rather Shane Strabala, Mike Huckabay et al. (Dep.)	State	Little Rock, AR	4/11/2012	60CV 2010-4936	Pulaski Co.	AR
Dienne Arbec Personal Injury	Hugh Spinks	State	Hot Springs, AR	4/12/2012		Garland Co.	AR
Richard L. Kramer v. US	George Wise Loretta Radford (Dep.)	Federal	Little Rock, AR	4/24/2012	4:11-CV-00158-GKF-FHM	Northern District	OK
Real Forms v. ARA	Clarke Tucker Asa Hutchinson (Dep. 4/25)	State	Fayetteville, AR	5/15/2012	CV-11-1436-4	Washington Co.	AR
Steve Grammer v Peterson Beckner	Paul James Mike Aexander (Dep.)	State	Little Rock, AR	5/1/2012	60 CV2011 3227	Pulaski Co.	AR
Cole Minyard v. Baptist Health, et al.	Keith Grayson Adam Wells (Dep.)	State	Heber Springs, AR	5/3/2012	CV 08-5655	Pulaski Co. (2nd. Div)	AR
George James V. Jerry Burkett	Chip Baker Andy Turner (Dep.)	State	Little Rock, AR	5/15/2012	CV-2011-2250	Arkansas Co. (Southern District)	AR

Steve Perry v. AMTRAK	Jered Medlock Jeff Fields (Dep.)	Federal	Ft. Smith, AR	5/16/2012	111-CV-00587-F	Oklahoma Western District	OK
Nancy Leeks (Guardian of Garrett Henderson) v. Alexander	Tim Cullen Adam Wells (Dep.)	State	Little Rock, AR	5/18/2012	CV 09-163-6th	Columbia Co.	AR
Frederick McClard v. Bruce L. Smith, M.D.	Jim Keever Tony DiCarlo (Dep.)	State	Little Rock, AR	5/29/2012	CV 209-360-III	Garland Co.	AR
Ruben Miller v. St. Edward Mercy Medical Center	Regina Young Chip Welch (Dep.)	Federal	Little Rock, AR	5/21/2012	11-2102	Western District Fort Smith Division	AR
Terri Fought v. James Tree & Crain Service	Taylor Chaney Michael Harrison (Dep.)	State	Little Rock, AR	5/31/2012	CV-2008-10413	Pulaki Co.	AR
Brunken/Restek v. EMC	Kevin Hoskins Kent McGuire (Dep.)	State	Tulsa, OK	6/1/2012	CJ-2009-9614	Oklahoma Co.	OK
Debra Smith v. St Mary's Hospital Foundation	Cephus Richard Kirk Doughtery (Dep.)	State	Conway, AR	6/27/2012	CV-2009-2028-3	Benton Co.	AR
Fratesi v. Southern Farm Bureau	Dennis Davis Andy Turner (Dep.)	Federal	Bryant, AR	6/25/2012	5:11-CV-0198 BSM	Eastern District Pine Bluff Division	AR
Adams v. Pilgrim's Prode	Mark Brodeur	Federal	Marshall, TX	7/17/2012	2:09 -CV - 397	Eastern District Marshall Division	TX
Richard Hargreaves III. V. Concord Water & Sewer	Bob Buckalew Joel Farthing (Dep.)	State	Little Rock, AR	7/24/2012	CV 2010-269-1	Crawford Co.	AR
Mike Townsend v. Bayer Corp.	Brian Reddick Joe Nealan (Dep.)	Federal	Little Rock, AR	7/26/2012	5:11 CV00055-JMM	Eastern District Pine Bluff Division	AR
Terry Alexander v. IESI Corp.	Dean Malone Bryan Pollard (Dep.)	State	Little Rock, AR	8/10/2012	CC-11-05442-D	Dallas Co.	TX
Kenndylle Brown v. University of Alabama Health Services	Janet Dann Ty E. Dedmon (Dep.)	State	Little Rock, AR	8/10/2012	01-CV-2010-902148	Jefferson Co.	AL
Michael Reed v. Malone's Mechanical, Inc.	Joey McCutchen	Federal	Ft. Smith, AR	8/22/2012	11-CV-2135PKH	Western District Ft. Smith Division	AR
Nicole Kies v. Byrd & Associates	Don Kendall Cliff Plunkett (Dep)	State	Ft. Smith, AR	9/11/2012	CV 2011-710-5	Benton Co.	
Debra Thomas v. Michael Brandt & James Loehrer	Steve Meyerkord Diane Robben (Dep)	State	St. Louis, Mo	9/12/2012	09SL-CC01858	St. Louis Co.	MO
Griffin v. Dumas Cotton Gin	Paul James (Lee Tucker, Bruce Munson (Dep.)	State	Little Rock, AR	9/14/2012	CV 2010-211-3	Desha Co.	AR
Jack Tyler Engineering Co. v. Colfax Corporation	Tony Wilcox Andrew Campbell (Dep.)	Federal	Memphis, TN	9/17/2012	2:10-CV-02373-RHC-CGC	Western District	TN
Adams v. Pilgrim's Prode	Mark Brodeur	Federal	Marshall, TX	9/20/2012	2:09 -CV - 397	Eastern District Marshall Division	TX
Joyce Owen v. Toyota Motor Corp.	Geoff Culbertson Mark Killingsworth (Dep.)	Federal	Little Rock, AR	9/24/2012	2:10-CV-00504-JRG-RSP	Eastern District Marshall Division	TX
Bobby Hullett v. GPS of NWA, Inc.	James Swindill	State	Fort Smith, AR	10/3/2012		Sebastian Co	AR
Holly Riley v. John Pappas	Cephus Richard Debra Gullett (Dep.)	State	Conway, AR	10/3/2012	CV-2011-1462-6	Benton Co.	AR
JCI and York v. Sholimier	Greg Campbell, Richard Watts	Arbitration	Tulsa, OK	10/2/2012	7150533211	Am. Arbitration Assoc.	OK
Estate of Milton Taylor v. AMR G. El-Shafei, M.D. et al.	Tim Smith Debra Gullett (Dep.)	State	Conway, AR	10/10/2012	CV-210-3460-5	Benton Co.	AR
Charles Mills v. D&R Railroad	Chester Lauck Teresa Wineland (Dep.)	State	Little Rock, AR	10/15/2012	CV-2006-337-3	Saline Co.	AR
Jon Stover v. Shinsung	Bob Trammell Elise Vasquez (Dep.)	State	San Francisco, CA	11/4/2012	CIV 504587	San Mateo Co.	CA
Mike Townsend v. Bayer Corp.	Brian Reddick	Federal	Little Rock, AR	11/7/2012	5:11 CV00055-JMM	Eastern District	AR
Bryce C. Brewer v. Rosie Young (Estate of William C. Young, Jr.)	Paul Ford	State	Jonesboro, AR	11/8/2012	CV-2011-0473 (JF)	Craighead, Co.	AR
Roy Jackson (Estate of Melissa Jackson) v. Dr. David Dias	Matt Lindsay Kyle Heffley (Dep.)	State	Conway, AR	11/9/2012	CV-09-1682-2	Washington Co.	AR
Julie Venable	Kirby Mouser Katie Kirkpatrick (Dep.)	State	Little Rock, Ar	11/12/2012			AE
Charles Mills v. D&R Railroad	Chester Lauck	State	Benton, AR	11/14/2012	CV-2006-337-3	Saline Co.	AR
Ashley Stewart (Estate of Vickie Freemyer) v. State of Arkansas (ASP)	Robert Coleman	State	Little Rock, AR	11/15/2012	12-0512-CC	AR. State Claims Comm.	AR
Holly Riley v. John Pappas	Cephus Richard	State	Bentonville, AR	11/15/2012	CV-2011-1462-6	Benton Co.	AR
Brenda L. Dotson v. Jacob C. Maxwell	Taylor Chaney Karen Hughes (Dep.)	State	Little Rock, AR	11/16/2012	CV-2010-192	Clark, Co.	AR
J. C. Cary v. United States of America	Darrell Baker Lindsay Lorence (Dep.)	Federal	Little Rock, Ar	11/19/2012	2-11-CV-0140BRW	Eastern District	AR
Terry Alexander v. IESI Corp.	Dean Malone	State	Dallas, TX	12/7/2012	CC-11-05442-D	Dallas Co.	TX
Estate of Milton Taylor v. AMR G. El-Shafei, M.D. et al.	Tim Smith	State	Bentonville, AR	12/11/2012	CV-210-3460-5	Benton Co.	AR
Harold & Peggy Pate v. Gary Gehrki, M.D.	Michael Dennis Phil Matco (Dep.)	State	Little Rock, AR	12/19/2012	CV-2010-84-1	Pike Co.	AR
Bobby Sutton v. Waste Management of AR et al.	Lamar Porter Betty Hardy (Dep.)	Federal	Little Rock, AR	1/4/2013	4:12-CV-00027-BSM	Eastern District	AR
George Bennett v. Pilot Travel centers, LLC.	Scott Wilhite	State	Marion, AR	1/8/2013	CV-2010-231	Crittendem, Co.	AR
Joyce Owen v. Toyota Motor Corp.	Geoff Culbertson	Federal	Marshall, TX	1/14/2013	2:10-CV-00504-JRG-RSP	Eastern District Marshall Division	TX
ESD, Inc. v. York International Corporation et al.	Tony Wilcox Joe Falasco (Dep.)	State	Little rock, AR	1/17/2013	60CV-2011-2113	Pulaski Co.	AR

Ray Nassar & Gena Smith v. Hughes School District	Mike Easley	Federal	Jonesboro, AR	1/16/2013	3:11CV00133-SWW	Eastern District	AR
George James V. Jerry Burkett	Chip Baker	State	Dewitt, AR	1/17/2013	CV-2011-2250	Arkansas Co.	AR
Daniel Kenward v. Mark Hengel	Shane Bridgforth	State	Little Rock, AR	1/18/2013		(Southern District) Jefferson Co.	AR
	Mike Huckabay, Sr. (Dep.)						
Kenneth Hanson v. State Line Fireworks, Inc.	David Glass	State	Conway, AR	1/21/2013	11-C-692	Cass Co.	TX
	Greg Wilkins (Dep.)					(5Tth Judicial Dist.)	
Alexandria Smith v. King W. Evers and Carhop USA, Inc.	Lucas Gramlich	Federal	Conway, AR	2/6/2013	2:12-cv-02080-PKH	Western District	AR
	Dale Brown (Dep.)					Ft. Smith Division	
Dana Leigh Barton v. Frank Tomecek, Jr. M.D.	Karman Stoops	Federal	Conway, AR	2/18/2013	11CV-619 CVE TLW	Northern District	OK
	Linsey E. Williams (Dep.)						
David Stacy v. PPC Transportation Co.	Mark Brodeur	Federal	Texarkana, AR	2/27/2013	Civil Action 11-4018	Western District	AR
Jacqueline Blackwell v. Anna Palmieri et al.	Bill Wade	State	Memphis, TN	3/5/2013	CT-CT-00649-12	13th Judicial District,	TN
	Brad Gilmer (Dep.)					Memphis	
Kathy Allen et al. v. Natalie Ann Morgan et al.	Bill Wade	State	Memphis, TN	3/5/2013	CT-001759-12	13th Judicial District,	TN
	Maggie Cooper (Dep.)				Division III	Memphis	
Brenda Ivy v. Lea Bannister, et al.	Marty Bowen	Federal	Little Rock, AR	3/7/2013	2:12-02339-JPM-tmp	Western District	TN
	Randall Sellers (Dep.)						
Estate of Dawn Anita Gaddy v. Baptist Health, et al.	Gary Green	State	Little Rock, AR	3/14/2013	60CV-2010-5236	Pulaski Co.	AR
	Mark Wankum (Dep.)						
Reder, et al. v. Integrated Production Services, Inc. et al.	Matt Hartness	State	Little Rock, AR	3/20/2013	CV12-415	Faulkner County	AR
	Ed Lowther (Dep.)						
Wallace v. Chronister	Emily Herron	State	Conway, AR	3/22/2013	CJ-2007-386	McCurtain Co.	OK
	Bill Speed (Dep.)						
Birdsong v. Jackmen	Bill Reynolds	State	Little Rock, AR	4/2/2013		Pulaski Co.	AR
	Richard Smith (Dep.)						
Tabitha Gallaher v.Joshua Kugel-Rolls	Mike Murphy	State	Conway, AR	4/8/2013	11SF-CC00110	St. Francis Co.	MO
	Julianne O'Bannon Germinder (Dep.)						
Larry Minor et al. v. Schlumberger Technology Corp.	Chip Sexton	Federal	Little Rock, AR	4/9/2013	11-CV-2258-RTD	Western District	AR
	Shane Strabala (Dep.)					Fort Smith Division	
Steve Perry v. AMTRAK	Chester Lauck	Federal	Oklahoma City, OK	5/13/2013	111-CV-00557-F	Oklahoma	OK
	(Evidentiary Deposition)					Western District	
Jeremy Williamson Personal Injury	Robert Neal	State	Holdenville, OK	5/21/2013		Hughes Co.	OK
Scott Baker v. Rexdon, Inc.	Dan Bufford	Federal	Little Rock, AR	5/20/2013	3:12-CV-089BSM	Eastern District	AR
	Ben Willman (Dep)						
Adam Rababah v. Derrick Wayne Organ, et al.	Nick Wiseman	State	Dallas, TX	5/23/2013	DC-12-00741-G	Dallas Co.	TX
	Steven Anderson (Dep.)					(134th Judicial Dist.	
Eliah Haley-Franklin v. Methodist Healthcare et al.	Lou Chiozza	State	Memphis, TN	5/29/2013	CT-0020088-06	Memphis	TN
	Tiffany Bowders (Dep)					13th Judicial District	
Scotty McCollum v. Jacobs Engineering Group, Inc.	Tim Brooks	Federal	Memphis, TN	5/29/2013	5:11-CV-177-DCB-MTP	Southern District	MS
	Robert Hayberg (Dep.)						
Valerie Reese v. Gregory David Dabov & Campbell Clinic v. State of Tennessee	Bryan Smith	State	Memphis, TN	5/17/2013	CT-001659-07, Div.1 and CT001659-09, Div. 1	Memphis 13th Judicial District	TN
	Jennifer Sink (Dep.)						
Frederick McClard v. Bruce L. Smith, M.D.	Jim Keever	State	Hot Springs, AR	6/19/2013	CV 209-360-III	Garland Co.	AR
Russell Zachary v. The Parlor Club, Inc. et al	Tony Wilcox	State	Little Rock, AR	6/20/2013	CV-2012-106	Johnson Co.	AR
	Mark Breeden (Dep.)						
Lela Baird v. North American Hydro Contracting	Casey Castleberry	State	Little Rock, AR	7/9/2013	CV-2010-29-2	Independence Co.	AR
	Skip Davidson (Dep)						
Sanetta Davis v. HLR, LLC, d/b/a Little Rock Hilton, et al.	David Hodges	State	Little Rock, AR	7/10/2013	CV-2012-44	Phillips Co.	AR
	Gordon Rather (Dep)						
Symons v. Chrysler Group, et al.	Anna Betts	state	Little Rock, AR	7/18/2013	CV-2012-794-4	Benton Co.	AR
	Steve Bingham (Dep.)						
Garland Smith v. Spa Lodging and Otis Elevator Co.	Marty Bowen	State	Hot Springs, AR	8/2/2013	CV-2012-673-1	Garland Co.	AR
Curtis Pinson v. 45 Development, et al.	Ray Niblock	Federal	Conway, AR	8/6/2013	12-2160	Western District	AR
	Joel Farthing (Dep.)						
Donald Barbeau v. Baptist Health	John Gehlhausen	State	Little Rock, AR	8/7/2013	60CV-2012-1561	Pulaski Co. - 13th Div	AR
	Tyler Bone 9Dep.)						
Alfred Brown v. Union Pacific RR	Chet Lauck	Federal	Little Rock, AR	8/8/2013	5:12-CV-055 JLH	Eastern District - Pine Bluff	AR
	Robert Miller (Dep.)						
Sammy Hicks v. State Auto Insurance Companies	Ziad Masri	State	Conway, AR	8/9/2013	CV 2008-625-11	Crawford Co.	AR
	Curtis Stebbens (Dep.)						
Lela Baird v. North American Hydro Contracting	Tom Thompson	State	Batesville, AR	8/14/2013	CV-2010-29-2	Independence Co.	AR
Lillian Irene Roark v. John K. Thompson, M.D.	Bryan Smith	State	Memphis, TN	9/6/2013	31086-C	Sumner Co.	TN
	Taylor Mayes (Dep.)						
Estate of Rodney Miller v.Dr. David Riggs, et al.	Chris Averitt	State	Little Rock, AR	9/12/2013	60CV2011-1550	Pulaski Co. (Claims Com.)	AR
Johnny Clifton v. Liberty Mutual	Buddy Slate	State	Little Rock, AR	9/18/2013	CV2012-256-4	Independence Co.	AR
	David Donovan (Dep.)						
Patricia Brewer v. Kristine Lohr, M.D.	Dan Peel	State	Memphis, TN	9/19/2013	CT-001759-05	13th Judicial District at Memphis	TN
Terri Fought v. James Tree & Crain Service	Taylor Chaney	State	Little Rock, AR	9/23/2013	CV-2008-10413	Pulaki Co.	AR
Steekmacher v. Todd Doyals	Douglas Schumacher	State	Little Rock, AR	9/25/2013	CJ-2012-70	Custer County	OK
	Roy Jones (Dep.)						
Brenda Ivy v. Lea M. Bannister et al.	Marty Bowen	Federal	Memphis , TN	9/26/2013	2:12-02339-JPM-tmp	Western District	TN
Estate of marthey West v. Tri W Logging	Steve owings	State	Little Rock, AR	10/4/2013	27CV-2012-66-1	Grant Co.	AR

