The Mississippi Bar Litigation Section

E-Newsletter

Summer 2014

SPECIAL POINTS OF INTEREST:

- **Litigation Scholarship Winners**
- **Article - The Tort Claims Act and Medical Malpractice**
- **Article - BP Oil Spill Claims**
- **Article - Advocacy in an Atmosphere of Violence**
- **Article - Beating Plaintiff's Untimely Product Liability Claim**
- **MS Rules Annotated**
- **Save the Date - 2014 Annual Meeting - June 27, 2014**
- **2013-2014 Section Executive Committee**

Message from the Chair – Edward "Ted" Connell, Jr.

Welcome to the summer e-news letter to the Litigation Section of the Mississippi Bar. I have been honored to serve on the Executive Committee of the Litigation Section since 2008 and as its chair for 2013-2014 year. I believe that we have provided some very useful services to the bar's civil litigators and we hope to continue to do so through the Mississippi Bar's Annual Convention.

In conjunction with the Appellate Section, the Litigation Section presented an excellent continuing legal education seminar on April 4, 2014, in Oxford, Mississippi. The keynote speaker was Dr. Robert Khayat, former Ole Miss Chancellor, law school professor, and now, author. Dr. Khayat gave a very interesting perspective on how to be a leader in ones law firm.

Those in attendance received a "view from the bench" as Chief Justice William L. Waller, Jr., Justice Jess Dickinson, Judge Thomas K. Griffis, Jr., Judge Donna M. Barnes, and Judge James D. Maxwell, II, all discussed appellate practice and took questions and gave answers. In addition to the judges panel, speakers also included John Henegan of Butler Snow and Jim Warren of Carroll Warren and Parker. Judge Bernice Donald of the U.S. Court of Appeals for the Sixth Circuit, who serves as the President of the American Bar Foundation, spoke on leadership through diversity. Finally, Patsy Brumfield, recently retired from the Northeast Mississippi Journal and a former editor of the Daily Mississippi, discussed "Trying Your Case In The Media."

The Litigation Section will again team with the Appellate Section to provide equally impressive speakers for the Litigation Section annual meeting that will be held on June 27, 2014, during the Bar's Annual Convention at the Hilton Sandestin. Currently scheduled to speak as a panel regarding "The Fifth Circuit and its Confirmation Process" are Judge Charles W. Pickering, Sr., U.S. District Court for Southern District & U.S. Court of Appeals for Fifth Circuit and Judge Leslie H. Southwick, U.S. Court of Appeals for Fifth Circuit. Both are authors of books regarding this process and will be signing books following the discussion.

The Section has provided scholarship money to four deserving students at the University of Mississippi Law School Mississippi College School of Law. Further, the Litigation Section provided $1,500.00 for the Mississippi Volunteer Lawyers' Project.

We hope you have enjoyed and learned much from the e-mails from Lexology/Newsstand, an innovative, web-based daily newswire service, that provides litigation focused e-mails with a depth of free, practical know-how. The feedback has been very positive as most say that the information is very beneficial to the everyday litigation, legal practice. If you have any suggestions or feedback regarding this service, please let me know.

Finally, Brooke Driskel, past section chair, is cycling off of the Executive Committee. Along these lines, I would like to take this time to thank her for her service and welcome Rachel Waide as a new member of the Executive Committee. We are looking forward to all that she can contribute to the wide array of specialized offerings made by the Litigation Section to the Mississippi Bar's Civil Litigators.

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Litigation Section Awards Scholarships to Law Students

University of Mississippi Law School

The Litigation Section awarded $1000 scholarships to two outstanding law school students at the University of Mississippi Awards Day in March 2014. Pictured below, from left to right, are the Litigation Section award recipients, Garien Gatewood and Caroline Shepard.

Mississippi College School of Law

On behalf of the Litigation Section, Meade Mitchell, secretary of the Litigation Section, along with Dean Jim Rosenblatt presented, Thomas Hughes and Kasey Mitchell with a $1000 scholarship each for their continuing education. The scholarships were presented at the Law Day Awards ceremony in April 2014 at the Mississippi College School of Law.

THE TORT CLAIMS ACT AND MEDICAL MALPRACTICE - BE WARY

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I. INTRODUCTION

A nice lady walks into your office with a potential medical malpractice case. She tells you that her mother was admitted to a local hospital by her doctor, a physician who had cared for her mother for years. You are unfamiliar with the physician. Surgery was performed, but her mother did not survive. You have the case reviewed by an expert who concludes that the physician was negligent and that the negligence was the cause of death.

Thoughts begin to race through your mind. I know I have to give written notice before filing suit, but when? What must be contained in the notice letter? When does the statute of limitations run? When can I file suit? Does the potential recovery warrant pursuit of the claim given caps on damages? What is the applicable cap?

The answer to some, if not all, of these questions hinges on whether the physician is privately employed or employed by an entity subject to the protections of the Mississippi Tort Claims Act.[1] But in an age where transparency in government is trumpeted from Washington, D.C. to the county level, it is a lot more difficult to answer these questions than you might expect, yet the answers may mean the difference between a successful conclusion to your client's claim and your being required to defend yourself in a malpractice action.