Mary Ann Callison v. Dottie Morrison	Brent Correll (Dep.) Mick Crockett Richard Watts (Dep.)	State	Little Rock, AR	10/9/2013	CIV 11-287-3	Saline Co.	AR
Ragsdale, et al. v. Byassee	Luther Sutter	Federal	Cape Girardeau, MO	10/21/2013	1:11-CV-00200-LMB		MO
Candy Pavlianis v. Ryan E. Gursky and St. Francis hospital	Joel LaCourse David Graves (Dep.)	State	Tulsa, OK	10/28/2013	CJ-2011-01608	Tulsa Co.	OK
Zoreida Iglesias v. Dustyn Hayes and Union Pacific RR	David Hodges Jamie Jones (Dep.)	State	Little Rock, AR	10/30/2013	CV2013-54	Lonoke Co.	AR
Estate of Maurice Mitchell v. Raytheon Company, et as.	Shawn Daniels Paul Herbers (Dep.)	Federal	Little Rock, AR	11/20/2013	1:11-cv-1046 SOH	Western District El Dorado Division	AR
Danfoss Scroll Technologies v. PPG Industries	Ray Ripple, David Powell Gordon Rather (Dep)	Federal	Little Rock, AR	12/12/2013	6:11-cv-06014-RTD	Western District Hot Springs Division	AR
Sonia Dale Powell v. American Medical Systems, Inc.	Craig Cook Lynn Pruitt (Dep)	State	Little Rock, Ar	12/20/2013	CV -2011-1451	Sebastian Co.	AR
Estate of Akaylah Tucker v.Brian Elbe and Paul Seib	John Houseal Adam Wells (Dep)	State	Little Rock, Ar	12/20/2013	60CV-09-8052	Pulaski Co - 16th Division	AR
David Pipkin v Union Pacific Railroad	Chet Lauck Will Shelton (Dep.)	State	Little Rock, AR	1/2/2014	17CV-12-427	Crawford Co.	AR
Winnie Sims Camp v. USA	Shawn Daniels Lindsey Lorence (Dep.)	Federal	Little Rock, AR	1/3/2014	4:12-cv-313-DPM	Eastern District	AR
Trademark Medical, LLC v. Burchwood Laboratories, Inc.	Dan Ryan Dean Eyler (Dep.)	Federal	St. Louis, Mo	1/13/2014	4:12-CV-01890-JAR	Eastsr District Eastern Division	MO
Adam Rababah v. Derrick Wayne Organ, et al	Nick Wiseman	State	Dallas, TX	1/17/2013	DC-12-00741-G	Dallas Co. 134th Judicial District	TX
Patricia Castle v. Junamay Jay Rangolan and CAF Consulting	James Swindoll Mike Huckabay (Dep)	State	Little Rock, AR	1/24/2014	CV-2012-41	Mississippi Co	AR
Ashley Hurst v. Shelby County Healthcare Corporation et al.	Berry Cooper Darrell Baker (Dep.)	State	Little Rock, AR	1/28/2014	CT-00548-07	13th Judicial Distrlcy Memphis	TN
Russell Zachary v The Parlor Club, Inc. et al	Tony Wilcox	State	Clarksville, AR	1/30/2014	CV-2012-166	Johnson Co.	AR
Joshua McKiever v. Continental Casualty Co. et al.	David Blair Adam Wells (Dep.)	State	Little Rock, AR	2/6/2014	CV-2008-8382	Pulaski Co.	AR
Phyllis Jones v. Wayne L. Bruffett, et al.	Hugh Spinks Glenn Ritter (Dep.)	State	Little Rock, AR	2/6/2014	60 CV-2012-1521	Pulaki Co.	AR
Estate of Akaylah Tucker v.Brian Elbe and Paul Seib	John Houseal	State	Little Rock, Ar	2/20/2014	60CV-09-8052	Pulaski Co - 16th Division	AR
Steven J. Heglmeier v. Phillip Chavez A/F/A Felipe Chavez	Dean Malone Dana Ryan (Dep.)	State	Little Rock, AR	2/27/2014	296-00884-2013	Collin Co. 296th Judicial District	TX
Derek Scott Haggar v. Robert Shull M.D.	Melody Piazza Carson Tucker (Dep.)	State	Little Rock, AR	2/28/2014	CV-2010-721	Crittenden Co.	AR
Maria Graciano and First Community Trust v. Frances Renee Montgomery	Gary Green Glen Ritter (Dep.)	State	Little Rock, AR	3/6/2014	CV-2010-271-2	Independence Co.	AR
Genova Miller (Estate of Steve Bell) v. Phillips Hospital	David Hodges Ben Jackson (Dep)	State	Little Rock, AR	3/14/2014	CV-12-64-2	Phillips Co.	AR
EWI, Inc. v. Crafton, Tull & Associates	Joel Hoover David Matthews (Dep)	State	Russellville, AR	3/18/2014	CV-2011-329	Pope Co.	AR
Ted Chandler v. Jacobs Engineering Group, Inc.	John Ogles Frank Day	Federal	Jacksonville, AR	3/21/2014	3:12-CV-00104-BRW	Eastern District	AR
Maria Graciano and First Community Trust v. Frances Renee Montgomery	Gary Green	State	Batesville, AR	3/31/2014	CV-2010-271-2	Independence Co.	AR
Shiquita Burley v. Interstate Improvement, Inc.	Thom Diaz Kyle Burton (Dep.)	State	Little Rock, AR	4/2/2014	60CV-12-1930	Pulaski Co - 17th Div.	AR
Tricia Dundee v. Brenda Horton & Geico Ins. Co	Joey McCutchen	State	Greenwood, AR	4/8/2014	CV-2013-147-G	Sebastian Co (Greenwood)	AR
Carol Pratt v. Akins Janatorial Services, Inc.	Burl Newell Mark Breeding (Dep)	State	Little Rock, AR	4/14/2014	60CV-2013-3465	Pulaski Co (7th Division)	AR
Kelley Ammons v. Spencer Gunn, M.D.	Chuck Banks	State	Jonesboro, AR	4/15/2014	CV-2013-107(PH)	Craighead Co.	AR
Estate of Cedric Holbrooks, Estate of Travis Gum v. Entergy AR, Inc.	David Hodges J.C. Baker (Dep.)	State	Little Rock, Ar	4/18/2014	CV-2012-19	Phillips Co.	AR
Lome St. Christopher v. Union Pacific Railroad Company	Chet Lauck Kristopher Knox (Dep.)	Federal	Little Rock, AR	5/14/2014	5:12-cv-0058BSM	USDC Eastern District	AR
Denise and Curtis Ritchie v. Mercy Hospital Rogers, et al.	Robert Talaska Hayden Shurgar (Dep.)	State	Little Rock, AR	5/19/2014	CV-2012-547-4	Benton CO.	AR
David R. Robins v. Rebecca Mae Robins	Ron Metcalf	State	Ft. Smith, AR	5/21/2014	DR 13-233 G (III)	Sebastian Co	AR
Kellie Miller and James Miller v. Brittney Rose	Kent Tester	State	Conway, AR	5/29/2014	CV 13-443	Faulkner Co.	AR
Rasburry & Tedder v. Long & Falk Supply Company	Drew Ellis Ror Gene Sanders (Dep.)	State	Conway, AR	5/17/2014	CV-13-718-2	Saline Co.	AR
Pipkin v. UP	Chet lauck	State	Van Buren, AR	5/26/2014	17CV-12-427	Crawford Co.	AR
Andrew Jepko v. William G. Almand (Estate of Kimberly Whitmire)	Richard Watts Scott Provencher (Dep.)	State	Little Rock, AR	6/27/2014	60CV-2013-2848	Pulaski Co - 17th Div.	AR
Sandra Williams (Estate of Lonnie Williams v. Fred Kirk, et al.)	Glenn Gulick Scott Strauss (Dep.)	State	Conway, AR	6/30/2014	CV13-1208-2	Washington Co.	AR
Estate of Elizabeth Gilbert v. Rogers Group, Inc. v. Rickey Emerson & Mike Smith	Bruce McMath Gene Williams (Dep.)	State	Little Rock, AR	7/21/2014	CV 2011-199	Conway Co.	AR
Wayman Bryant v. Dalton Lee Anderson	Scott Vorhees Phillip Greathouse (Dep.)	State	Little Rock, AR	7/21/2014	13AO-CC0135	Jasper Co.	MO
Derek Scott Haggar v. Robert Shull M.D.	Melody Piazza	State	Little Rock, AR	7/23/2014	CV-2010-721	Crittenden Co.	AR
Phyllis Jones v. Wayne L. Bruffett, et al.	Hugh Spinks	State	Little Rock, AR	7/25/2014	60 CV-2012-1521	Pulaki Co.	AR

Wheat (hamric) v. Monster Beverage Corp. et al	Reggie Whitten	state	Durant, OK	7/31/2014	CJ-2013-15	Bryan Co.	OK
Mark and Rochelle Gardner v. Continental Casualty Company, Ark. Children's Hospital, et al.	Bruce Mulkey Will Griffin (Dep.)	Federal	Little Rock, AR	8/8/2014	4:13-CV-552-SWW	Eastern District	AR
Walter Paul Hoover & Vivian Hoover v. USA	George Wise	Federal	Little Rock, AR	8/21/2014	4-11-CV-0395 JM	Eastern District	AR
Delta Bank as Admin. of the Estate of Ricky Cessor v. Beacon Tire, Inc.	Conrad Guthrie Carter Fairley (Dep.)	State	Little Rock, AR	8/25/2014	CV-2010-150-3	Ashley Co.	AR
Phillip Roberts v. Ed Dell Wortz	Don Chaney Michael Huckabay (Dep.)	State	Conway, AR	9/5/2014	CV-2013-101	Sebastian Co	AR
Angela Dixon (Estate of Barbara Lynn Huggins) v. Clinton Edward Evans et al.	Bruce McMath	State	Little Rock, AR	9/9/2014	60-CV-2012-2477	Pulaski Co.	AR
Sammi N. Eddi v. Marcus W. Garoutte et al.	Thom Diaz	State	Bentonville, AR	9/17/2014	CV 2013-379-2	Benton Co.	AR
Jill Norris v. St. John's Medical Center, Dr. Patrick Han and Dr. Nathan Uy	Richard Shallcross Brandon Whitworth (Dep.)	State	Fayetteville, AR	9/19/2014	CJ-2011-05242	Tulsa Co.	OK
Barbara Ausbrooks Personal Injury	James Swindoll	State	Benton, AR	9/24/2014		Saline Co.	AR
Jamie Logan Gobea v. Lee R. Morisy et al.	Lou Chiozza Karen Koplon (Dep.)	State	Memphis, TN	9/29/2014	CT-008614-06 Div. IX	30th Judicial District at Memphis	TN
Deseeti Johnson v. Sewell Drilling LLC, et al	Lamar Porter Jeremy Swearingen (Dep.)	State	Little Rock, AR	10/3/2014	CV-2013-0259-6	Union Co.	AR
Trent Burnside v. Railserve, Inc.	Nelson Wolff Rick Donovan (Dep.)	State	Little Rock, AR	10/13/2014	12-32-3	Ashley Co.	AR
Jaye Burns & Richard Burns v. Valero Energy Corporation, et al.	Doug Carson Michael Harrison (Dep.)	State	Little Rock, AR	10/16/2014	17CV-11-698 (II)	Crawford Co.	AR
Tracy Dail v. Dr. Andrew Cole	George Wise Glenn Ritter (Dep.)	State	Little Rock, AR	10/23/2014	CV-2010-729	Faulkner Co.	AR
Linda McKinney v. HCA Health Services of Oklahoma, Inc.	Spencer Housley Chad Moody (Dep.)	State	Conway, AR	11/14/2014	CJ-2011-7152	Oklahoma Co.	OK
Tony Haggard v. Carolyn Logan and The Cincinnati Insurance Company	Jason Boyeski Joel Farthing (Dep.)	State	Springdale, AR	11/24/2014	CV-14-1048-5	Washington Co.	AR
Joseph R. Helmert v. Katherine Weaver	Chip Sexton Michael Harrison (Dep.)	State	Conway, AR	11/25/2014	CV-13-1010	Sebastian Co.	AR
Estate of Cora Lee Dowd v. Helena Regional Medical Center, et al.	John Ogles Tony Dicarlo (Dep.)	State	Little Rock, AR	11/26/2014	CV-2012-186	Phillips Co.	AR
Lucia Turcios v. Craftmark Products	Felipe Link Jeff wright (Dep.)	State	Conway, AR	12/9/2014	096-259057-12	Tarrant Co. 96th Judicial District	TX
Estate of Trenton Duane Williams v. Travis Horn, et al.	James Bargar John Moore (Dep.)	State	Conway, AR	12/18/2014	CV-2013-42-1	Johnson Co.	AR
William Keith Tramel v. Superior Graphite Co.	Brett Fleck Edward Druck (Dep.)			12/19/2014			
Estate of Curtis Plunkett v. Christus Health et al.	Jim Clements Katherine Larson (Dep.)	State	Little Rock, AR	12/22/2014	13C0522-202	Bowie Co. (202nd District)	TX
Estate of William C. Biermann v. West County Medical Specialists, Inc. et al.	Chris Wright Tim McCurdy (Dep)	State	Conway, Ar	12/29/2014	13SL-CC02524	St. Louis Co. (Div. 10)	MO
Tara R. Smith v. State of Tennessee	David Goodman Darrell Baker (Dep)	State	Little Rock, Ar	12/30/2014	CT-003246-11 (Div IX) CT-005217-12 (Div IX)	Shelby Co. (13th Judicial District)	TN
Rachel Bergren v. Matthew Torres, et al.	Gary Green Tommy Williams (Dep.)	State	Little Rock, AR	1/27/2015	63CV-14-111-2	Saline Co.	AR
Tim Chapman, Estate of Ella Chapman v. American Home Shield Corporation et al.	Russell Winburn Skip Henly (Dep.)	State	Fayetteville, AR	1/29/2015	CV-13-11621	Sebastian Co.	AR
Carla Lewis v. Old Dominion Freight Line, Inc. and Melvin Howze	Kara Mikles Gary Barrett (Dep.)	Federal	Little Rock, AR	1/30/2015	4:13CV0589-DPM	Eastern District -Western Div.	AR
Linda Gail Dagley v. Cowtown Materials, Inc. et al.	Avery McDaniel Thomas Fee (Dep.)	State	Little Rock, AR	2/2/2015	067-265610-13	Tarranni Co.	TX
Bert Hollibaugh v. Union Pacific Railroad Co.	James Ferguson John Tietz (Dep.)	State	LittleRock, AR	2/3/2015	ADV-2008-767	Lewis & Clark Co. (Montana First Judicial District)	Montana
Denise and Curtis Ritchie v. Mercy Hospital Rogers, et al	Robert Talaska	State	Bentonville, AR	2/5/2015	CV-2012-547-4	Benton CO.	AR
Jason Dunlap (Estate of Crystal Dunlap) v. U.S. Express, Inc. and Steve Cimino, Jr.	Matt Hartness Christy Comstock (Dep.)	State	Little Rock, AR	2/5/2015	CV2014-3	Mississippi Co.	AR
Erica L. Croquart (Estate of Robert Henry) et al v. D&L Trucking et al.	Kevin Graham Jerry Salkings (Dep.)	State	Little Rock, AR	2/9/2014	CV-2011-0781(JF)	Craighead Co.	AR
Tara R. Smith v. State of Tennessee	Les Jones	State	Little Rock, Ar	2/10/2015	CT-003246-11 (Div IX)	Shelby Co.	TN
Rachel Bergren v. Matthew Torres, et al.	Gary Green	State	Benton	2/11/2015	63CV-14-111-2	Saline Co.	AR
Michelle Patillo (Estate of Dorotha Patillo) v. Booneville Community Hospital et al.	Craig Cook Tyler Bone (Dep.)	State	Little Rock, AR	2/12/2015	42B-CV-2014-15, Div. II	Logan Co. - Southern Dist.	AR
Linda McKinney v. HCA Health Services of Oklahoma, Inc.	Spencer Housley	State	Oklahoma City, OK	2/25/2015	CJ-2011-7152	Oklahoma Co.	OK
Erin Miller v. Rachel Berry	Drew Ellis Michael Harrison (Dep.)		Conway, AR	2/27/2015			AR
Michael Wilson v. Timothy Joe Mitchell and John Christner Trucking Co.	Matt Corbett (Zack Vaughn Dep.)	State	Conway, AR	3/10/2015	10SL-CC01702	St. Louis Co. - Div. 1	MO
Marquitta Corbin v. Baptist Health Inc., et al	Hugh Spinks	State	Little Rock, AR	3/13/2015	60-CV-2013-1436	Pulaski Co.	AR
Victoria Lynn Banks, et al. v. Con-Way Truckload, Inc. et al	Paul Waddell	State	Corning, AR	3/18/2015	CV-2013-23	Clay Co.	AR
Rodney Poe v. Lee Mechanical Contractors, Inc. and Rodney Berry	Mark Dunn Scott Reid (Dep.)	State	Conway, AR	3/19/2015	11JE-CC00360-J1	Jefferson Co.	MO
Karen Hawkins v. State Farm Automobile Insurance Co.	Drew Ellis	State	Benton, AR	4/1/2015	63CV-158-2	Saline Co.	AR
Richard Toland v. State Farm Mutual Automobile Ins. Co	Nathan Chaney John Moore (Dep.)	Federal	Little Rock, AR	4/16/2015	12CV-00044-DPM	US District Court #2	AR

Bank of Batesville (Guardian of William Scott Mueller) v. Baptist Health et al.	Scott Davidson	State	Little Rock, AR	4/23/2015	60CV-14-1270-IX	Pulaski Co.	AR
Estate of Ryan M. Bullard v. Carson and Associates and Snyder Environmental	Chet Lauck Mike Alexander (Dep.)	State	Little Rock, AR	4/30/2015	CV 2013-193-2	Jefferson Co.	AR
Daniel M.Robinson v. SOS and Schlumberger Technology Corporation & SOS Employment	Mark Alberi Josh Harrison (Dep)	State	Conway, Ar	5/15/2015	CJ-2013-138	Beckham Co.	OK
Phyllis Crouch, et al. v. Mablene Buggs, M.D. and Freeman Health Systems	Roger Johnson Dennis Harms (Dep.)	State	Conway, AR	6/2/2015	14NW-CV00055	Newton Co.	MO
Daniel M.Robinson v. SOS and Schlumberger Technology Corporation & SOS Employment	Mark Alberi, Joe White	State	Sayler, OK	6/4/2015	CJ-2013-138	Beckham Co.	OK
Estate of Anderson Dale Williams v. Schwarze Industries, Inc. et al.	Charles Sydney Gibson Joe McKay (Dep.)	State	Little Rock, AR	6/5/2015	CV-2014-59-1	Desha Co.	AR
Michaela Gulley v. Brookshire Grocery Company	Rusty Mitchell Paul Miller (dep.)	State	Little Rock, AR	6/29/2015	29CV-13-162-1	Hempstead Co.	AR
Mountain Pure Water, LLC v. Les Usinages Mallette, Inc., et al	Tim Dudley Kathryn Pryor (Dep.)	Federal	Little Rock, AR	7/9/2015	4:13CV691 JMM	Easter District (Western Division)	AR
Selena Taylor, et al. v. EMCARE of Missouri, et al.	Kim Luther Brett McDaniel (Dep.)	State	St. Louis, MO	7/16/2015	14CG-CC00026	Cape Girardeau Co.	MO
Charles Williams v. Board of County Commissiones of Mayes Co.	Robert Winter Ethan Gee (Dep)	State	Conway, AR	7/22/2015	CJ-14-9	Mayes Co.	OK
Stephanie Burchfield v. John B. Cone, M.D.	Hal Cook Will Griffin (Dep.)	State	Little Rock, AR	7/22/2015	CV-14-1599	Pulaki Co.	AR
Estate of Jennifer Laurent v. The Lakes, et al.	Dennis Davis	State	Benton, AR	7/23/2015		Saline Co.	AR
Deborah Kenkel v. Petroplus LLC	Thom Diaz Scott Strauss (Dep.)	State	Conway, AR	7/29/2015	23-CV-14-174	Faulkner Co.	AR
Rachelle Daniels v. Wal-Mart Stores, Inc, et al.	David Williams Jeff Spillyards (Dep.)	State	Little Rock, AR	7/31/2015	CV-2014-74	Clark Co.	AR
Paine v. Hugentobler	Hugh Crisp	State	Malvern, AR	8/13/2015	Probate Hearing	Hot Spring Co.	AR
Jerry Stover v. Coring and Cutting Services, Inc.	Craig Oliver Scott Provencher (Dep.)	State	Conway, AR	8/20/2015	CV-2014-969-4	Washington Co.	AR
Amanda Boardman, et al. v. Dr. Amy Buckner, et al.	Casey Tucker Adam Wells (Dep)	State	Little Rock, AR	8/26/2015	35CV-09-739-5	Jefferson Co	AR
Estate of Anderson Dale Williams v. Schwarze Industries, Inc. et al	Charles Sydney Gibson	State	Little Rock, AR	9/2/2015	CV-2014-59-1	Desha Co.	AR
Christina Helms v. Bradley Woelber and Hattabaugh Trucking, Inc.	Powell Sanders Barrett Deacon (Dep.)	State	Conway, AR	9/9/2015	CIV-2014-3-G	Sebastian Co.	AR
Catherine Dew v. United States	Scott Davidson	Federal	Little Rock, AR	9/23/2015	1:14CV1	Eastern District	AR
Christina Helms v. Bradley Woelber and Hattabaugh Trucking, Inc.	Powell Sanders	State	Conway, AR	9/29/2015	CIV-2014-3-G	Sebastian Co.	AR
Michaela Gulley v. Brookshire Grocery Company	Rusty Mitchell	State	Little Rock, AR	9/29/2015	29CV-13-162-1	Hempstead Co.	AR
Nikki Haughey v. Central Refrigerated Service, Inc., et al.	Tony Wilcox Todd Murrah (Dep.)	Federal	Conway, AR	10/8/2015	3:13-cv-00268 BSM	Eastern District - Jonesboro	AR
Estate of Sheila Jackson v. Continental Casualty Co., et al.	Ryan Scott Adam Wells (Dep.)	State	Conway, AR	10/9/2015	60CV-13-4118	Pulaski Co. Civil Division	AR
Estate of Curtis Plunkett v. Christus Health et al.	Jim Clements	State	New Boston, TX	10/22/2014	13C0522-202	Bowie Co. (202nd District)	TX
Matt Elkins et al. v. Greene V. Colvin IV,M.D. et al.	Les Jones Chris Vescovo (Dep.)	State	Memphis, TN	10/23/2015	CT-001959-09	13th Judicial District - Memphis	TN
James L. Barker v. Wepfer Marine	Frank Dantone Jessica Hayes (Dep)	Federal	Conway, AR	10/29/2015	2:14-cv-02387	Western District (Western Division)	TN
Beatriz Morales(Estate of Melvin Gonzalez- Paredes) v. Devin Hall et al.	Louis Hakin Paul Derks (Dep)	State	Conway, AR	10/29/2015	DC-14-02373	Dallas Co. (14th District)	TX
Kristy Crews (Estate of Kinley Breanne Crews) v Stephen W. Bowen et al.	Lauren Baber Richard Lusby (dep)	State	Conway, AR	11/5/2015	CV-2014-451(MR)	Craighead Co. (Western District)	AR
Regina Wood v. Austin Duckett, et al	Denise Hoggard Brian Ratcliff (Dep)	Federal	Little Rock, AR	11/13/2015	1:15-CV-1003-SOH	Western District (El Dorado)	AR
Mountain Pure Water, LLC v. Les Usinages Mallette, Inc., et al.	Tim Dudley	Federal	Little Rock	11/16/2015	4:13CV691 JMM	Easter District (Western Division)	AR
Virginia Ray and Jeff Ray v. Allen Weston, M.D. and Freeman Health Systems	Roger Johnson	State	Little Rock, AR	11/24/2015	14AO-CC00207	Jasper Co.	MO
Estate of Sheila Jackson v. Continental Casualty Co., et al.	Ryan Scott	State	Little Rock, AR	12/11/2015	60CV-13-4118	Pulaski Co. Civil Division	AR
Rhonda Lynn Speaks v. Danny Wayne Thomas	Bill Reynolds Jeffrey Curran (Dep.)	Federal	Fort Smith, AR	12/21/2015	6:15-cv-00357-SPS	Eastern District	OK
Ronald Matney v. Chanel, Inc. and Renee Buchholtz	Chip Baker Scott Strauss (Dep.)	State	Little Rock, AR	1/5/2016	60CV-15-1727	Pulaski Co.	AR
Thomas Wells v. Union Pacific Railroad Company et al.	Nelson Wolff Pam Blair (Dep.)	State	Little Rock, AR	1/6/2016	48CV-14-31	Monroe Co. Division 1	AR
Chris Phillips v. City of Little Rock	Jerry Larkowski LaTonya Austin (Dep.)	State	Little Rock, AR	1/14/2016		Pulaski Co.	AR
Carolyn Olson v. William Chad Wiglington, et al	Keith Grayson Bryce Crawford (Dep.)	State	Heber Springs, AR	1/15/2016	CV 14-1518	Benton Co.	AR
Connie Parker Personel Injury	Jay Neal	State	Fayetteville, AR	1/20/2016		Washington Co.	AR
Bruce Menser v. FCA US	Marty Bowen Steve Bingham (Dep.)	Federal	Conway, AR	1/21/2016	4:15-CV-136 KGB	Eastern District (Western Division)	AR
Isaac Torkelson (Estate of Aaron Torkelson) v. Matthew S. Berg et al.	Thom Diaz DonTaylor (Dep.)	State	Conway, AR	1/26/2016	CV 2013-87-1	Marion Co.	AR
Lonnie F.Johnson (estate of Joe Michael Johnson) v. Haight Trucking, et al.	Geoff Culbertson	State	Little Rock, AR	2/4/2016	CV-2015-102	Polk Co.	AR

Jeremy Ricks (Logan Ricks) v. Michael B. McClurkan, M.D., et al.	Jerry Sallings (Dep.) Lamar Porter	State	Little Rock, AR	2/4/2016	CV-2011-0835 (PH)	Craighead Co.	AR
Wayne Miner and James Easley v. Phillip Morris Companies, Inc., et al	Paul McNeill, Paul Waddell (Dep.) Tom Thrash	State	Little Rock, AR	2/15/2016	60CV03-4661	Pulaski Co.	AR
Virginia Ray and Jeff Ray v. Allan Weston, M.D. & Freeman Health Systems	Sean Eskovitz (Dep.) Roger Johnson	State	Joplin, MO	2/25/2016	14AO-CC00207 Div.-1	Jasper Co.	MO
Wilson Termination	Luther Sutter	State	Little Rock, AR	3/1/2016		Pulaski Co.	AR
Laeyton Holloway v. Conway Regional Health System, et al.	Jason Penn Adam Wells (Dep.)	State	Little Rock, AR	3/10/2016	23CV-13-973	Faulkner Co.	AR
Estate of Ronnie L. Smith v. Trans-Carriers, Inc. and Richard Hubbard	Lee Brown Michael Thompson (Dep.)	Federal	Little Rock, AR	3/14/2016	4:15-cv-00253-BSM	Eastern District Western Division	AR
Jason Jacobsen v. Montata Rail Link	James Ferguson	State	Livingston, MT	3/28/2016			MT
Estate of Alfred Thomas v. Frederick Meadors, M.D., et al.	Gene McKissic Mark Wankum (Dep)	State	Little Rock, AR	4/5/2016	60CV-13-3428	Pulaski Co.	AR
Tracy Dail v. Dr. Andrew Cole	Lamar Porter	State	Conway, AR	1/15/2016	CV-2010-729	Faulkner Co.	AR
Monroe H. Gunnet v. James Douglas Stroud, et al.	Greg Taylor Will Griffin (Dep.)	State	Little Rock, AR	4/14/2016	23CV-15-471	Faulkner Co.	AR
Estate of Dan Stilwell v. Jose Padilla, Jr., M.D., et al.	Chip Sexton Glenn Ritter (Dep.)	State	Conway, AR	4/25/2016	17CV-15-196 I	Crawford Co.	AR
Estate of Angel Alexus Pacheco v. Great River Pediatric Clinic, et. al	Jodi Black Jason Browning (Dep.)	State	Conway, AR	4/26/2016	CV-2010-394(RP)	Mississippi Co.	AR
Colleen A. Wallace v. Helton's Wrecker Service et al	Thom Diaz Clarke Tucker (Dep.)	State	Conway, AR	5/9/2016	23CV-12-231	Faulkner Co.	AR
Riverside Marine Remanufacturers, Inc. v. Western Diesel Services, Inc	John Tull, Chip Chiles, Ryan Younger	State	Little Rock, AR	5/4/2016		Pulaski Co.	AR
Shiquita Bracy v. Delta Tech., et al.	Wesley Hisaw Angela Williams (Dep.)	Federal	Memphis, TN	5/6/2016	3:14-cv-00238-MPM-SAA	Northern District of MS	MS
Tracy T. Young, et al. v. Martin Specialty Coatings, et al.	Chad Trammell Alexander Mijalis (Dep.)	Federal	Little Rock, AR	4/26/2016	5: 14-CV-03356-SMH-KLH	Western District of LA Shreveport Division	LA
Anna Hoaglin (as power of attorney for Mikaela Hoaglin) v. Cox Health, et al.	Roger Johnson Catherine Reade (Deposition)	State	Little Rock, AR	5/12/2016	1531-CC00121	Greene Co.	MO
Estate of Cora Lee Dowd v. Helena Regional Medical Center, et al.	John Ogles	State	Little Rock, AR	6/2/2016	CV-2012-188	Phillips Co.	AR
Michelle Day, Administrator of the Estate of James Avery Deweese, Sr. et al. v. USA	David Hodges Lindsey Lorence (Dep)	Federal	Little Rock, AR	6/9/2016	4:14-CV-342 KGB		AR
Estate of Ronald Fulton v. Ozarks Electric, et al.	Alan Lane Richard Hornbeek (Dep)	State	Tulsa, OK	6/10/2016	CJ-2011-100	Adair Co.	OK
Nicole Hinson as Next Friend of C.H. a Minor, v. Dorel Juvenile Group, Inc.	Jeff Embry	Federal	Marshall, TX	6/14/2016	2:15cv713	Eastern District of TX - Marshall	TX
Shawn Moffett v. St. Vincent Infirmary Medical Center, et al.	Gene Adams Brandon Cole (Dep)	State	Little Rock, AR	7/7/2016	60CV-15-1308	Pulaski Co.	AR
John David Stobbe v. Victoria E. Young	Chandler Gregg Philip Sumner (Dep)	State	Conway, AR	6/24/2016	1531-CC00035	Greene Co., Division 1	MO
Estate of Alfred Thomas v. Frederick Meadors, M.D., et al.	Gene McKissic	State	Little Rock, AR	7/14/2016	60CV-13-3428	Pulaski Co.	AR
Frederick Holst v. Sendil Kumar Hari Prasad, M.D.	Marc Stewart Carson Tucker (Dep.)	State	Little Rock, AR	8/2/2016	23CV-14-254	Faulkner Co.	AR
Estate of James Scott Fleming v. Kenneth Vest, M.D.	Jack Talbot Tyler Bone (Dep.)	State	Little Rock, AR	8/8/2016	CV2011-184-111	Garland Co.	AR
Kattula v. Jaeger Sports Academy Inc., et al.	Clark Mason (Mike Hale Dep.)	Federal	Conway, AR	8/17/2016	4:15CV95-JM	Eastern District of AR Western Division	
Charles W. Hodge v. Roxanne M. Garrison and Mercy Home Health Bentonville	Jim Sproti Glenn Ritter (Dep.)	State	Conway, AR	8/25/2016	05CV-15-256-3	Boone Co.	AR
Estate of James Frederick Boehn v. Deestone International Co. et al.	Craig Cook Carter Fairley (Dep.)	State	Little Rock, AR	8/25/2016	CV 2015-068 ND	Arkansas Co.	AR
Deborah Hubbard v. Jon Simons and Lesa Simons	David Childers (Pat Keck Dep.)	State	Conway, AR	8/30/2016	12CT-CC00134	Christian Co.	MO
Estate of Denise Moren v. David Heath Stacey, et al.	Erin Vorhees Dale Garrett (Dep.)	State	Conway, AR	9/19/2016	CV15-1041-2	Washington Co.	AR
Clifton Morgan V. City Water and Light Plant of Jonesboro, AR	Shawn Daniels (J.C. Baker Dep.)	State	Little Rock, AR	9/20/2016	CV-2014-521 (DL)	Craighead Co.	AR
Tracy T. Young, et al. v. Martin Specialty Coatings, et al.	Chad Trammell	Federal	Shreveport, LA	8/31/2016	5: 14-CV-03356-SMH-KLH	Western District of LA	LA
Hershall Morse v. USA	Callis Childs (Lindsey Lorance Dep.)	Federal	Little Rock, AR	9/14/2016	4:14-CV-00249-BSM	Eastern District of AR Western Division	AR
Matthew Grey Selonus v. Rebecca A. Rolfsrock, M.D., et al	Kim Kinsler Richard Glassman (Dep.)	State	Little Rock, AR	9/22/2016	C-13-4 DIV II	28th Judicial District Jackson	TN
Petro Shale, Inc. v. Poseidon Energy Services and Marcus Devine	Larry Burkes	State	Searcy, AR	9/28/2016	CV2099-424	White Co.	AR
Jack E. Johnson v. The Harris Waste Management Group, Inc.	Chad Trammell Joseph Price (Dep.)	State	Little Rock, AR	9/29/2016	CV-2013-84-1	Little River Co.	AR
Blake Thatcher v. Wal-Mart Stores, Inc.	Stephen Dacus Timothy Kingsbury (Dep.)	State	Little Rock, AR	10/4/2016	CV2015-360-5	Benton Co.	AR
Nancy J. Wells v. Mercy Hospital Fort Smith	Alan Lane Joseph Luebke (Dep.)	State	Conway, AR	9/29/2016	CV 2015-946	Sebastian Co.	AR
Estate of Ericka Chaistain Ritter v. Michael Marsh, et al.	Hal Cook Mark Dossett (Dep.)	State	Little Rock, AR	10/25/2016	CV 2014-11	Sebastian Co.	AR
Tennyia Crase v. Wal-Mart Stores, Inc.	Trae Bryant Mark Steele (Dep.)	State	Fort Smith, AR	10/13/2016	CJ-2015-141	Pittsburgh Co.	OK

Benjamin Cantwell v. Mark Holub and Edge Supply Co.	Ben Stringer Brendon Sanders (Dep.)	State	Conway, AR	10/14/2016	15CT-CC00526	Christian Co.	MO
Tonya Potthast v. Fort Smith HMA et al.	Ziad Masri Colin Johnson (Dep.)	State	Conway, AR	11/21/2016	CV-15-917	Sebastian Co.	AR
Estate of Deborah Deane Magness v. Harjit Singh et al.	Reggie Whitten Gil Steidley (Dep)	State	Conway, AR	1/5/2017	CJ-2015-190	Fort Smith District Lincoln Co	OK
Sims v. State Farm	Don Chaney	Federal	Little Rock, AR	1/10/2017	4:13-CV-00371	Eastern District of AR	AR
Estate of Billy Joe Campbell v. United States	George Wise Campbell (Lindsey Lorance Dep.)	Federal	Little Rock, AR		3:15-cv-9-DPM	Eastern District of AR	AR
Joaquin mendez v. Larry Castrop, et al.	David Borland Bill Edwards (Dep.)	State	Conway, AR	1/26/2017	17CV14-3560	Crawford Co.	AR
Estate of Gloria Arkadie v. Arkansas Elder Outreach of Little Rock, Inc. et al.	Kyle Ludwig Bruttany Pettingill (Dep).	State	Little Rock, AR	1/27/2017	18CV-2015-148	Crittenden Co.	AR
Charles Andrews v. Kenney Industries	Dean Malone		Dallas, TX	2/9/2017	AAA Case # 01-15-0005-8676		
Patricia Lyons v. Peco Foods, Inc	Fuller Bumpers Sheldon Alston (Dep.)	Federal	Batesville, AR	2/14/2017	1:15-CV-117-DPM	Eastern District	AR
Vicky L. Turner v. Donald Pease	Bob Cearley Joel Farthing (Dep.)	State	Conway, AR	2/23/2017	44CV-16-82-5	Madison Co.	AR
Tara Edwards (Rex Hicks) v. Gateway Emergency Physicians, et al.	Erin Vorhees Anthony Debre (Dep)	State	Conway, AR	2/27/2017	14NW0CV-02169-01	McDonald Co.	MO
Katelyn Gooden (Khyree Martin) v. St. Vincent Infirmary Medical Center, et al.	Robert Talaska David Jung (Dep.)	State	Little Rock, AR	3/1/2017	60CV-15-1715	Pulaski Co. (9th Civil Div.)	AR
Sutton Warren v. Pediatrics East, et al.	Richard Glassman Jana Lamanna (Dep.)	State	Memphis, TN	3/2/2017	CT-003380-12	Shelby Co. (30th District)	TN
Estate of Daniel Wallace Earls v. Town of Arkoma, et al.	Jeff Edwards Robert Lafferrandre (Dep.)	Federal	Conway, AR	3/6/2017	CIV-16-371-Raw	Eastern District	OK
Southern Design and Mechanical v. Flowserve US, Inc.	David Powell Earsa Jackson (Dep.)	AAR	Little Rock, Ar	3/7/2017	01-16-0001-3305	AAR	
Estate of William C. Biermann v. West County Medical Specialists, Inc. et al.	Chris Wright	State	St. Louis, Mo	3/9/2017	13SL-CC02524	St. Louis Co. (Div. 10)	MO
Reed & Armstrong v.Lynn, et al.	Richard Shallcross	State	Tulsa, OK	3/13/2017	CJ-2011-6116	Tulsa Co.	OK
Cindy Tune and Emily Conley (Estate of Shirley Ann Morrell) v. Brandon Brown, et al.	Alan Lane Cliff Plunkett (Dep.)	State	Little Rock, AR	3/3/2017	CV-2016-91-1	Crawford Co.	AR

APPENDIX 47

79323

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiffs,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

NOTICE OF FILING FOREIGN SUBPOENA AND ADDITIONAL DOCUMENTS SERVED ON RICHARD M. SOBEL, M.D., MPH

Defendant, Mark A. McLean, M.D., by and through counsel, hereby gives notice of filing the Foreign Subpoena served on Richard M. Sobel, M.D., MPH for appearance and production of documents at his deposition on October 4, 2017.

On September 2, 2017, at 11:20 a.m., Richard M. Sobel, M.D., MPH was personally served with a copy of the Georgia Subpoena For The Production of Evidence; Tennessee Subpoena Duces Tecum; and Request for Issuance of Foreign Subpoena Pursuant to Georgia Code 24-13-112 by Edmond J. Byer. A copy of the Affidavit of Service and all documents served on Richard M. Sobel, M.D., MPH are being filed in this matter.

Respectfully Submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

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Attorneys for Defendant Mark A. McLean, M.D.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Joe Bednarz, Jr. (BPR #18540)
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Attorney for Plaintiffs

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Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

This the 21st day of September, 2017.

79323

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiffs,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

ADDITIONAL DOCUMENTS FOR PRODUCTION FROM RICHARD M. SOBEL, M.D., MPH

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4. The bills that you have submitted in this case and your records showing how much time you have spent on this case and how much you have been paid for your work in this case;
5. Copies of advertisements for your services reviewing medico-legal matters for the years 2013, 2014, 2015, 2016, and 2017;
6. A current Curriculum Vitae;
7. A list of cases in which you have been or currently are a party for the years 2013, 2014, 2015, 2016, and 2017;
8. A list of all publications you have authored in the previous ten (10) years;
9. A list of the state and federal medical malpractice cases in which you have testified as an expert witness for the years 2013, 2014, 2015, 2016, and 2017;

10. A list of the state and federal cases in which you have testified as an expert witness for law firm, Bednarz & Bednarz, for the years 2013, 2014, 2015, 2016, and 2017;

11. Records showing the total income Richard M. Sobel, M.D., MPH derived from work as an expert witness for Bednarz & Bednarz for 2012, 2013, 2014, 2015, and 2016;

12. A schedule of charges for work as an expert witness;

13. Copies of the relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which will allow Richard M. Sobel, M.D., MPH to answer questions about his total income paid for medico-legal matters during these years) which show the amount of money Richard M. Sobel, M.D., MPH was paid for medico-legal matters during these years;

14. A complete copy of all records and other matters (including medical articles and/or medical texts) which he has reviewed in order to form his opinions in this case;

15. All written reports that he has prepared in this case, including any notes that he has made about the case;

16. A copy of all the depositions that he has given in medical malpractice cases; and

17. A list of all medical malpractice cases which he has reviewed as an expert witness in the last ten years, including the caption of the case, the attorneys for the respective parties, on whose behalf he was testifying, and a brief description of the nature of the case.

APPENDIX 48

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiffs,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

DEFENDANT MARK A. MCLEAN, M.D.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS SUBPOENAED FROM RICHARD M. SOBEL, M.D.

Defendant Mark A. McLean, M.D., by and through counsel, respectfully moves the Court for an order compelling Plaintiff and Plaintiff's expert, Richard M. Sobel, M.D. to produce the following items listed in the Tennessee Subpoena Duces Tecum, Georgia Subpoena For The Production of Evidence, and Request for Issuance of Foreign Subpoena Pursuant to Georgia Code 24-13-112, served on Richard M. Sobel, M.D. on September 2, 2017:

13. Copies of the relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which will allow Richard M. Sobel, M.D., MPH to answer questions about his total income paid for medico-legal matters during these years) which show the amount of

money Richard M. Sobel, M.D., MPH was paid for medico-legal matters during these years.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

BY: Michelle Sellers

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

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Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

This the 31st day of January, 2018

Michelle Sellers

APPENDIX 49

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiffs,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MARK A. MCLEAN, M.D.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS SUBPOENAED FROM RICHARD M. SOBEL, M.D.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff filed this health care liability action on January 12, 2016. (Compl.) Plaintiff alleges that Defendant Mark A. McLean, M.D. ("Dr. McLean") acted negligently in treating Cody Blackburn at Maury Regional Medical Center emergency room. On or about May 1, 2017, Plaintiff served Plaintiff's Rule 26 Expert Disclosures As To All Defendants in this matter. (Pls. Rule 26 Discl.) Plaintiff identified Richard M. Sobel, M.D. as an expert witness who may testify at trial on behalf of Plaintiff. Dr. Sobel's expert discovery deposition was scheduled to be taken on October 4, 2017 in Peachtree City, Georgia.

Dr. Sobel is not an occasional expert in medical malpractice cases. He is involved frequently in medical malpractice cases. In fact, based on his own case

list and deposition testimony he has testified by deposition approximately two hundred (200) times and testified at trial at least twenty-eight (28) times since 2001. (Case List attached as **Exhibit A**; Depo. of Sobel at 125-126, 131-132. (Pertinent excerpts of Dr. Sobel's deposition are attached as **Exhibit B**.)

On August 25, 2017, a Subpoena Duces Tecum was issued by the Maury County Circuit Court for Richard M. Sobel, M.D., MPH. to appear at the Hilton Garden Inn Atlanta/Peachtree City, 2010 North Commerce Drive, Peachtree City, Georgia on October 4, 2017 at 9:00 a.m. The subpoena duces tecum and attached list identified a number of items that Dr. Sobel was to bring with him to the deposition. (Subpoena Duces Tecum)

On August 31, 2017, a Subpoena For The Production of Evidence At A Deposition was issued by the Superior Court Clerk for Fayette County, Georgia. The clerk attached the Request For Issuance Of Foreign Subpoena Pursuant To Georgia Code § 24-13-112, Subpoena Duces Tecum issued by the Maury Circuit Court Clerk with the Additional Documents For Production From Richard M. Sobel, M.D., MPH attached to the Subpoena Duces Tecum, to the Georgia Subpoena For The Production Of Evidence At A Deposition. (Georgia Subpoena For The Production Of Evidence At A Deposition.) On September 2, 2017, at 11:20 a.m., Edmond J. Byer personally served Richard M. Sobel, M.D., MPH with a copy of the Georgia Subpoena For The Production of Evidence; Tennessee Subpoena Duces Tecum; Request For Issuance of Foreign Subpoena Pursuant to Georgia Code § 24-13-112. (Affidavit of Service.) Dr. Sobel was served with the aforementioned documents at 101 Passage Point, Peachtree City, Fayette

County, Georgia. (A copy of the documents served on Dr. Sobel is attached as **Exhibit C**.)

Pursuant to Rule 45.04 of the Tennessee Rules of Civil procedure, the Tennessee Subpoena Duces Tecum specifically provided that "The failure to serve an objection to this subpoena within twenty-one days after the day of service of the subpoena waives all objections to the subpoena, except the right to seek the reasonable cost for producing books, papers, documents, electronically stored information, or tangible things." Dr. Sobel failed to serve an objection to the subpoena within twenty-one (21) days after the day of service of the subpoena. (*See* Subpoena Duces Tecum.)

On September 8, 2017, Plaintiff's counsel was provided with a copy of the Subpoena Duces Tecum that was issued by the Maury County Circuit Court and served on Dr. Sobel. The subpoena duces tecum included the list of documents Dr. Sobel was requested to bring to his discovery deposition on October 4, 2017. Plaintiff's counsel was also informed that another document was issued in Georgia requesting the same items/referring Dr. Sobel to the subpoena duces tecum issued in Maury County, but defense counsel did not yet have the documents back from the process server in Georgia. (A copy of the email including the documents provided is attached as **Exhibit D.**)

On September 21, 2017, a Notice of Filing Subpoena and Additional Documents Served on Richard M. Sobel, M.D., MPH were sent to all counsel and the Court for filing. (A copy of the Notice is attached as **Exhibit E**.)

On September 29, 2017, twenty-seven (27) days after Dr. Sobel was served with the Subpoena Duces Tecum and four (4) days before his deposition in Peachtree City, Georgia, Plaintiff's counsel sent a letter to defense counsel stating that assuming the subpoena was valid, Dr. Sobel was objecting to many of the documents requested in the subpoena. (A copy of the letter is attached as **Exhibit F.**) The letter does not specifically set forth what items in the subpoena duces tecum that Dr. Sobel is objecting to.

On October 4, 2017, counsel for Defendants deposed Dr. Sobel at the Hilton Garden Inn – Peachtree City in Peachtree City, Georgia. Pursuant to the Tennessee Subpoena Duces Tecum, Georgia Subpoena For The Production of Evidence, and Request for Issuance of Foreign Subpoena Pursuant to Georgia Code 24-13-112, Dr. Sobel was to appear and produce records showing the total income Richard M. Sobel, M.D., MPH derived from work as an expert witness and copies of the relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which will allow Richard M. Sobel, M.D., MPH to answer questions about his total income paid for medico-legal matters during these years) which show the amount of money Richard M. Sobel, M.D., MPH was paid for medico-legal matters during these years. Dr. Sobel did not bring the documents set forth in the Subpoena Duces Tecum and Additional Documents served on him. Additionally, during the deposition, Dr. Sobel was unable to answer questions regarding his income earned from medical-legal work.

Defendant Mark A. McLean, M.D. now moves the Court for an order compelling Plaintiff and Plaintiff's expert, Richard M. Sobel, M.D. to produce the

following items listed in the Tennessee Subpoena Duces Tecum, Georgia Subpoena For The Production of Evidence, and Request for Issuance of Foreign Subpoena Pursuant to Georgia Code 24-13-112, served on Richard M. Sobel, M.D. on September 2, 2017:

13. Copies of the relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which will allow Richard M. Sobel, M.D., MPH to answer questions about his total income paid for medico-legal matters during these years) which show the amount of money Richard M. Sobel, M.D., MPH was paid for medico-legal matters during these years.

Defendant moves the Court to require Plaintiff and Plaintiff's expert, Dr. Sobel, to provide the documentation requested within fifteen days.

II. LAW AND DISCUSSION

A. The Tennessee Rules of Civil Procedure allowed Dr. Sobel twenty-one days from the date of service to object to the subpoena or waive his objections.

Pursuant to Rule 45.04 of the Tennessee Rules of Civil procedure, an individual served with a subpoena duces tecum is allowed twenty-one days after the day of service of the subpoena to serve an objection or waive those objections. In accordance with Rule 45.04 the Tennessee Subpoena Duces Tecum specifically provided that "The failure to serve an objection to this subpoena within twenty-one days after the day of service of the subpoena waives all objections to the subpoena, except the right to seek the reasonable cost for producing books, papers, documents, electronically stored information, or

tangible things." (*See* Subpoena Duces Tecum.) Dr. Sobel failed to serve an objection to the subpoena within twenty-one (21) days after the day of service of the subpoena.

Dr. Sobel was served with the subpoena duces tecum on September 2, 2017. (Affidavit of Service; Depo of Sobel at 104.) On October 4, 2017, counsel for Defendants deposed Dr. Sobel at the Hilton Garden Inn – Peachtree City in Peachtree City, Georgia. During the deposition, Dr. Sobel testified that he was served with a subpoena for the deposition. He did not dispute the date he was served with the subpoena. The testimony was as follows:

> Q: I'm marking as Exhibit 1 information related to your subpoena for today's deposition. You were served with a subpoena for this deposition, right, Dr. Sobel?
>
> A: Yes.
>
> Q: And that subpoena was served on September the 2nd, 2017; is that right?
>
> A: I suppose. I don't specifically recall.
>
> Q: Well, you don't dispute the date of service that says as much, do you?
>
> A: Sure, if that's what it says. I don't recall.
>
> (Depo. of Sobel at 104.)

No objection or motion to quash the subpoena duces tecum was ever filed by Dr. Sobel. The only information Defendant received regarding Dr. Sobel's objection to parts of the subpoena duces tecum was provided on September 29, 2017, twenty-seven (27) days after Dr. Sobel was served with the Subpoena Duces Tecum and four (4) days before his deposition in Peachtree City, Georgia.

The letter from Plaintiff's counsel stated that assuming the subpoena was valid, Dr. Sobel was objecting to many of the documents requested in the subpoena. The letter did not identify or specifically set forth what items in the subpoena duces tecum that Dr. Sobel was objecting to.

Dr. Sobel waived any potential objections to the subpoena duces tecum, except the right to seek the reasonable cost for producing books, papers, documents, electronically stored information, or tangible things, by failing to timely serve an objection in accordance with the Tennessee Rules of Civil Procedure. *See* Tenn. R. Civ. P. 45.04. Assuming the letter from Plaintiff's counsel constitutes an objection to the subpoena duces tecum from Dr. Sobel, pursuant to the Tennessee Rules of Civil Procedure, the objection was untimely.

Therefore, the Court should enter an order compelling Plaintiff and Plaintiff's expert, Richard M. Sobel, M.D., MPH to produce the documents set forth in the Subpoena Duces Tecum and other documents served on Dr. Sobel within fifteen days.

B. Dr. Sobel did not produce the documents identified in the subpoena duces tecum regarding his income from medical-legal work and made no effort to comply with the subpoena.

During his deposition, Dr. Sobel agreed that he saw, in reviewing the subpoena, that he was to bring several items to the deposition. (*Id.*) However, he refused to bring the documents related to his income from medical-legal work.

Item 13 of the subpoena duces tecum provides that Dr. Sobel was to bring to the deposition copies of the relevant 1099s from 2012 through 2016, or other similar documents that would allow him to answer questions about the total

income paid to him for his service as an expert in medical-legal matters during these years. Dr. Sobel failed to bring any records responsive to Item 13 of the subpoena. Dr. Sobel testified that not only did he not bring any responsive records; he made no effort to comply with Item 13 of the subpoena. The testimony was as follows:

Q: Item 13 asks for copies of relevant 1099s from 2012 through 2016, or other similar documents that would allow you to answer questions about the total income paid to you for your service as an expert in medical-legal matters.

Did you bring those documents?

Mr. Bednarz: Marty, we would object to that. I don't think that's discoverable, but you're certainly welcome to ask him questions on it.

Q: (By Mr. Phillips) Did you bring those documents, Doctor?

A: No, I did not.

Q: Okay. You do have those documents, don't you?

A: No, I do not. They may exist, but I don't have them.

Q: Your accountant would have those documents?

A: I think so, possibly, going back to 2012. But I don't think I'm required to keep them for that long. Possibly.

Q: You would certainly be able to obtain these documents from your accountant or whoever happens to be the holder of the documents currently, right?

A: Possibly, at a cost.

Q: And whatever documents you have showing income for expert witness work, you would have reported as part of your tax returns, wouldn't you?

A: Yes.

Q: And it would be customary for you to receive a 1099 from law firms paying monies to you in given years, wouldn't it?

A: Yes.

Q: Did you make any effort to comply with Request 13 in the subpoena?

A: No.

(Depo. of Sobel at 128-129.)

Despite being served with a subpoena duces tecum over a month before his deposition identifying 1099s or other documentation regarding his total income from his medical-legal work to be produced at his deposition and setting forth that he should be prepared be testify on that issue (and being asked these questions in prior depositions), Dr. Sobel refused to comply with the subpoena duces tecum and was unable to answer questions regarding his total income derived from his expert witness work. Dr. Sobel did not recall his total income from serving as an expert witness for 2012. He testified as follows:

Q: In the year 2012, what was your total income from serving as an expert witness in medical malpractice cases?

A: I don't recall.

Q: What's your best estimate?

A: I'm not sure I could give an accurate estimate, but I would say probably in the range of perhaps $200,000 a year, or so, from 2012 to 2016. And I don't know exactly, but I would give you a ballpark figure of that.

Q: So would that be your answer to every year from 2012 through 2016?

A: Yes. I don't know exactly, but I think that would be a fair enough estimate. Some years might be less; others more. And I don't exactly recall; I don't know what it was last year. I don't do my own accounting even.

(*Id.* at 134-135.) Dr. Sobel does not really know what his expert income was from 2012 to 2016. He testified further as follows:

> Q: So your answer with regard to income is that you don't really know what your expert income is from 2012 through 2016?
>
> A: No. I don't know the exact figure.
>
> Q. And could your estimate of $200,000 be terribly low?
>
> A: I don't think so.

Dr. Sobel admitted that he could have looked at documents and been prepared to answer questions about his income from medical legal work. He testified as follows:

> Q: You could have before today, knowing that I was going to ask these questions, you could have looked at documents, talked with your accountant, talked with your wife, and been able to answer these questions, right?
>
> A: It would be rather time consuming and it would involve puling records for six years. It's a possibility, yes, I could have. But I'm not sure that you're legally entitled to that sort of information, nor my personal income as a physician.

(*Id.* at 136.)

Although the documents Dr. Sobel was subpoenaed to bring to his discovery deposition exist, likely in an electronic format and at least some of those documents have previously been compiled and produced in a health care liability action in Tennessee, Dr. Sobel made no effort to produce the documents or familiarize himself with the requested information to be able to answer questions during his deposition as to his income from medical-legal work. As a

result, the Court should order Plaintiff and Plaintiff's expert to produce the documents Dr. Sobel was subpoenaed to bring to his discovery deposition.

C. Dr. Sobel has previously produced 1099s and information regarding his income from medical-legal work but made no effort to gather the information already compiled or to review that information to enable him to answer questions.

Dr. Sobel has previously produced information regarding his total income obtained as an expert witness in certain years as was requested in the subpoena duces tecum. (*Id.* at 142.) In a prior case in Memphis, his accountant provided financial information, including 1099s showing the amount of money earned as an expert witness in certain years. After testifying that he had never produced 1099s before, Dr. Sobel testified as follows:

> Q: What information did you provide? Was it records? Was it testimony? What was it?
>
> A: The accountant provided all the financial information, and it included 1099s.
>
> Q: And did the accountant give information about what your total expert income was for particular years?
>
> A: Well, I think that was the simple sum of the 1099s. I believe so, yes. The accountant was actually paid quite a bit of money to submit that to the Court.
>
> Q: Do you still - -
>
> A: I'm not sure I even read it.

(*Id.* at 143-144.) Dr. Sobel did not attempt to obtain the documentation that was previously compiled and produced in a prior case regarding his income from medical-legal work. His testimony was as follows:

> Q: Do you still have the information that was produced in that case about your total income as an expert witness?

A: No. And as I stated, it was under a judge - - judge's protective order that it could not be used in any other case.

Q: This same accountant you've identified in this case was the one who would have provided the information in the other case?

A: Yes. It was - -

Q: Did you - -

A: Mr. Ron Spain, yes.

Q: Did you check to see if Mr. Spain kept a copy of what he had already gathered and produced in some other case?

A: No.

Q: You didn't check with him and ask that after you got this subpoena?

A: No, because it's absolutely inappropriate and I object.

(*Id.* at 144-145.) There can be no undue burden especially as to the requested documentation that has already been compiled and previously produced. Simply because Dr. Sobel does not want to produce information regarding his income earned from medical-legal work does not make it an undue burden to produce the documentation. The Court should order Plaintiff and Plaintiff's expert, Dr. Sobel to produce the documents identified in the subpoena duces tecum that Dr. Sobel refused to produce at his deposition.

D. Even if Dr. Sobel had filed a timely objection to the subpoena duces tecum, the information requested regarding his income earned from medical-legal work is undeniably relevant and probative of his bias and credibility.

It is well settled that judges and juries in Tennessee "may consider an expert's bias or financial interest in the litigation when determining the weight to be given to his or her opinions." *Laseter v. Regan*, 481 S.W.3d 613, 629 (Tenn.

Ct. App. 2014) *app. for perm. to appeal denied* (Tenn. Dec. 18, 2014)(*quoting GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 547 (Tenn. Ct. App. 2005)(*quoting Street v. Levy, L.P.*, No. M2002-02170-COA-R3-CV, 2003 WL 21805302, at *4 n.5 (Tenn. Ct. App. Aug. 7, 2003)).

Information regarding Dr. Sobel's income for his services as an expert witness is probative of Dr. Sobel's bias and credibility and is relevant and discoverable in this matter where he is serving as an expert witness. Pursuant to Rule 616 of the Tennessee Rules of Evidence, "[a] party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Tenn. R. Evid. 616. In 2005, the Tennessee Supreme Court recognized that "a witness's personal stake in the outcome of the litigation, ... a witness's relationship to a party in the lawsuit, [and] a witness's motives for testifying" were examples of bias or prejudice. *Hunter v. Ura*, 163 S.W.3d 686, 699 (Tenn. 2005)(*citing* Neil P. Cohen, et al., *Tennessee Law of Evidence* § 6.16[4](4th ed.2000)).

Rule 611(b) of the Tennessee Rules of Evidence provides that a party may conduct cross examination "on any matter relevant to any issue in the case, including credibility." Tenn. R. Evid. 611(b). The discovery of data and documentation relating to income earned for services as an expert witness in medical-legal matters is necessary to determine the credibility of Dr. Sobel.

Tennessee Courts have previously required production of the exact information and documentation Dr. Sobel was subpoenaed to bring to his discovery deposition on October 4, 2017. First, as previously discussed, Dr.

Sobel himself has produced this information and documentation in a case in Memphis, Tennessee. (Depo. of Sobel at 142-145.) Second, in July of 2014, in a twenty-one page decision, the Tennessee Court of Appeals upheld the decision of a trial court that found annual income of an expert was relevant and discoverable and required the expert to disclose information regarding his income. *See Laseter*, 481 S.W.3d at 613. The Court of Appeals went on to affirm the trial court's exclusion of the expert as a discovery sanction for his failure to disclose the information regarding his income. *Id.* In *Laseter*, the Court found that it was not unreasonable to require the expert witness to produce documentary evidence confirming his prior estimate of income. *Id.* at 635. The Court quoted a Missouri Court of Appeals decision and stated "[k]eeping in mind the purpose of this type of discovery is to detect bias, the Missouri Court of Appeals, affirming an order requiring document production in *Lichtor*, noted that 'a venal expert witness could not be expected to fully answer inquiries as to which the witness is not required to produce documentation,' and some invasion of the expert's privacy may be 'necessary to insure the honesty and accountability of the expert.'" *Laseter*, 481 S.W.3d at 635 (*quoting Lichtor*, 845 S.W.2d at 65). Defendant is not saying that Dr. Sobel is a venal expert witness, however, without documentation to support his answers or to answer the questions that the he was unable to answer, then Defendant must accept the answers without any opportunity to verify them or be left with vague, evasive answers regarding his income from medical-legal work.

In February of 2016, the Tennessee Court of Appeals upheld a trial court decision ordering an expert in a health care liability action to provide information concerning the amount of income he earns annually from medical-legal review, consulting, and testifying as an expert witness. *Buman v. Gibson*, No. W2015-005110COA-R3-CV, 2016 WL 660104 at *1 (Tenn. Ct. App. Feb. 18, 2016) *app. for perm. to appeal denied* June 23, 2016. In Buman, the trial court ordered an expert witness "to provide his annual income from medical-legal review from 2005-2011 within thirty days of the entry of the written order." *Id.* The Court stayed the case pending the outcome of the proceedings in *Laseter.* The Court noted that "[t]he *Laseter* Court ruled that the discovery of an expert's income from medical-legal review was proper and that it was not an abuse of discretion to exclude the expert for his failure to comply with valid discovery requests." *Id.* at *2 (*citing Laseter v. Regan*, No. W2013-02105-COA-R3-CV, -- S.W.3d -- , 2014 WL 3698248 at *19 (Tenn. Ct. App. July 24, 2014), *perm. app. denied* (Tenn. Dec. 18 2014). The Court of Appeals held that "the trial court did not abuse its discretion in requiring that Dr. Evans produce evidence regarding his income from medical-legal review in the years preceding the case-at-bar. Furthermore, the trial court did not abuse its discretion in ultimately excluding Dr. Evans from testifying due to his failure to comply with a valid discovery request." *Id.* at *7.

In the present action, Dr. Sobel failed to file a timely objection to the subpoena duces tecum setting forth the items he was to bring to his discovery deposition. He then failed to bring the items listed in the subpoena duces tecum

to his deposition and was unable to answer questions regarding his income earned for medical-legal work during a finite period of time.

Dr. Sobel testifies frequently in medical malpractice actions. Attached as **Exhibit A** is a seventeen (17) page list of cases in which he has provided expert testimony in medical-legal matters. Throughout his career as an expert witness he has refused to provide documentation regarding his income derived from his expert witness work. He is very vague and evasive with his responses regarding his income from medical-legal work. Additionally, he has given vastly different testimony as to his total income from medical-legal work in various depositions. As in *Laseter* and *Buman*, the Court should order Dr. Sobel to produce the documentation set forth in the subpoena duces tecum. It is undeniable that the documentation and information is relevant and probative of his bias and credibility and without documentation the Defendant will be required to rely on Dr. Sobel's evasive and inconsistent answers regarding his income from medical-legal work.

III. CONCLUSION

In light of the foregoing, the Court should grant Defendant's Motion to Compel and Order Plaintiff and Plaintiff's counsel to produce the documentation identified in the subpoena duces tecum.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

BY: Michelle Sellers

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

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This the 31st day of January, 2018.

Michelle Sellers

APPENDIX 50

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	**No. 15513**
v.	)	**JURY DEMAND**
MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT MARK A. MCLEAN, MD.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS SUBPOENAED FROM RICHARD M. SOBEL, M.D.

Defendant argues that Plaintiff waived any right to object to the subpoena issued to Dr. Sobel because it did not come within 21 days of service. However, it was Defendants failure to comply with Rule 45.02 of the Tennessee Rules of Civil Procedure that prevented Plaintiff from making an objection within 21 days.

> Rule 45.02: For Production of Documents and Things or Inspection of Premises
>
> A subpoena may command a person to produce and permit inspection, copying, testing, or sampling of designated books, papers, documents, electronically stored information, or tangible things, or inspection of premises with or without commanding the person to appear in person at the place of production or inspection. When appearance is not required, such a subpoena shall also require the person to whom it is directed to swear or affirm that the books, papers, documents, electronically stored information, or tangible things are authentic to the best of that person's knowledge, information, and belief and to state whether or not all books, papers, documents, electronically stored information, or tangible things responsive to the subpoena have been produced for copying, inspection, testing, or sampling. **Copies of the subpoena must be served pursuant**

> **to Rule 5 on all parties**, and all material produced must be made available for inspection, copying, testing, or sampling by all parties. [As amended by order entered December 14, 2009, effective July 1, 2010.]

According to the timeline submitted by this Defendant in it's memorandum,

- The subpoena was issued on August 25, 2017 by the Maury County Circuit Court.
- On August 31, 2017, a subpoena was issued by the Superior Court Clerk for Fayette County, Georgia.
- On September 2, 2017 the subpoena was served on Dr. Sobel.
- As pointed out by defense counsel, on September 8, 2017 Plaintiff's counsel was provided a copy of the subpoena "issued by the Maury County Circuit Court and served on Dr. Sobel." What Defendant fails to point out is that **these documents were provided at that time only because Plaintiff's counsel asked for them** after receiving a phone call from Dr. Sobel.
- Plaintiff's counsel was not provided with a copy of the subpoena issued by the Georgia court at that time.
- On September 21, 2017, "a Notice of Filing Subpoena and Additional Documents Served on Richard M. Sobel, M.D., MPH were finally served on all counsel.
- Plaintiff's counsel sent a letter objecting to the subpoena on September 29, 2017.
- The Defendant has not provided any reasons why the Tennessee subpoena was not served on all parties on August 25, 2017 when it was issued as required by Rule 45.02, or why the Georgia subpoena was not served on all parties when it was issued on August 31, 2017.
-

Uniform Interstate Depositions and Discovery Act

The Advisory Comment to Tenn. R. Civ. P. 45.04 explains that "Tennessee Lawyers seeking to take a deposition or obtain discovery in a foreign jurisdiction must look to that jurisdiction's law for similar [service in a foreign jurisdiction] assistance."

Georgia has adopted the Uniform Interstate Depositions and Discovery Act. O.C.G.A. § 24-13-112 states:

> Requirements for issuance of foreign subpoenas; application
>
> (a) To request issuance of a subpoena under this Code section, a party shall submit a foreign subpoena to the clerk of superior court of the county in which the person receiving the subpoena resides. A request for the issuance of a subpoena under this Code section shall not constitute an appearance in the courts of this state.(b) When a party submits a foreign subpoena to a clerk of superior court in this state, the clerk shall promptly issue and provide to the requestor a subpoena for service upon the person to which the foreign subpoena is directed.(c) A subpoena under subsection (b) of this Code section shall:(1) Incorporate the terms used in the foreign subpoena; and(2) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.(d) This Code section shall only apply to a subpoena to be issued in this state if the foreign jurisdiction that issued the foreign subpoena has adopted a version of the "Uniform Interstate Depositions and Discovery Act."(e) This Code section shall not apply to criminal proceedings.

O.C.G.A. § 24-13-112

Georgia law also permits the other party to oppose the subpoena.

> Protective order or enforcement, quashing, or modification of foreign subpoena
>
> An application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall comply with the statutes and court rules of this state and shall be submitted to the superior court of the county in

which the subpoena was issued.

O.C.G.A. § 24-13-116.

The only possible explanation for not complying with the rules and not serving a copy of the subpoena on Plaintiff's counsel was that the Defendant was attempting to let the 21 days run before Plaintiff's counsel could object and depriving the Plaintiff of any opportunity to challenge the subpoena in the Georgia court. Plaintiff respectfully requests that Defendant's subpoena be stricken for failure to comply with Tenn. R. Civ. P. Rules 5 and 45.02.

However, once again, the Defendants failure to serve the application on Plaintiff's counsel prevented any reasonable opportunity to challenge the subpoena in Georgia.

THE SUBPOENA REQUESTS INFORMATION BEYOND THE SCOPE OF RULE 26 AND IS FOR THE PURPOSES OF HARASSMENT, OPPRESSION, AND INTIMIDATION

This is not a case where an expert is trying to hide the amount of income that he has made as an expert witness. In fact, Dr. Sobel testified that he has made approximately $200,000.00 per year over the past few years testifying as an expert.

During the deposition on October 4, 2017, Dr. Sobel produced payments made to him by the Plaintiffs' counsel in both cases he worked on.

> Q. Do you have records showing your income as an expert for Mr. Bednarz and his firm, other than what you've produced for this case?
>
> A. Well, the only other case would be the Jernigan cases - - case, and I did print out the invoices that were on that list as I went through. I don't know if those are complete invoices in the Jernigan cases - - case. (Dep. Dr. Sobel, Oct. 4, 2017, Pg. 126-127).

Dr. Sobel further was asked about his income from medical legal work, to which he provided his estimated income between 2012 and 2016.

Q. What's your best estimate?

A. I'm not sure I could give an accurate estimate, but I would say probably in the range of perhaps $200,000 a year, or so, from 2012 to 2016. And I don't know exactly, but I would give you a ballpark figure of that.

Q. So would that be your answer to every year from 2012 through 2016?

A. Yes. I don't know exactly, but I think that would be a fair estimate. Some years might be less; others more. ...

Q. And could your estimate of $200,000 be terribly low?

A. I don't think so. (Dep. Dr. Sobel, Oct. 4, 2017, Pg. 135-136).

Plaintiff submits that if Dr. Sobel were attempting to hide the fact that he has made a lot of money testifying in healthcare liability cases, he would have either been more evasive in his answers of submitted an amount much lower than the $200,000 he has admitted to making. The Defendants have the information they need to impeach Dr. Sobel about any potential bias he might have because of the amount of money he has made. Attempting to make him produce his personal tax records is an egregious invasion of privacy and is not warranted here. It is very difficult to find expert witnesses from a contiguous state to testify in healthcare liability cases. This sort of intrusion into the personal affairs of these experts makes it even more difficult and will have a chilling effect on other experts willing to come forward and participate in these cases. Tennessee Rule of Civil Procedure 26.04(4) states as follows:

(A)(I) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for

> each opinion. In addition, upon request in an interrogatory, for each person so identified, the party shall disclose the witness's qualifications (including a list of all publications authored in the previous ten years), a list of all other cases in which, during the previous four years, the witness testified as an expert, and a statement of the compensation to be paid for the study and testimony in the case.

All of this information has been provided to the Defendant. There is no just reason to require Dr. Sobel to produce personal tax records. Tennessee Rules of Civil Procedure Rule 26.03 gives the Court the power to protect witnesses from "annoyance, embarrassment, oppression, or undue burden or expense." Plaintiff respectfully requests that the Court find that Defendants are not entitled to Dr. Sobel's tax records.

The Tennessee cases cited by the Defendant in their motion are not applicable to the facts of this case. The basis of the trial court's decisions that tax returns and financial records were deemed discoverable in Laseter v. Regan, Weatherspoon v. Minard, and Buman v. Alycia D. Gibson, P.A. is because the medical expert had a long established history of being hired by the plaintiff's counsel. In all three cases, the medical expert witness had been hired for multiple cases per year for several years, and ordering discovery of tax returns were to be used to show the connection and payment from that one attorney to the expert witness over the years. There is no such history here. This is only the second case Dr. Sobel has ever worked with Plaintiff's counsel. Sobel Deposition p. 126, 127 *Supra.*

However, several of the out of state cases cited by those cases do give guidance. The Florida Supreme Court in Allstate Ins. Co. v. Boecher held that "the expert shall not be required to disclose his or her earnings as an expert witness" unless there are "unusual or compelling circumstances." 733 So.2d 993, 999 (1999).

In Behler v. Hanlon, the Maryland District Court held that **tax returns and financial documents were only discoverable because there was an ongoing economic relationship where a significant amount of income was earned from the party's counsel that constituted a need for such discovery**. 199 F.R.D. 533 (D. Md. 2001)(emphasis added). The Court further held that **there must be a showing why less intrusive financial information would not suffice**. Id. at 561. (Emphasis added).

In Olinger v. Curry, the Texas Court of Appeals held that the medical expert's testimony on the percentage of his total income earned through expert testimony, in that case being 90%, along with the testimony that his financial interest had nothing to do with the outcome of the case, was enough for the court to deny discovery of financial documents and tax returns. 926 S.W.2d 832 (1996).

The Maryland Supreme Court in Wrobleski v. Lara held that **allowing such intrusive discovery would do nothing more than invade unnecessarily their legitimate privacy and discourage experts from testifying** that would result in needed testimony to be nearly impossible to obtain. 727 A.2d 930 (1930). (Emphasis added).

In Primm v. Isaac, the Supreme court of Kentucky held that requiring an expert to produce tax returns should only be considered after a showing that less intrusive, burdensome, and costly means of discovery were attempted first. **There must also be a showing that the expert has not been forthcoming about his financial information**. 127 S.W.3d 630 (2004). (Emphasis added).

Likewise in this case, "allowing such intrusive discovery would do nothing more than invade unnecessarily their legitimate privacy and discourage experts from testifying." There has

been no showing of any unusual or compelling circumstance nor that Dr. Sobel has not been forthcoming about his financial information.

Plaintiff respectfully submits that this Defendant is on an improper fishing expedition with no legitimate basis to force Dr. Sobel to produce personal and private tax information. This motion should be denied.

Respectfully submitted,

BEDNARZ & BEDNARZ

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been mailed, via First Class prepaid postage and via email, to:

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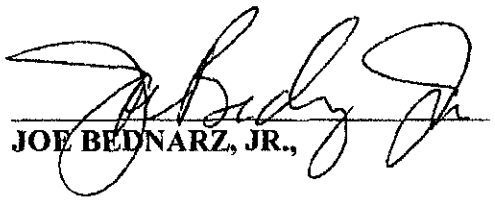
on this the 7th day of March, 2018.



JOE BEDNARZ, JR.,

APPENDIX 51

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IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor,
Individually, and as the Natural Child of
CODY CHARLES BLACKBURN, deceased,
By Next Friend and Grandfather,
BARRY CHARLES BLACKBURN,

Plaintiff,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY
REGIONAL HOSPITAL, d/b/a
MAURY REGIONAL MEDICAL CENTER,

Defendants.

ORDER GRANTING DEFENDANT MARK A. MCLEAN, M.D.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS SUBPOENAED FROM RICHARD M. SOBEL, M.D.

On March 9, 2018, the Court heard arguments on Defendant Mark McLean, M.D.'s Motion to Compel Production of Documents Subpoenaed From Richard M. Sobel, M.D. Defendant Maury Regional Hospital d/b/a Maury Regional Medical Center joined the motion. After considering the motion, the memorandum, the documents filed in support of the motion, the arguments of counsel, and the entire record in this case, the Court determined that the motion was well-taken and should be granted.

On September 2, 2017, Dr. Sobel was served with a subpoena which required him to appear for a deposition on October 4, 2017 and produce several documents at the time and place of his deposition including,

13. Copies of the relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which would allow Richard M. Sobel, M.D., MPH to answer questions about his total income paid for medico-legal matters during these years) which show the amount of money Richard M. Sobel, M.D., MPH was paid for medico-legal matters during these years.

Dr. Sobel did not produce the documents at his deposition, and he made no effort to comply with the subpoena which requested the documents noted above. The Court determines that the Motion to Compel should be granted as it is appropriate for Dr. Sobel to produce the documents which were subpoenaed. In addition, the Court hereby orders Dr. Sobel to produce by April 9, 2018, copies of all relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which would allow Dr. Sobel to answer questions about his total income paid for medico-legal matters during these years) which show the amount of money Dr. Sobel was paid for medico-legal matters during these years.

The Court orders the Defendants to pay any reasonable costs associated with the production of the documents. If the parties cannot agree as to what constitutes a reasonable cost, then the Court will make that determination. In addition, the Court orders Dr. Sobel to produce these documents subject to a protective order which will be separately entered.

IT IS SO ORDERED.

HONORABLE RUSSELL PARKES

5/27/18

DATE

APPENDIX 52

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	**No. 15513**
v.	)	**JURY DEMAND**
MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR CONTINUANCE

Comes now the Plaintiff, Briton Gage Blackburn, a Minor, Individually, and as the Natural Child of Cody Charles Blackburn, Deceased, By next Friend and Grandfather, Barry Charles Blackburn, and moves this Honorable Court to continue the trial of this matter which is currently set for April 30, 2018. As grounds, Plaintiff would show that several issues have arisen during the past few weeks that would make going to trial at this time very difficult and unfairly prejudicial to the Plaintiff. These issues include the granting of Defendant's Motion to Amend the Answer to allege comparative fault against Cody Blackburn, a deposition of Dr. Joel Phares, and the production of 1099s by Plaintiff's expert Richard Sobel, M.D. While the amendment alone requires a continuance, these other events make it even more important to obtain a continuance. In support of this motion, Plaintiff relies upon the entire record in this cause, the Memorandum of Law filed in support thereof, and the attached transcript of the hearing of March 9, 2018.

Respectfully submitted,

BEDNARZ & BEDNARZ

JOE BEDNARZ, JR. #18540
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Attorneys for Plaintiffs
505 East Main Street
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been mailed, via First Class prepaid postage and via email, to:

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Marty Phillips, Esq.
RAINEY, KIZER REVIERE
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105 S. Highland Avenue
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on this the 10th day of April, 2018.

JOE BEDNARZ, JR.,

APPENDIX 53

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	**No. 15513**
v.	)	**JURY DEMAND**
MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CONTINUANCE

On March 9, 2018 the Court heard arguments on and granted Defendants' Motion to Amend Answer to allege comparative fault against Cody Blackburn for not seeking earlier medical treatment. At that time, the Court indicated it would be inclined to grant a continuance if Plaintiff so desired. Plaintiff did not want a continuance and has diligently tried to get this case to trial. However, at this point believes a continuance is necessary. The late allegations of comparative fault have made it necessary for Plaintiff to obtain a cardiologist to testify in this case.

On April 5, 2018, the Defendants took the deposition of Dr. Joel Phares. Dr. Phares is neither a treating physician, nor a disclosed expert. His only role in this case was that he read the EKG of Cody Blackburn **after** his death. Nevertheless, defense counsel elicited a number of opinions from Dr. Phares that can only be characterized as expert testimony. This late and unexpected testimony is just another reason Plaintiff needs a continuance at this point.

The Court also ordered on March 9, 2018 that Plaintiff's emergency room expert Richard Sobel, M.D. produce 1099s for the years 2012, 2013, 2014, 2015, and 2016. The production of these documents has strained the relationship of Plaintiff's counsel and Dr. Sobel which will make it very difficult to go forward. Plaintiff may request leave to obtain a new ER expert if this motion is granted.

LAW AND ARGUMENT

The Rules and our case law also make provisions for continuances if the other party has been prejudiced by an amendment. When a judge allows a party to amend at or near the trial date, then the other party must be granted sufficient time to properly prepare for any new issues presented by the amendment. *Walden v. Wylie*, 645 S.W.2d 247, 250 (Tenn. Ct. App. 1982)

> This rule mandates that motions to amend shall be liberally granted unless the amendment would result in an injustice to the opposing party or is irrelevant to any claim or defense. *Walden v. Wylie*, 645 S.W.2d 247, 250 (Tenn. Ct. App. 1982). Factors which would justify a refusal by the trial court to permit an amendment include bad faith; an undue delay in filing; lack of notice or undue prejudice to the opposing party; repeated failure to cure deficiencies by previous amendments; futility of the amendment. Id. Rule 15.01 is premised on the fact that pleadings function primarily as a notice mechanism. Id. **Accordingly, if leave to amend is granted close to the trial date, the court must grant a continuance in order to allow the opposing party sufficient time to address the new issue.** Id.

Textron Fin. Corp. v. Powell, No. M2001-02588-COA-R3-CV, 2002 Tenn. App. LEXIS 713, at *6-7 (Ct. App. Oct. 8, 2002).(emphasis added).

> Tenn. R. Civ. P. 15 reflects a broad policy favoring permitting parties to amend their pleadings. See *Branch v. Warren*, 527 S.W.2d 89, 91-92 (Tenn. 1975); *Winn v. Tucker Corp.*, 848 S.W.2d 64, 68 (Tenn. Ct. App. 1992). The policy is qualified only by considerations of fairness, and the courts, as a general rule, will grant motions to amend if the amendment does not unduly prejudice the opposing party's ability to go forward with

> an action or defense. See *Gardiner v. Word*, 731 S.W.2d 889, 891-92 (Tenn. 1987); *Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc.*, 677 S.W.2d 457, 463 (Tenn. Ct. App. 1984). **When the prejudice caused by an amendment consists of inconvenience, surprise, or tactical disadvantage, the courts should, and generally will, grant the opposing party's request for a continuance**. See Tenn. R. Civ. P. 15.02; *Gardiner v. Word,* 731 S.W.2d at 892-93; *Walden v. Wylie*, 645 S.W.2d 247, 250 (Tenn. Ct. App. 1982). Accordingly, parties who neglect to request a continuance to prepare to meet the evidence to be introduced under an amendment waive the right to complain about the amendment on appeal. See *Arcata Graphics Co. v. Heidelberg Harris, Inc.*, 874 S.W.2d 15, 22 (Tenn. Ct. App. 1993).

Ledford v. Ledford, 1998 Tenn. App. LEXIS 709, at *6-7 (Ct. App. Oct. 23, 1998)(emphasis added).

The issue of whether Mr. Blackburn acted reasonably the night before his admission is obviously a very important issue in this case and one that needs to be addressed by expert testimony. There is simply no proof that the Defendants would have acted any differently if Mr. Blackburn had presented earlier. While Plaintiff was hoping to avoid a continuance, it has become apparent that Plaintiff would be at a serious and unfair disadvantage to go forward with trial at this time.

Dr. Phares

Dr. Joel Phares was deposed on April 5, 2018. Dr. Phares is neither a treating physician, nor a disclosed expert. His only role in this case was that he read the EKG of Cody Blackburn **after** his death.

> Q. Okay. Now, you were not on call, **you were not the on-call cardiologist on the 17th of September, 2014**, were you?
>
> A. I was not.
>
> Q. Okay. **You did not have any contact at all with Mr. Blackburn**

while he was alive, correct?

A. No, not to my knowledge, no.

Q. And **your first contact and, really, your only contact with this case was overreading of the EKG**?

A. Correct.

Q. And **that was done after he was -- had passed?**

A. Correct.

Q. Am I correct that **you read this at, uh, 10:41 on the18th**?

A. Yes.

Deposition of Joel Phares, p. 37

Q. Okay. So if I'm correct, the machine read it the first time at 10:25 on the 17th of September, which would be Exhibit 3, correct?

A. Correct.

Id. at 39

Q. All right. And, um, now, you were one of Cody Charles Blackburn's treating physicians, um, to the extent that you overread an EKG that was performed on him in the Emergency Department at Maury Regional; is that correct?

A. I read the EKG. **I never treated him. I never saw him**. Um, I was **unaware of him until I read the EKG**, um, and then subsequently everything that happened after that.

Id. at 11

Q. And, um, now, did Maury Regional -- does Maury Regional have a policy or procedure that requires EKGs done in its Emergency Department to be overread and interpreted by a cardiologist such as yourself?

A. Every facility that I have been at, the cardiologist always overreads the EKGs, for several reasons: one is for accuracy; um, also for billing, um, **it has to be overread by somebody who is credentialed to read**

them or the hospital can't bill for them, obviously.

Id. at 13

Q. So, at 10:41, so approximately 24 hours later is when you overread this?

A. Yes.

Id. at 23

It is clear from the above testimony that Dr. Phares was not a treating physician. He has not been disclosed as a Rule 26 expert. His only involvement was in reading the EKG 24 hours after the fact and after Mr. Blackburn's death. The reason that he read the EKG was so that the hospital could bill for it. Nevertheless, the Defendants elicited many opinions from Dr. Phares. Although Plaintiff believes the testimony should be excluded in its entirety, Plaintiff cannot wait for the Court's ruling on this matter to seek a continuance.

The combined effect of the testimony of Dr. Phares and the allegations of comparative fault have put Plaintiff in the position of needing a cardiologist expert.

Dr. Sobel

The Court's Order requiring Dr. Sobel to produce tax documents has strained the relationship between Dr. Sobel and Plaintiff's counsel. The tax returns were produced as ordered but raise additional issues which need to be addressed. Plaintiff's counsel has serious concerns about the ability to continue to work with Dr. Sobel. While this alone is certainly not grounds for a continuance, on top on everything else in this case Plaintiff submits that this is a serious issue and anticipates asking the Court to obtain a new emergency room expert if this motion is granted.

Conclusion

For the foregoing reasons Plaintiff respectfully requests that this Honorable Court grant this Motion for Continuance.

Respectfully submitted,

BEDNARZ & BEDNARZ

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been mailed, via First Class prepaid postage and via email, to:

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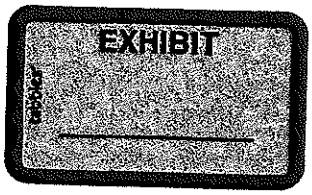
on this the 10th day of April, 2018.

JOE BEDNARZ, JR.,



Textron Fin. Corp. v. Powell

Court of Appeals of Tennessee, At Nashville

October 8, 2002, Filed

No. M2001-02588-COA-R3-CV

Reporter

2002 Tenn. App. LEXIS 713 *; 2002 WL 31249913

TEXTRON FINANCIAL CORPORATION v. ELAINE E. POWELL, ET AL.

Prior History: [*1] Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; and Remanded. Direct Appeal from the Circuit Court for Davidson County. No. 98C-2652. Walter C. Kurtz, Judge.

Disposition: Judgment of the Circuit Court Reversed; and Remanded.

Core Terms

disbursed, trial court, amount due, amend, misrepresentation, fraudulent inducement, parol evidence rule, terms, ***continuance***, unambiguous, Trailer, exclude evidence, proceeds, parties, extrinsic evidence, motion to amend, leave to amend, mutual mistake, admissible

Case Summary

Procedural Posture

In 1997, respondent financing corporation entered into an agreement with a trucking company to consolidate financing of equipment. Appellant guarantors executed personal guarantees on the note. The financing corporation filed a complaint against the guarantors to enforce the agreement and alleged that the borrower had defaulted. The Circuit Court for Davidson County (Tennessee) found for the financing corporation. The guarantors appealed.

Overview

On appeal, the guarantors contended, inter alia, that the court below erred in applying the parol evidence rule to evidence which would have shown mistake. The guarantors argued that the distribution of $ 156,427 by the financing company to itself was intended to pay off a 1995 note, and that amount reflected a mistake regarding the amount actually due on the 1995 note. The appellate court held that the disbursement sheet was silent as to how the financing company disbursed the to itself. The corporation acknowledged, however, that the purpose of the disbursement was to "close out" the 1995 note. Thus the essence of the agreement was that the trucking company would borrow funds from the corporation, which the corporation would then disburse to itself, in order to pay off the 1995 note. The additional sums represent interest collected in advance. It was undisputed that the 1997 note did not serve to finance additional equipment. Accordingly, the appellate court held that evidence of the amount due on the 1995 note and of how

the corporation disbursed the $ 156,427 to itself was not barred by the parol evidence rule.

Outcome

The judgment of the circuit court was reversed and the case was remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 **Standards of Review, De Novo Review**

Appellate review of a trial court's conclusions of law in a jury trial is de novo upon the record, with no presumption of correctness. Tenn. R. App. P. 13(d).

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2 **Pleadings, Amendment of Pleadings**

See Tenn. R. Civ. P. 15.01.

Civil Procedure > Pretrial Matters > ***Continuances***

Tax Law > ... > Tax Credits & Liabilities > Deficiencies > Delivery of Notices

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN3 **Pretrial Matters, Continuances**

Tenn. R. Civ. P. 15.01 mandates that motions to amend shall be liberally granted unless the amendment would result in an injustice to the opposing party or is irrelevant to any claim or defense. Factors which would justify a refusal by the trial court to permit an amendment include bad faith; an undue delay in filing; lack of notice or undue prejudice to the opposing party; repeated failure to cure deficiencies by previous amendments; futility of the amendment. Rule 15.01 is premised on the fact that pleadings function primarily as a notice mechanism. Accordingly, if leave to amend is granted close to the trial date, the court must grant a ***continuance*** in order to allow the opposing party sufficient time to address the new issue.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN4 **Defenses, Demurrers & Objections, Denial of Allegations**

See Tenn. R. Civ. P. 9.02.

Business & Corporate
Compliance > ... > Contracts
Law > Types of Contracts > Guaranty Contracts

HN5[⬇] **Types of Contracts, Guaranty Contracts**

A guaranty in a commercial transaction will be construed as strongly against the guarantor as the sense will admit.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Banking Law > ... > National Banks > Interest & Usury > General Overview

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Defenses > General Overview

Contracts
Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts
Law > Defenses > Ambiguities & Mistakes > Mutual Mistake

Business & Corporate
Compliance > ... > Contract Formation > Mistake > Mutual Mistake

Business & Corporate
Compliance > ... > Contracts
Law > Types of Contracts > Guaranty Contracts

Evidence > Admissibility > Statements as Evidence > Parol Evidence

Real Property Law > ... > Contracts of Sale > Enforceability > Mistake

HN6[⬇] **Defenses, Fraud & Misrepresentation**

The parol evidence rule serves to secure the integrity of contracts and to guard against fraud by a party who agrees to the unambiguous terms of a written agreement and then seeks to disavow those terms through extrinsic evidence. Accordingly, the courts have refused to permit alteration of unambiguous contractual terms through the use of extrinsic or parol (oral) evidence. The rule encompasses contracts of guaranty. However, application of the parol evidence rule includes many exceptions. Once such exception to the parol evidence rule is that extrinsic evidence is admissible to show fraud or mistake. In order to be admissible to show mistake, the mistake must be shown to be clerical or mutual, or, if unilateral, to have resulted from fraud or other inequitable conduct. A mutual mistake is one where both parties are operating under the same misconception. The contract as written, therefore, is not an expression of the parties' actual intent. When parol evidence is offered not to vary or disavow the terms of the contract, but to show an alleged fraud or mistake, an appellate court is hesitant to exclude the

evidence. Thus the rule has been considerably relaxed by the courts in order that fraud may be thwarted, mistakes corrected, accidents relieved against, trusts set up and enforced, and usury exposed and eliminated.

Counsel: Stephen C. Knight, Nashville, Tennessee, for the appellants, Elaine E. Powell and John E. Powell.

Melissa Blackburn, Nashville, Tennessee, for the appellee, Textron Financial Corporation.

Judges: DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY K. LILLARD, J., joined.

Opinion by: DAVID R. FARMER

Opinion

This dispute arises out of a personal guaranty executed by the defendants securing a loan. Following a trial by jury, the court below awarded the plaintiff $ 68,330 in damages plus attorney's fees and costs. On appeal, the defendants contend that the court below erred in applying the parol evidence rule to evidence which would show mistake and in not permitting the defendants to amend their answer. We reverse the judgment entered below and remand for a new trial.

In 1995, Textron Financial Corp. (Textron), entered into an agreement with SBT, Inc. (SBT), to consolidate financing of several **[*2]** pieces of trucking equipment. The equipment was in the possession of Royal Transport (Royal), which began making the loan payments to Textron. In 1997, Trailer Lease purchased the equipment from Royal, and Textron and Trailer Lease (Elaine Powell, president) entered into a security agreement with Textron securing a $ 183,993.73 installment note. Collateral securing the note included several vehicles, a tractor and several trailers. John and Elaine Powell (the Powells) executed personal guarantees on the note. The 1997 transaction included a disbursement by Textron to itself of $ 156,427.54 of the $ 183,993.73 note. The additional $ 27,993 represents interest on the 1997 note collected in advance. The Powells paid $ 104,000 on the note and stopped making payments after June of 1998. In September of 1998, Textron filed a complaint against the Powells to enforce the guarantee agreement, alleging Trailer Lease had defaulted on the 1997 note. Textron prayed for damages of $ 72,854,40.

The Powells contend that the note had been paid in full. They submit that the 1997 agreement with Textron was to refinance the equipment for the amount due on the 1995 note, and that Textron represented that **[*3]** the amount outstanding on the 1995 note was $ 156,427.54. They further contend that the distribution of this amount from proceeds of the 1997 note by Textron to itself was intended to pay off the 1995 note. The Powells allege that Textron mistakenly represented the amount due on the 1995 note, and that the actual amount due was $ 80,000. They accordingly argue that because the outstanding amount on the1995 note was only $ 80,000, the remaining sums paid by Trailer Lease should have been applied against the principal under the terms of the loan

agreement. The disbursement sheet, which was signed by the Powells, does not indicate the amount due on the 1995 note or for what purpose the $ 156,427.54 disbursement was made. Textron does not dispute that proceeds from the 1997 note included amounts to "close out" the 1995 note, but submits that the disbursement sheet is silent as to how the sums were to be disbursed.

The trial court refused to admit evidence of how much was due on the 1995 note or of how Textron disbursed the $ 156,427.54 to itself. The court concluded that the written agreement between Textron and the Powells was unambiguous on its face, and that the parol evidence rule **[*4]** therefore operated to exclude extrinsic evidence to vary the contract. Regarding the possibility of mistake, the court stated,

of course plaintiff contends that there was no mistake. Therefore, evidence showing that the refinanced amount was 'wrong' was not admissible to impeach the signed documents, despite Mr. and Ms. Powell[s'] insistence. . . . There is no proof here that the plaintiff or its agents entered into the contract based upon any mistake.

The court also declined to grant Powells' oral motion, made on the morning of trial, to amend their answer to include the affirmative defenses of misrepresentation and fraudulent inducement.

The cause was heard by a jury in June of 2001. The jury awarded Textron damages of $ 68,330, reducing the amount demanded by Textron based upon proof that Textron had failed to entirely mitigate its damages. Textron was also awarded $ 22,000 in attorney's fees and costs. The Powells' motion for a new trial, and Textron's motion for judgment in accordance with its motion for directed verdict or, in the alternative, an additur, were denied. Appeal to this Court ensued.

Issues

The issues raised by the Powells for our review, **[*5]** as we perceive them are:

I. Whether the trial court erred in its application of the parol evidence rule when it excluded evidence regarding the amount due on the 1995 note and evidence of how Textron disbursed $ 156,427.54 of proceeds from the 1997 note to itself.

II. Whether the trial court erred in denying Powells' request to amend their answer to include the defense of fraudulent inducement.

Textron raises the additional issue of whether the trial court erred in denying its amended motion for judgment in accordance with a motion for a directed verdict or, in the alternative, for an additur.

Standard of Review

The issues presented for our review in this case are issues of law. Our ***HN1***[↑] review of the trial court's conclusions of law in a jury trial is ***de novo*** upon the record, with no presumption of correctness. Tenn. R. App. P. 13(d); ***Campbell v. Florida Steel Corp.***, *919 S.W.2d 26, 28 (Tenn. 1996)*.

Denial of the Powells' Motion to Amend Their Answer

We first address the issue of whether the trial court erred when it refused the Powells' motion to amend their answer to

include a defense of fraudulent inducement. The **[*6]** Tennessee Rules of Civil Procedure provide:

HN2[↑] A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of the court; and leave shall be freely given when justice so requires.

Tenn. R. Civ. P. 15.01

This rule *HN3*[↑] mandates that motions to amend shall be liberally granted unless the amendment would result in an injustice to the opposing party or is irrelevant to any claim or defense. ***Walden v. Wylie, 645 S.W.2d 247, 250 (Tenn. Ct. App. 1982)***. Factors which would justify a refusal by the trial court to permit an amendment include bad faith; an undue delay in filing; lack of notice or undue prejudice to the opposing party; repeated failure to cure deficiencies by previous amendments; futility of the amendment. ***Id.*** Rule 15.01 is premised on the fact that pleadings function primarily as a notice mechanism. **[*7]** ***Id.*** Accordingly, if leave to amend is granted close to the trial date, the court must grant a ***continuance*** in order to allow the opposing party sufficient time to address the new issue. ***Id.***

In the present case, the Powells sought leave to amend their answer to include a defense of mistake, misrepresentation or fraudulent inducement on the morning of trial. The trial court granted the motion regarding mistake, but denied leave to amend to include fraud or misrepresentation. [1] The court observed that if leave were granted to add fraud and misrepresentation, the lawsuit would be so broadened as to necessitate a trial ***continuance***. Counsel for the Powells stated, "I don't think anybody wants a ***continuance***. We want to get on with this thing. . . . If [your Honor is] telling me that you would only grant [the motion to amend] along with a ***continuance*** of this trial, then I will withdraw it."

[*8] We agree with the court below that had leave to amend been granted on the morning of trial to permit the Powells to add a defense of fraudulent inducement or misrepresentation, justice would have required a ***continuance*** of the trial. The record reflects that the Powells withdrew their motion to amend to include misrepresentation or fraudulent inducement in order to avoid a ***continuance***. The Powells' assignment of error on this issue is therefore without merit. We accordingly affirm on this issue.

Exclusion of Evidence Based on the Parol Evidence Rule

---

[1] Powells' oral motion to amend made at the beginning of trial requested leave to add the defenses of mutual mistake, misrepresentation, and fraudulent inducement. In denying the motion, the trial court stated, "I think you already - if I recall, your answer, you already alleged mutual mistake." Counsel for Powells responded, "Okay. But also I think fraud or misrepresentation need to be added to that just out of precaution." The answer did not include a defense of mistake however, although the court initially operated under the belief that it did. Any error which might have resulted from this belief was avoided, however, as the court subsequently specifically granted leave to amend to include the defense of mistake. The court stated, "Well, I think I'll allow you to amend to include it [mutual mistake]."

We next turn to the issue of whether the trial court erred in refusing to admit evidence of the amount due on the 1995 note and the disbursement of $ 156,427.54 of the 1997 note from Textron to itself. The Powells contend that the 1997 note was intended in essence to be a transfer of indebtedness for the same equipment previously owned by SBT. Thus $ 156,427.54 was disbursed from Textron to itself in order to pay off the 1995 note. The Powells contend that the parties were mistaken, however, regarding the balance due on the 1995 note. They allege Textron had indicated that they would review the records regarding payment **[*9]** of the 1995 note and make an adjustment if necessary. The Powells further submit that during the course of discovery Textron refused to provide information regarding the principal amount due from SBT, and that it was only after examining the records of Royal Transportation, which had gone into bankruptcy, that they discovered that the balance due was in fact $ 80,000. The Powells contend that the indebtedness for the equipment had therefore already been paid, and that the $ 156,427.54 transfer from Textron to itself to close out the 1995 note resulted in an overpayment of the amount due. The Powells' argument on appeal, as we perceive it, is that it was error for the trial court to exclude evidence of the amount due on the 1995 note and the disbursement of $ 156,427.54 because such evidence proves a mistake regarding the amount of indebtedness actually due on the equipment.

Textron contends that the Powells waived the defense of mutual mistake because the defense does not appear in the Powells' answer to the Second Amended Complaint. The Tennessee Rules of Civil Procedure require

HN4[↑] in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated **[*10]** with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Tenn. R. Civ. P. 9.02. We note, however, that the Powells' oral motion to amend their answer included the defense of mistake, and that they averred that the mistake pertained to the amount due on the 1995 loan to SBT which was, in essence, transferred to Trailer Lease. The trial court declined to grant the motion as to misrepresentation and fraudulent inducement without a ***continuance*** of the trial, and the Powells withdrew the motion pertaining to these defenses rather than accept a ***continuance***. As noted above, however, the trial court granted the Powells' motion to amend to include the defense of mistake. The defense accordingly is not waived.

Textron further argues that the lawsuit pertains only to the 1997 note, and that the 1995 note is a completely distinct transaction between separate parties. It argues that the 1997 note and guarantee are unambiguous on their face and that extrinsic evidence of the 1995 note or of how Textron disbursed the $ 156,427.54 to itself are therefore inadmissible. Textron does concede, however, that proceeds of the 1997 note were used **[*11]** to "close out" the 1995 note, and that the $ 156,427.54 was disbursed for that purpose.

The essence of Textron's argument, as we

perceive it, is that evidence of the amount due on the 1995 note is extrinsic to the 1997 agreement, and that the 1997 agreement must be enforced as written because its terms are clear and unambiguous. Powells' argument, as perceived by this Court, is that while the terms of the 1997 note are unambiguous, the purpose of the 1997 note was to transfer a pre-existing debt of SBT to Powells, and that proof of the amount due on the 1995 note is admissible to show a mistake regarding the amount actually due Textron for the equipment. The trial court excluded evidence of the 1995 note and how the $ 156,427.54 was disbursed from Textron to itself based on the parol evidence rule. After examining Powells' offer of proof, the court stated found no evidence that Textron made a mistake regarding the amount due.

HN5[↑] A guaranty in a commercial transaction will be construed as strongly against the guarantor "as the sense will admit." ***Farmers-Peoples Bank v. Clemmer***, *519 S.W.2d 801, 805 (Tenn. 1975)*. Upon examination of the 1997 note, security agreement, **[*12]** and guarantee by the Powells, we find their terms unambiguous, and extrinsic evidence is not admissible to explain or vary those terms. ***Id.*** *at 804*. However, in the present action, the Powells seek not to explain or modify the unambiguous terms of the written agreement with Textron. They do not submit that the agreed upon terms or obligations under the contract were other than those which appear on the face of the documents. Rather, Powells argue that the distribution of $ 156,427.54 by Textron to itself was intended to pay off the 1995 note, and that this amount reflects a mistake regarding the amount actually due on the 1995 note.

HN6[↑] The parol evidence rule serves to secure the integrity of contracts and to guard against fraud by a party who agrees to the unambiguous terms of a written agreement and then seeks to disavow those terms through extrinsic evidence. 32A C.J.S. ***Evidence*** § 1132, § 1159 (1996); ***see*** ***Tidwell v. Morgan Bldg. Sys., Inc.***, *840 S.W.2d 373, 376 (Tenn. Ct. App. 1992)*. Accordingly, the courts have refused to permit alteration of unambiguous contractual terms through the use of extrinsic or parol (oral) evidence. **[*13]** ***Id.*** The rule encompasses contracts of guaranty. 32A C.J.S. ***Evidence*** § 1165 (1996). However, application of the parol evidence rule includes many exceptions. ***Id.*** at § 1194; ***see*** ***Huffine v. Riadon***, *541 S.W.2d 414 (Tenn. 1976)*. Once such exception to the parol evidence rule is that extrinsic evidence is admissible to show fraud or mistake. ***See id.*** In order to be admissible to show mistake, the mistake must be shown to be clerical or mutual, or, if unilateral, to have resulted from fraud or other inequitable conduct. 32A C.J.S. ***Evidence*** § 1234. A mutual mistake is one where both parties are operating under the same misconception. ***Id.*** The contract as written, therefore, is not an expression of the parties' actual intent. ***Id.*** When parol evidence is offered not to vary or disavow the terms of the contract, but to show an alleged fraud or mistake, this Court is hesitant to exclude the evidence. ***See Maxwell v. Land Dev., Inc.***, *485 S.W.2d 869, 877 (Tenn. Ct. App. 1972)*; ***Rentenbach Eng'g Co. v. General Realty, Ltd.***, *707 S.W.2d 524, 527 (Tenn. Ct. App. 1985)*; **[*14]** ***Decatur County***

Bank v. Duck, 969 S.W.2d 393, 397 (Tenn. Ct. App. 1997). Thus the rule has been considerably relaxed by the courts "in order that fraud may be thwarted, mistakes corrected, accidents relieved against, trusts set up and enforced, and usury exposed and eliminated." Gibson's Suits in Chancery, § 189 (William H. Inman ed., 6th ed. 1982).

In this case, the disbursement sheet is silent as to how Textron disbursed over $ 156,000 of proceeds to itself. Textron acknowledges, however, that the purpose of the disbursement was to "close out" the 1995 note. Thus the essence of the agreement was that Trailer Lease would borrow funds from Textron, which Textron would then disburse to itself, in order to pay off the 1995 note. The additional sums represent interest collected in advance. It is undisputed that the 1997 note did not serve to finance additional equipment other than that transferred from Royal Transport. Proof introduced to show that the amount due on the 1995 note was in fact $ 80,000 would serve not to vary the contract, but to show mistake regarding the amount of indebtedness remaining on the equipment. Accordingly, we hold that evidence of the **[*15]** amount due on the 1995 note and of how Textron disbursed the $ 156,427.54 to itself is not barred by the parol evidence rule. Judgment of the trial court on this issue is therefore reversed. We remand for a new trial.

Conclusion

We affirm the decision of the trial court denying the Powells leave to amend their answer on the morning of trial to include the affirmative defenses of misrepresentation or fraudulent inducement. Judgment of the trial court excluding evidence of the 1995 note executed by Textron and SBT and evidence of how $ 156,427.54 in proceeds from the 1997 note were disbursed by Textron to itself is reversed. This cause is remanded for a new trial consistent with this opinion. In light of the foregoing, Textron's assignment of error regarding the trial court's denial of a judgment in accordance with its motion for directed verdict or, in the alternative, an additur, is pretermitted. Costs of this appeal are taxed to the appellee, Textron Financial Corp.

DAVID R. FARMER, JUDGE

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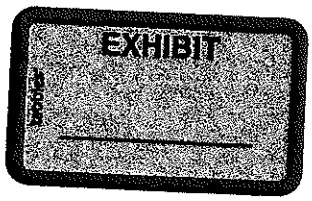

Ledford v. Ledford

Court of Appeals of Tennessee, Middle Section, At Nashville

October 23, 1998, Filed

Appeal No. 01A01-9701-CH-00029

Reporter
1998 Tenn. App. LEXIS 709 *; 1998 WL 736664

MICHAEL SHANE LEDFORD, Plaintiff/Appellee, VS. PHYLLIS DIANNE LEDFORD, Defendant/Appellant.

Prior History: [*1] APPEAL FROM THE CHANCERY COURT FOR LAWRENCE COUNTY AT LAWRENCEBURG, TENNESSEE. Chancery Court. Lawrence County. THE HONORABLE JIM T. HAMILTON, JUDGE. No. 7378-95.

Disposition: AFFIRMED AND REMANDED.

Core Terms

damages, trial court, amend, parties, appellate record, money damages, proceedings, contempt, divorce

Case Summary

Procedural Posture
Appellee former husband filed a petition in the Chancery Court for Lawrence County (Tennessee) seeking to have appellant former wife held in contempt. The trial court granted the husband's motion to amend his petition to seek monetary damages and awarded the husband damages. The wife appealed.

Overview
The husband claimed the wife damaged the parties' house, which the husband received pursuant to their divorce decree. The husband also claimed that some personal property awarded to him in the divorce was missing. At trial, the wife offered evidence concerning valuation of the damage and the missing items. The wife claimed on appeal that the trial court had refused to grant the husband's motion to amend the complaint to seek damages, but the appellate court found that the record established that the motion to amend was granted. There was no reversible error in allowing the husband to proceed with the damages claim, as the wife offered evidence and therefore tried the issue by consent. The wife failed to establish that the evidence in the record preponderated against the trial court's damage award.

Outcome
The judgment was affirmed and remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Record on Appeal

HN1[⬇] **Appeals, Standards of Review**

An appellate court's review of the issues presented on appeal is limited to the contents of the appellate record. With the exception of post-judgment facts, the appellate court must obtain its understanding of what transpired during the proceedings below from the record on appeal.

Civil Procedure > Appeals > Record on Appeal

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

HN2[⬇] **Appeals, Record on Appeal**

An appellant is required to supply an appellate court with a record that conveys a fair, accurate, and complete account of what transpired in the trial court with respect to the issues that form the bases for the appeal. Tenn. R. App. P. 24(a).

Civil Procedure > Appeals > Record on Appeal

HN3[⬇] **Appeals, Record on Appeal**

Ordinarily, the appellate record contains a verbatim transcript of proceedings in the trial court. Tenn. R. App. P. 24(b). However, when a transcript is not available, Tenn. R. App. P. 24(c) permits the use of a statement of the evidence of the proceedings. The statement of the evidence must be approved by the trial court, Tenn. R. App. P. 24(f), and once it is approved, it becomes the official record of the proceedings in the trial court for the purposes of the appeal.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN4[⬇] **Pleadings, Amendment of Pleadings**

Tenn. R. Civ. P. 15 reflects a broad policy favoring permitting parties to amend their pleadings. The policy is qualified only by considerations of fairness, and the courts, as a general rule, will grant motions to amend if the amendment does not unduly prejudice the opposing party's ability to go forward with an action or defense.

Civil Procedure > Pretrial Matters > ***Continuances***

Criminal Law & Procedure > ... > Reviewability > Waiver > Admission of Evidence

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN5[⬇] **Pretrial Matters, Continuances**

When the prejudice caused by an amendment of pleadings consists of

inconvenience, surprise, or tactical disadvantage, the courts should, and generally will, grant the opposing party's request for a ***continuance***. Tenn. R. Civ. P. 15.02. Accordingly, parties who neglect to request a ***continuance*** to prepare to meet the evidence to be introduced under an amendment waive the right to complain about the amendment on appeal.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6[⬇] **Standards of Review, De Novo Review**

Compensatory damage awards made by a trial court sitting without a jury are findings of fact. Accordingly, an appellate court reviews them de novo upon the record with a presumption that they are correct unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d).

Civil Procedure > Appeals > Standards of Review > General Overview

HN7[⬇] **Appeals, Standards of Review**

An appellant has the burden of demonstrating that the evidence in the record preponderates against the trial court's factual finding on damages.

Counsel: For Plaintiff/Appellee: Paul A. Bates, Christopher V. Sockwell, Boston, Bates, Holt & Sockwell, Lawrenceburg, Tennessee.

For Defendant/Appellant: R. Eddie Davidson, Nashville, Tennessee.

Judges: WILLIAM C. KOCH, JR., JUDGE. CONCUR: HENRY F. TODD, PRESIDING JUDGE, M.S., BEN H. CANTRELL, JUDGE.

Opinion by: WILLIAM C. KOCH, JR.

Opinion

OPINION

This appeal involves a dispute over the destruction of property awarded to one of the spouses in a divorce case. Believing that his former wife was responsible for the damage to real and personal property he had received following the divorce, the former husband filed a petition in the Chancery Court for Lawrence County seeking to have his former wife held in contempt. During the contempt hearing, the trial court granted the former husband's motion to amend his petition to seek monetary damages and later awarded the former husband $ 6,000 in damages. The former wife asserts on this appeal that the trial court erred by permitting her former husband to amend **[*2]** his petition to seek damages and that the evidence does not support the damage award. We affirm the trial court.

I.

In March 1996, Michael Shane Ledford and Phyllis Dianne Ledford [1] were divorced in the Chancery Court for Lawrence County. Mr. Ledford received the parties' house as part of the division of the marital property, but the divorce decree permitted Ms. Ledford to continue to occupy the house

[1] Ms. Ledford remarried and is now Phyllis Dianne Rawdon.

until the third week of May 1996. The parties agreed that Ms. Ledford would vacate the house on or around May 20, 1996.

Mr. Ledford discovered extensive damage to the house when he took possession from Ms. Ledford on May 21, 1996. Light fixtures and curtains had been removed; window screens had been removed, and windows broken; carpet had been torn; pieces of indoor and outdoor furniture had been damaged; pantry doors had been taken down; and a telephone jack had been yanked from the wall. Several of the rooms had been blatantly trashed. Mr. Ledford **[*3]** also discovered that certain items of personal property awarded to him in the divorce were missing, including a television and VCR, a heating stove, fishing poles and fishing tackle, a complement of tools that Mr. Ledford had been given by his father, some kitchen items, a step ladder, some bedding, and some building materials.

On June 12, 1996, Mr. Ledford filed a petition in the Chancery Court for Lawrence County seeking to hold Ms. Ledford in contempt for "willful disobedience of the court's prior order." His petition requested that Ms. Ledford be made to appear and show cause why she should not be jailed or fined for contempt, and sought all proper general relief. Ms. Ledford opposed the petition.

The trial court held a hearing in the matter on August 13, 1996. Mr. Ledford presented evidence concerning the scope of the property damage and the value of missing or damaged property. When Ms. Ledford objected to the valuation evidence, Mr. Ledford moved to amend his petition to include a claim for money damages for the missing or damaged property. Following arguments from both parties, the trial court took the question under advisement and proceeded with the hearing. Thereafter, **[*4]** Ms. Ledford testified herself and offered other evidence concerning her estimation of the damaged and missing items.

On August 19, 1996, the court entered an order granting Mr. Ledford's motion to amend his petition and finding that Ms. Ledford had harassed Mr. Ledford in violation of the court's previous decree. After concluding that Ms. Ledford had intentionally damaged the former marital residence, the trial court awarded Mr. Ledford $ 6,000 in damages for the loss or destruction of his property. Ms. Ledford has appealed.

II.

Before we turn to the two issues Ms. Ledford seeks to raise on this appeal, we must consider the content of the record on appeal. ***HN1***[↑] Our review of the issues presented on appeal is limited to the contents of the appellate record. With the exception of post-judgment facts, which are not applicable here, we must obtain our understanding of what transpired during the proceedings below from the record on appeal.

HN2[↑] The appellant is required to supply this court with a record that conveys a fair, accurate, and complete account of what transpired in the trial court with respect to the issues that form the bases for the appeal. *See* Tenn. R. App. P. 24(a); **[*5]** *State v. Banes, 874 S.W.2d 73, 82 (Tenn.*

Crim. App. 1993); State v. Boling, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992). HN3[↑] Ordinarily, the appellate record contains a verbatim transcript of proceedings in the trial court. See Tenn. R. App. P. 24(b); however, when a transcript is not available, Tenn. R. App. P. 24(c) permits the use of a statement of the evidence of the proceedings. The statement of the evidence must be approved by the trial court, see Tenn. R. App. P. 24(f), and once it is approved, it becomes the official record of the proceedings in the trial court for the purposes of the appeal.

The appellate record in this case consists of the papers filed with the trial court, the exhibits introduced by Mr. Ledford at the August 13, 1996 hearing, and Mr. Ledford's statement of the evidence that was approved by the trial court. These are the documents that comprise the factual universe on this appeal, and we must limit our consideration to these documents, notwithstanding the other factual representations appearing in the parties' briefs that have no support in the record.

III.

Ms. Ledford's first assertion, as best we understand it, is that the trial court **[*6]** erred by awarding Mr. Ledford money damages for the damage or destruction of his property after it refused to grant his oral motion to amend his complaint to seek money damages. [2] The factual premise on which this assertion is based cannot be substantiated by the appellate record. If anything, the appellate record establishes that precisely the opposite occurred. Both the statement of the evidence and the final judgment state unambiguously that the trial court granted Mr. Ledford's motion to amend. Thus, the only conclusion that we can draw from the record is that the trial court granted Mr. Ledford's motion to amend to seek money damages.

HN4[↑] Tenn. R. Civ. P. 15 reflects a broad policy favoring permitting parties **[*7]** to amend their pleadings. See Branch v. Warren, 527 S.W.2d 89, 91-92 (Tenn. 1975); Winn v. Tucker Corp., 848 S.W.2d 64, 68 (Tenn. Ct. App. 1992). The policy is qualified only by considerations of fairness, and the courts, as a general rule, will grant motions to amend if the amendment does not unduly prejudice the opposing party's ability to go forward with an action or defense. See Gardiner v. Word, 731 S.W.2d 889, 891-92 (Tenn. 1987); Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc., 677 S.W.2d 457, 463 (Tenn. Ct. App. 1984). HN5[↑] When the prejudice caused by an amendment consists of inconvenience, surprise, or tactical disadvantage, the courts should, and generally will, grant the opposing party's request for a ***continuance***. See Tenn. R. Civ. P. 15.02; Gardiner v. Word, 731 S.W.2d at 892-93; ***Walden v. Wylie, 645 S.W.2d 247, 250 (Tenn. Ct. App. 1982)***. Accordingly, parties who neglect to request a ***continuance*** to prepare to meet the evidence to be introduced under an amendment waive the right to complain about the amendment on appeal. See

[2] Ms. Ledford's brief states that "counsel for Mr. Ledford made an oral motion to amend for money damages to which the Court replied that no damages were prayed for, and that someone would 'either go to jail or pay a fine,' but inasmuch as no judgment was plead, there would be no such money damages."

Arcata Graphics Co. v. Heidelberg Harris, Inc., 874 S.W.2d 15, 22 (Tenn. Ct. App. 1993).

The record contains no **[*8]** indication that Ms. Ledford requested a ***continuance*** in order to marshal a response to Mr. Ledford's request for money damages. To the contrary, Ms. Ledford affirmatively countered Mr. Ledford's evidence on damages through her own testimony and by calling her own witnesses to testify about the damages and missing items. Based on the appellate record, no conclusion can be drawn other than that Ms. Ledford tried the damages issue by consent at the August 13, 1996 hearing. Accordingly, we find that the trial court did not commit reversible error by permitting Mr. Ledford to proceed with his claim for damages.

IV.

As a back-up argument, Ms. Ledford asserts that the evidence does not support the trial court's damage award. ***HN6***[↑] Compensatory damage awards made by a trial court sitting without a jury are findings of fact. *See Armstrong v. Hickman County Hwy. Dep't, 743 S.W.2d 189, 195 (Tenn. Ct. App. 1987)*. Accordingly, we review them de novo upon the record with a presumption that they are correct unless the evidence preponderates otherwise. *See* Tenn. R. App. P. 13(d).

The record contains exhibits and other evidence supporting Mr. Ledford's claim for damages. The evidence in the **[*9]** appellate record contains nothing contradicting in detail the amount of damages claimed by Mr. Ledford. The statement of the evidence merely recites that the court found "certain witnesses produced by Mrs. Ledford to be of benefit to the Court in establishing damages of $ 6,000.00 as contrasted to the higher value approximating $ 10,000.00 sought by Mr. Ledford." As we observed earlier in this opinion, our analysis of Ms. Ledford's issues has been restricted by the record before us. ***HN7***[↑] Ms. Ledford has the burden of demonstrating that the evidence in the record preponderates against the trial court's factual finding on damages. She has not carried that burden on this record.

Ms. Ledford's argument that the trial court could not use its contempt power to assess damages against her misses the point. The court properly allowed Mr. Ledford to amend his original contempt petition to recover monetary damages for the items broken or missing from the marital residence. The resulting money judgment is reasonably attributable to Mr. Ledford's added prayer for relief.

V.

We affirm the judgment and remand the case to the trial court for whatever further proceedings may be required. We tax **[*10]** the costs of this appeal to Phyllis Dianne Ledford and her surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE, M.S.

BEN H. CANTRELL, JUDGE

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APPENDIX 54

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiff,

v.

No. 15513
JURY DEMANDED

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR CONTINUANCE

Defendants, by and through counsel, hereby respond in opposition to Plaintiff's Motion for Continuance.

I. FACTS AND PROCEDURAL HISTORY

Whether or not a cardiology consult was needed in this matter and whether the EKGs were appropriately interpreted have been issues in this matter since the beginning of this lawsuit. Plaintiff filed his Complaint in this matter on January 12, 2016. The Complaint lists "[f]ailure to obtain a cardiology consult in a timely manner." (Compl.) Additionally, the fact that Cody Blackburn failed to seek medical attention when his pain began the evening prior to his presentation to the hospital has been known to Plaintiff since at least the date of the alleged malpractice. (Medical Records of MRMC; Depo. Courtney Blackburn; Depo.

Barry Blackburn.) Plaintiff made an issue out of the timeliness of medical treatment when the Complaint was filed. Plaintiff's expert testified as to whether or not the outcome would be different if Cody had sought earlier medical treatment. Nothing new and prejudicial to the Plaintiff has happened in the last few weeks and Plaintiff has failed to present a good basis for a continuance in this matter.

Plaintiff filed this health care liability action on January 12, 2016. (Compl.) Paragraph 10 of the Complaint discusses the EKGs that were performed and the reading of those EKGs. (Compl. at ¶ 10.) Paragraphs 14(d) and 16(d) of the Complaint asserts that there was a "[f]ailure to obtain a cardiology consult in a timely manner." (Compl. at ¶¶ 14(d), 16(d).)

On March 28, 2016, Defendant, Mark A. McLean, M.D. (hereafter referred to as "Dr. McLean"), filed a Petition for Qualified Protective Order Pursuant to Tennessee Code Annotated § 29-26-121(f) and Memorandum in Support of the Petition for Qualified Protective Order. (Petition for Qualified Protective Order; Memo. In Supp. of Petition for Qualified Protective Order.) Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center (hereafter referred to as "MRMC"), joined the Petition for Qualified Protective Order. (MRMC's Notice of Joinder in Dr. McLean's Petition for Qualified Protective Order.) The proposed Qualified Protective Order attached to the Memorandum includes **Joel M. Phares, M.D.** as a physician who was involved in the care and treatment of Cody Charles Blackburn at Maury Regional Hospital. On April 20, 2016, the Court entered the Qualified Protective Order listing Joel M. Phares, M.D. as a physician

who was involved in the care and treatment of Cody Charles Blackburn at Maury Regional Hospital. (Qualified Protective Order.)

On September 29, 2016, Plaintiff's counsel deposed Mark A. McLean, M.D. (hereafter "Dr. McLean") in this matter. Plaintiff's counsel questioned Dr. McLean if he agreed with **Dr. Phares**. Plaintiff's counsel pointed out that Dr. Phares stated on his overread "Consider acute ST elevation myocardial infarction." Dr. McLean was further questioned as to why he did not agree with Dr. Phares. (Depo. Dr. McLean at 15.)

On January 27, 2017, Plaintiff filed a Motion to Set this matter for trial. (Pl.'s Mot. to Set.) On February 23, 2017, the Court entered an Agreed Scheduling Order setting this matter for trial beginning on April 30, 2018. Paragraph 10 of the Agreed Scheduling Order provides: "[t]his scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties. Failure to abide by this order may result in sanctions as set forth in Tenn. R. Civ. P. 16.06." (Agreed Scheduling Order.) The Agreed Scheduling Order also provided that "All motions to amend the pleadings shall be filed by January 1, 2018." (*Id.*) On April 7, 2017, the Court entered an Amended Agreed Scheduling Order. (Am. Agreed Scheduling Order.) The Amended Agreed Scheduling Order provided that the trial would begin on April 30, 2018. It also contained the statement that: "[t]his scheduling order shall not be modified except by leave of the Court for good cause shown, or agreement of the parties. Failure to abide by this order may result in sanctions as set forth in Tenn. R. Civ. P. 16.06." The Amended Agreed Scheduling Order also provides that "All

motions to amend the pleadings shall be filed by January 1, 2018." (Am. Agreed Scheduling Order.)

On May 1, 2017, in accordance with the Amended Agreed Scheduling Order, Plaintiff disclosed four experts in this matter. (Pl's Rule 26 Expert Disclosures.) Plaintiff chose to disclose one cardiothoracic surgeon, one emergency department physician, one nurse, and an economist as experts in this matter. The Background section of Plaintiff's Rule 26 Expert Disclosures includes information about Dr. Phares and his interpretation of the EKG performed at MRMC ER. It states: "Another EKG at 10:25 a.m. reflects similar inferior lead abnormalities. At this time there is misplacement of V leads. Joel Phares, M.D., the over-reading EKG physician's interpretation later is "Consider Acute ST Elevation MI."

On July 14, 2017, in accordance with the Amended Agreed Scheduling Order, Dr. McLean disclosed his Rule 26 Expert Witnesses. Dr. McLean disclosed two cardiothoracic surgeons, two emergency department physicians, a cardiologist, a radiologist, several treating physicians, and Dr. McLean. (Dr. McLean's Rule 26 Expert Disclosures.) Dr. McLean also cross-designated the experts disclosed by MRMC to the extent that those experts were not adverse to him. Dr. McLean's Rule 26 Expert Disclosures specifically state:

TREATING PHYSICIANS

> Although not expert witnesses defined by Tennessee law, to avoid any claim of surprise by Plaintiff, Defendant gives notice to Plaintiff that he may call one or more of Mr. Blackburn's treating physicians and healthcare providers, including, but not limited to Stephen Barr, M.D.; James S. Dean, M.D.; **Joel M. Phares, M.D.**; Kevin

Maquiling, M.D.; Gary Podgorski, M.D.; Brice T. Boughner, M.D.; Brian McCandless, EMT-P; and Jeffrey Sharp, EMT-IV.

(Defendant's Rule 26 Expert Disclosures.)(emphasis added.) Additionally, in accordance with the Amended Agreed Scheduling Order, MRMC disclosed Rule 26 Expert Witnesses. MRMC disclosed one emergency department physician, one nurse, and an economist.

On August 25, 2017, a Subpoena Duces Tecum was issued by the Maury County Circuit Court for Richard M. Sobel, M.D., MPH to appear at the Hilton Garden Inn Atlanta/Peachtree City, 2010 North Commerce Drive, Peachtree City, Georgia on October 4, 2017 at 9:00 a.m. The subpoena duces tecum and attached list identified a number of items that Dr. Sobel was to bring with him to the deposition. (Subpoena Duces Tecum.) A Subpoena For The Production of Evidence At A Deposition was issued by the Superior Court Clerk for Fayette County, Georgia on August 31, 2017. The clerk attached the Request For Issuance of Foreign Subpoena Pursuant To Georgia Code § 24-13-112, Subpoena Duces Tecum issued by the Maury Circuit Court Clerk with the Additional Documents For Production From Richard M. Sobel, M.D., MPH attached to the Subpoena Duces Tecum, to the Georgia Subpoena For The Production of Evidence At A Deposition. (Georgia Subpoena For The Production of Evidence At A Deposition.) Dr. Sobel was personally served with a copy of the Georgia Subpoena For the Production of Evidence; Tennessee Subpoena Duces Tecum; and Request for Issuance of Foreign Subpoena Pursuant to Georgia Code § 24-13-112 (hereafter "subpoena") on September 2, 2017, at 11:20 a.m. (Affidavit of Service.)

On September 21, 2017, Plaintiff's expert, Keith Blaine Allen, M.D. was deposed by counsel for Defendant. (Depo. of Keith Allen, M.D.) During his deposition, Dr. Allen testified that if Mr. Blackburn had sought earlier treatment, and if that treatment were the same as the treatment that was provided when he presented, he would probably be alive. (*Id.* at 71.)

On October 4, 2017, counsel for Defendants deposed Dr. Sobel. Pursuant to the subpoena, Dr. Sobel was to appear and produce records showing the total income he derived from work as an expert witness and copies of the relevant 1099s from 2012, 2013, 2014, 2015, and 2016 (or other similar documents which will allow him to answer questions about his total income paid for medico-legal matters during these years) which show the amount of money he was paid for medico-legal matters during these years. Dr. Sobel did not bring the documents set forth in the subpoena. He made no effort to comply and during the deposition he was unable to answer questions regarding his income earned from medico-legal work. Dr. Sobel's failure to comply with the subpoena and failure to provide information regarding his income received from his work as an expert witness forced Defendants to file a Motion to Compel.

During his deposition, Dr. Sobel testified about Cody Blackburn's EKGs that were performed by EMS and at the MRMC ER. He testified as to Dr. McLean's interpretation of the EKG during his deposition. He testified as to the alleged dynamic changes on the EKGs performed by EMS and at the MRMC ER. Dr. Sobel testified that the information in the EKGs was completely disregarded by Dr. McLean. Dr. Sobel testified extensively about the EKGs in this matter and

the interpretation of Dr. Phares. He also testified that if Dr. McLean thought Dr. Phares was wrong and there was no ST elevation on the EKG, then Dr. McLean did not know how to interpret the EKGs.

On January 2, 2018, in accordance with the Amended Agreed Scheduling Order, the facts in this matter, and the testimony of Plaintiff's experts, Defendant filed a Motion to Amend Answer to assert the comparative fault of Cody Charles Blackburn for his failure to seek earlier medical treatment.[1] Prior to Defendants' filing of the Motion to Amend Answer, Plaintiff's counsel had not deposed any of Dr. McLean's expert witnesses and had only deposed one of MRMC's expert witnesses. Following the filing of the Motion, Plaintiff's counsel deposed Larkin Daniels, M.D. on January 9, 2018. Dr. Daniels is one of Dr. McLean's identified cardiothoracic surgeon expert witnesses. (Depo. Larkin Daniels, M.D.) He deposed Dr. McLean's Emergency Department Physician Experts, Bryan Sharpe, M.D. and Kevin Bonner, M.D. on January 10, 2018. (Depo Bryan Sharpe, M.D.; Depo. Kevin Bonner, M.D.) Plaintiff's counsel deposed Dr. McLean's other cardiothoracic surgeon expert witness, Arthur Grimball, M.D., on January 11, 2018. (Depo. Arthur Grimball, M.D.) Finally, Plaintiff's counsel deposed Taral Patel, M.D. on January 30, 2018. Dr. Patel is Dr. McLean's expert cardiologist. (Depo. Taral Patel, M.D.) Plaintiff's counsel deposed MRMC's nurse expert, Jodi Thurman, on February 22, 2018. (Depo. Jodi Thurman, RN.) The only expert identified by Defendants who was deposed prior to the filing of

[1] Defendant scheduled the Motion to Amend Answer as soon as possible on February 16, 2018. (Notice of Hearing on Defendant's Motion to Amend Answer.) Plaintiff's counsel was unavailable for hearing on February 16, 2018. Defendant rescheduled the Motion to Amend for hearing on a special hearing date of March 9, 2018. (Amended Notice of Hearing on Defendant's Motion to Amend Answer.)

the Motion to Amend was Timothy Price, M.D., MRMC's Emergency Department Physician Expert. Dr. Price was deposed on October 24, 2017. (Depo. Timothy Price, M.D.) Plaintiff's counsel has already had an opportunity to question Defendants' experts regarding the issue set forth in Defendants' Motion to Amend.

Plaintiff's counsel did not question Defendants' experts about the fault of Cody Blackburn as alleged in the Motion to Amend Answer. Plaintiff's counsel did, however, question Defendants' experts about the EKGs and the opinions of Dr. Allen, Dr. Sobel, and Dr. Phares regarding their interpretation of the EKGs.

On January 31, 2018, Dr. McLean filed a Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D. and a Memorandum in Support of the Motion. (Dr. McLean's Motion to Compel Prod. of Documents Subpoenaed from Richard M. Sobel, M.D.; Dr. McLean's Memorandum in Support of Motion to Compel Prod. of Documents Subpoenaed from Richard M. Sobel, M.D.)

On March 9, 2018, the Court heard argument on and granted Defendants' Motion to Amend Answer. (Order Granting Defendants' Motion to Amend Answer.) The Court also heard argument on and granted Defendants' Motion to Compel Production of Documents Subpoenaed From Richard M. Sobel, M.D. (Order Granting Defendants' Motion to Compel.) The Motion to Compel was filed in response to Plaintiff's expert, Richard M. Sobel, M.D.'s failure to comply with a subpoena served on September 2, 2017 and evasive responses during his discovery deposition on October 4, 2017.

On March 9, 2018, Defendants requested available deposition dates for the depositions of Melissa Malone, Dr. Phares, and Dr. Podgorski. Plaintiff has known since at March 9, 2018 that Defendants planned to depose Dr. Phares in this matter. Due to scheduling conflicts, the depositions were not able to be scheduled until April 5 and April 11.

In accordance with the Order Granting Defendants' Motion to Compel Production of Documents Subpoenaed from Richard M. Sobel, M.D., on April 9, 2018, Plaintiff's counsel produced 1099s from 2012, 2013, 2014, 2015, 2016 and some additional documentation regarding Dr. Sobel's income from medico-legal matters. The **following day**, seventeen (17) days prior to the scheduled trial in this matter, Plaintiff filed a Motion to Continue. (Pl.'s Mot. to Continue.)

This matter is ready for the trial scheduled to begin on April 27, 2018. Defendants want and deserve to go to trial as scheduled in this matter. Furthermore, Plaintiff has failed to set forth a good basis for a continuance in this matter and the Court should deny Plaintiff's Motion for Continuance.

II. LAW AND ARGUMENT

Plaintiff's Motion for Continuance of the trial in this matter is untimely and unwarranted. No issues have arisen within the last several weeks, including the granting of Defendant's Motion to Amend Answer, the evidentiary deposition of Joel Phares, M.D., and the production of Richard M. Sobel, M.D.'s 1099s, that would make going to trial at this time unfairly prejudicial for the Plaintiff.

A. Defendant's Motion to Amend Answer was timely filed in accordance with the Agreed Amended Scheduling Order in this matter and it does not create any new issues that Plaintiff needs additional time to address.

The fact that Cody Blackburn began having pain on September 16, 2017, has been known to Plaintiff since the date of the alleged malpractice. (Medical Records of MRMC; Depo. Courtney Blackburn; Depo. Barry Blackburn.) Plaintiff alleged that Dr. McLean and Dr. Caleb Barr delayed in providing medical treatment to Cody Blackburn in the Complaint. (Compl.) Therefore, the timing of medical treatment is an issue that has been known to Plaintiff since the beginning of the lawsuit. The issue of whether Mr. Blackburn's outcome would have been different if he had sought earlier treatment has already been addressed by expert testimony, including Plaintiff's expert, Keith Allen, M.D. (*See* Depo. of Keith Allen, M.D.)

The Motion to Amend Answer was a housekeeping issue in this matter. It was timely filed in accordance with the requirements set forth in both the Agreed Scheduling Order entered in February of 2017 and the Amended Agreed Scheduling Order entered in April of 2017. (Agreed Scheduling Order; Am. Agreed Scheduling Order.)

Plaintiff asserts that whether Cody Blackburn acted reasonably the night before his admission is an issue that needs to be addressed by expert testimony. (Pl.'s Mtn. for Continuance.) Importantly, Defendant's Motion to Amend Answer to assert the comparative fault of Cody Blackburn was filed before Plaintiff deposed any of Dr. McLean's expert witnesses and before Plaintiff deposed all

but one of MRMC's expert witnesses. Plaintiff's counsel did not question any of the Defendants' experts about the comparative fault of Cody Blackburn.

Plaintiff further asserts that there is no evidence that Defendants would have acted differently if Mr. Blackburn had presented earlier. The filing of the Motion to Amend does not require evidence to prove that Defendants would have acted differently if Mr. Blackburn had presented earlier. This is a causation issue that has been in the case from the beginning and Plaintiff identified a causation expert on May 1, 2017. Therefore, Plaintiff already has an expert to testify as to causation in this matter.

The allegation set forth in Defendants' Motion to Amend does not result in any need for Plaintiff's to obtain a new cardiologist expert in this matter. Plaintiff has been aware of the issues in this case and the facts that Defendants' Motion to Amend is based on for quite some time. Plaintiff chose not to obtain a cardiology expert and chose not to question Defendants' cardiology expert about Cody Blackburn's fault.

Plaintiff has suffered no prejudice as a result of Defendants' timely Motion to Amend. No discovery is needed on this issue and Plaintiff has failed to show good cause for a continuance based on the timely amendment.

B. Plaintiff has failed to provide the Court with good cause to support a continuance in this matter based on the fact that an evidentiary deposition of Joel M. Phares, M.D. was taken in this matter on April 5, 2018.

Dr. Joel Phares was Cody Blackburn's treating physician in this matter. It is undisputed that he overread the EKG performed at the MRMC ER. Plaintiff has known about the existence of Dr. Phares since the date he obtained medical

records in this matter. Plaintiff could have spoken to Dr. Phares at any time, but chose not to do so until his deposition was scheduled.

Interestingly, Dr. McLean filed a Petition for Qualified Protective Order in this matter on March 28, 2016. (Def.'s Pet. For Qualified Prot. Order.) Dr. Phares is listed as a treating physician in the Qualified Protective Order entered by this Court almost two years ago, on April 20, 2016. Plaintiff did not object to Dr. Phares being listed or identified as a treating physician or to Defendants speaking with Dr. Phares pursuant to a Qualified Protective Order when Defendants filed the Petition for Qualified Protective Order in this matter over two years ago.

Dr. Phares was listed in Dr. McLean's Rule 26 Expert Disclosures that were provided to Plaintiff, almost one year ago, on May 1, 2017. Additionally, Dr. McLean identified a cardiologist expert, Dr. Taral Patel, in this matter on May 1, 2017. (Def.'s Rule 26 Expert Disclosures.)

Plaintiff identified a cardiology issue in his Complaint filed on January 12, 2016. (Compl.) Plaintiff chose not to identify a cardiologist as an expert in this matter. Plaintiff identified a cardiothoracic surgeon and an emergency department physician as experts to opine on the issues in this matter. (Pl.'s Rule 26 Expert Disclosures.) Plaintiff's expert, Dr. Sobel, testified as to the EKGs and EKG interpretation by Dr. Phares and others extensively during his deposition. (Depo. Richard Sobel, M.D.) Dr. Allen also testified about the EKG interpretation. (Depo. Keith Allen, M.D.) Plaintiff now, less than one month

before trial and over a year after Plaintiff's Expert Disclosure deadline passed, has determined that he needs a cardiologist to serve as an expert in this matter.

A treating physician is a physician who acquired his information not in preparation for trial, but as an actor in regard to the occurrence. Dr. Phares reviewed the EKGs and records in this matter as part of his job as a cardiologist at MRMC. Dr. Phares confirmed, overread and interpreted Cody Blackburn's EKG that was performed in the MRMC ER. (Depo. Joel Phares, M.D. at 11.) Dr. Phares believes that he also reviewed Cody Blackburn's EMS EKG. (*Id.* at 15.) The fact that he read the EKGs after Mr. Blackburn passed is irrelevant. Dr. Phares reviewed the EKGs in the course of his employment as a cardiologist. (*Id.* at 48.) It is not unusual to review EKGs a day or more after they are performed. (*Id.*)

Plaintiff has relied extensively on the EKG and computer interpretation of the EKG during this lawsuit. Plaintiff made Dr. Phares' interpretation of the EKG an issue in this matter. Plaintiff has known for over eight months that Defendants had a cardiologist expert who would be testifying in this matter in disagreement with what Plaintiff's experts had opined was Dr. Phares' interpretation of the EKG. (Def.'s Rule 26 Expert Discl.)

The evidentiary deposition of Dr. Phares is in no way a good cause basis for continuance in this matter. Additionally, the deposition of Dr. Phares fails to present any good cause reason for Plaintiff to identify an additional expert in this matter almost a year after his expert disclosure deadline. Plaintiff set forth the

cardiology issue in this case when the Complaint was filed almost two and one-half years ago. No continuance is warranted in this matter.

C. The fact that Dr. Sobel was required to produce subpoenaed documents presents no reason for a continuance in this matter.

Plaintiff's expert, Dr. Sobel, was ordered to produce documents that were subpoenaed prior to his deposition in October. In accordance with the Order Granting Defendants' Motion to Compel, 1099s and other documents regarding Dr. Sobel's income as a medical malpractice expert were produced on April 9, 2017. The very next day, Plaintiff filed a Motion for Continuance in this matter. The fact that the Court ordered Dr. Sobel to produce the documents subpoenaed presents no reason for a continuance in this matter.

Plaintiff chose Dr. Sobel as his sole emergency room expert in this matter. He did so knowing that Dr. Sobel is a professional expert. He chose Sobel knowing that baggage came with him. In fact, Plaintiff has used Dr. Sobel as an expert in a prior matter. (Depo. Richard Sobel, M.D.) He knew that Dr. Sobel had testified in hundreds of cases. He knew that Dr. Sobel's income as an expert was an issue in the prior case and had been an issue in other matters.

Plaintiff even admits that any "strained" relationship as a result of Dr. Sobel being required to produce the documents that were subpoenaed in this matter is not a reason for a continuance.

III. CONCLUSION

This matter is ready for trial as scheduled. Defendants want and deserve to go to trial as scheduled in this matter. This Court should deny Plaintiff's Motion for Continuance and move forward with the trial as scheduled.

Respectfully submitted,

BY: Michelle Sellers

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Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

Joe Bednarz, Sr. (BPR #9347)
Joe Bednarz, Jr. (BPR #18540)
Bednarz & Bednarz
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615.256.0100

Attorneys for Plaintiff

This the 13th day of April, 2018.

APPENDIX 55

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
vs.	)	**Case No. 15513**
	)	**JURY DEMAND**
MARK A. McLEAN, M.D., AND MAURY REGIONAL HOSPITAL d/b/a MAURY REGIONAL MEDICAL CENTER,	)	
Defendants.	)	

ORDER

This cause came to be heard by the Court relative to the Plaintiff's Motion to Continue. The Court has made certain findings of fact and/or rulings after conferring with all counsel via conference call on Monday, April 16, 2018. In said conference call it announced that it would grant Plaintiff's Motion to Continue based on the Court's granting of the Defendants' Motion to Amend the Defendants' Answers to allege comparative fault. Defense counsel inquired as to the status of a continuance if defense counsel withdrew their comparative fault defense. The Court allowed counsel time to confer with their clients to determine if in fact the comparative fault defense would be withdrawn. The Court has now received communication, copied to all counsel, that the comparative fault argument will not be withdrawn. The Court has thus granted Plaintiff's Motion to Continue which will specifically be addressed in a separate Order. It is the finding of this Court that counsel shall appear on April 30, 2018, to hear any and all pending

Motions and/or conduct a status and scheduling conference, pursuant to Rule 16 of the Tennessee Rules of Civil Procedure.

It is, thus, **ORDERED, ADJUDGED** and **DECREED** that this cause is removed from its present trial date, which was to commence April 30, 2018. Counsel will appear on April 30, 2018, to argue any and all pending Motions which counsel deems necessary. At said time, the Court will conduct a scheduling and/or status conference, pursuant to Rule 16 of the Tennessee Rules of Civil Procedure and enter a Scheduling Order which the Court deems appropriate.

SO ORDERED this 17 day of April, 2018.

J. Russell Parkes, Judge

Clerk's Certificate of Service

I, the undersigned Clerk hereby certifies that I have sent a true and exact copy of the foregoing Order to the parties at their last known address, by U.S. Mail with sufficient postage thereon to deliver said Order to its destination.

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This the ___ day of April, 2018.

APPENDIX 56

79323

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE
AT COLUMBIA

BRITON GAGE BLACKBURN, a minor, Individually, and as the Natural Child of CODY CHARLES BLACKBURN, deceased, By Next Friend and Grandfather, BARRY CHARLES BLACKBURN,

Plaintiff,

v.

No. 15516
JURY DEMANDED

FILED
2018 JUN 12 AM 10:00
SANDY McLAIN, CIRCUIT CLERK
MAURY COUNTY, TN

MARK A. McLEAN, M.D., and MAURY REGIONAL HOSPITAL, d/b/a MAURY REGIONAL MEDICAL CENTER,

Defendants.

THIRD AMENDED SCHEDULING ORDER

---

1. Plaintiff shall identify any expert(s) to address the issue of Cody Blackburn's comparative fault only on or before June 30, 2018, and pursuant to Tenn. R. Civ. P. 26.02(4)(A)(i) shall fully disclose the substance of the facts and opinions to which each expert is expected to testify.

2. Defendants shall complete the discovery depositions of any new expert witnesses on or before September 28, 2018.

3. Plaintiff shall complete any supplemental depositions of Defendants experts on the issue of Cody Blackburn's comparative fault only on or before October 5, 2018.

4. Defendants shall identify any rebuttal expert(s) on or before December 7, 2018.

5. Plaintiff shall complete the discovery depositions of any rebuttal experts on or before January 18, 2019.

6. The parties shall file all pretrial motions, amended witness lists, exhibit lists, motions in limine, and designations of depositions to be used at trial by February 15, 2019. The amended witness lists, exhibit lists, motions in limine, and designations of depositions will be limited to the issue of Cody Blackburn's comparative fault or any new information related to that issue.

7. The parties shall file any objections to amended witness lists, exhibit lists, responses to motions in limine, counter deposition designations and objections to deposition designations by February 22, 2019.

8. The parties shall file their requested jury instructions and proposed jury verdict forms by February 22, 2019.

9. A pretrial conference is set for March 4, 2019 at 9:00 ~~a.m.~~ p.m.; Pre-trial Motions will be heard on March 4, 2019, at 9:00 a.m.

10. This scheduling order shall not be modified except by leave of Court for good cause shown, or by agreement of the parties. Failure to abide by this order may result in sanctions as set forth in Tenn. R. Civ. P. 16.06.

IT IS SO ORDERED.

HONORABLE RUSSELL PARKES

2/11/18
DATE

APPROVED FOR ENTRY:

Michelle Sellers

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Attorneys for Defendant, Maury Regional Hospital, d/b/a Maury Regional Medical Center

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon the following counsel by mailing postage prepaid or by delivery to the person or office of such counsel:

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615.256.0100

Attorneys for Plaintiff

This the 31st day of May, 2018.

Michelle Sellers

APPENDIX 57

IN THE CIRCUIT COURT FOR MAURY COUNTY, TENNESSEE

BRITON GAGE BLACKBURN, a minor, Ind. and as the Natural Child of CODY CHARLES BLACKBURN, deceased, by Next Friend and Grandfather, BARRY CHARLES BLACKBURN,	)	
Plaintiffs,	)	
v.	)	NO. 15513
	)	JURY DEMAND
MARK A. McLEAN, M.D., AND MAURY REGIONAL HOSPITAL D/B/A MAURY REGIONALMEDICAL CENTER,	)	
Defendants.	)	

DEFENDANT MAURY REGIONAL HOSPITAL, D/B/A MAURY REGIONAL MEDICAL CENTER'S (MRMC) NOTICE OF JOINDER

MRMC gives notice to the Court and counsel that it joins in the Defendant Mark A. McLean, M.D.'s Response in Opposition to Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Regarding April 30, 2018 Status Conference and Rule 9 Appeal and the Defendant Mark A. McLean, M.D.'s Response in Opposition to Plaintiff's Motion to Alter or Amend the Court's Order of June 8, 2018 Granting Defendant Mark A. McLean, M.D.'s Motion for Summary Judgment as to Standard of Care Claims for Which There is no Expert Proof or in the Alternative for Rule 9 Appeal as fully as if set forth herein verbatim on behalf of MRMC.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via Electronic Mail and by United States mail, postage pre-paid to the following:

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Attorneys for Mark A. McLean, M.D.

on this 7 day of August, 2018.

Robert L. Trentham

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