II. THE TORT CLAIMS ACT[2]

The Mississippi Tort Claims Act was enacted in response to the Mississippi Supreme Court's decisions in *Pruett v. City of Rosedale*[3] and *Presley v. Miss. State Highway Comm'n* [4] which

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[1] Miss. Code Ann. § 11-46-1 et seq.

[2] Several scholarly articles have been written on the Tort Claims Act. *See Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions*, 76 Miss. L.J. 973 (2007); Robert F. Walker, *Mississippi Tort Claims Act: Is Discretionary Immunity Useless?*, 71 Miss. L.J. 695 (2001).

[3] *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss. 1982).

[4] *Presley v. Miss. State Highway Comm'n*, 608 So. 2d 1288 (Miss. 1992).

urged a legislative end to sovereign immunity. The Act governs tort claims for damages against governmental entities including the state and political subdivisions.[5] The "state" is defined, obviously, as the State of Mississippi, and relevant to this discussion, includes state hospitals.[6] A "political subdivision" is defined as "any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including . . . [a] community hospital."[7] Employees of governmental entities, including physicians, are immune from personal liability for ordinary negligence.[8] There is a rebuttable presumption that a negligent act by a governmental employee committed "within the time and at the place of his employment is within the course and scope of his employment."[9] Finally, the liability of the state and political subdivisions is capped at $500,000 for all damages, both economic and noneconomic.[10]

The Act imposes significant procedural issues on lawyers. The statute of limitations for claims against entities protected by the Act is only one year.[11] Within that year period, and ninety days before suit may be filed, written notice must be given to the "chief executive officer of the governmental entity."[12] Such notice must be delivered personally or by registered or certified United States mail.[13] The Act requires specific information in the notice letter, including:

(1) a short and plain statement of the facts upon which the claim is based;
(2) the circumstances which brought about the injury;
(3) the extent of the injury;
(4) the time and place the injury occurred;
(5) the names of all persons known to be involved;
(6) the amount of money damages sought; and
(7) the residence [address] of the person making the claim at the time of the injury and at the time of filing the notice.[14] Timely written notice tolls the statue of limitations for 95

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[5] Miss. Code Ann. § 11-46-1(a) and (g).

[6] Miss. Code Ann. § 11-46-1(j).

[7] Miss. Code Ann. § 11-46-1(i).

[8] Miss. Code Ann. § 11-46-7(2).

[9] Miss. Code Ann. § 11-46-7(7).

[10] Miss. Code Ann. § 11-46-15(1)(c).

[11] Miss. Code Ann. § 11-46-11(3)(a).

[12] Miss. Code Ann. § 11-46-11(1).

[13] Miss. Code Ann. § 11-46-11(2)(b)(ii)

[14] Miss. Code Ann. § 11-46-11(2)(b)(iii); *see also S. Cent. Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252 (Miss. 2006)("the failure to provide *any* of the seven statutorily required categories of information falls short of the statutory requirement and amounts to non-compliance with Miss. Code Ann. § 11-46-11(2).")

days.[15] After the tolling period expires, you have 90 days to file suit.[16]

The landscape is much different with respect to claims against physicians or hospitals not covered by the Act. Claims against privately employed physicians and privately owned hospitals are governed, generally, by a 2-year statute of limitations.[17] While sixty days' prior written notice is required, §15-1-36(15) requires "no particular form of notice" but only that the defendant be notified "of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered." The notice need only be provided to the "defendant[18]" not specifically to "the chief executive officer of the governmental entity" as under the Act.

III. THE TRAP

Years ago, it was fairly easy to determine if a potential defendant in a medical negligence case was subject to the protections of the Act. Practitioners generally knew that claims against the University of Mississippi Medical Center, and its physicians, as well as, claims against the Mississippi State Hospital at Whitfield fell under the Act.[19] It was obvious that a claim against a local, county-owned "public" hospital (not staff physicians) would be subject to the requirements of the Act.

Similarly, it was relatively easy to delineate which hospitals were privately owned and which physicians were privately employed. Claims against privately employed physicians and private hospitals encompassed the vast majority of medical negligence claims. Physicians were rarely employed directly by hospitals, but merely possessed admitting privileges, which, in and of itself, did not impose liability on a hospital even if the physician's negligent conduct occurred within the confines of the hospital.[20]

But times have changed. Hospitals throughout the state fall under the Act. The Tort Claims Board maintains a list of such hospitals at *www.dfa.state.ms.us/offices/tort/tort.htm* but

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[15] Miss Code Ann. § 11-46-11(3)(a).

[16] Miss Code Ann. § 11-46-11(3)(b); Another potential trap exists in this circumstance. In the event that the defendant denies your claim in writing, you have 90 days to file suit from receipt of the notice of denial of the claim. Does one have only 90 days to file suit after receipt of notice of denial of a claim regardless of when the statute of limitations would run? For instance, if the negligent act occurred on February 1, 2014, notice of claim was given on March 1, 2014, and the claim denied on April 1, 2014, does the Claimant have only until July 1, 2014 to file suit even though the statute of limitations would run on February 1, 2015?

[17] Miss Code Ann. § 15-1-36(1).

[18] *Id.*

[19] *But see*, *Mozingo v. Scharf*, 828 So. 2d 1246 (Miss. 2002); *Miller v. Meeks*, 762 So. 2d 302 (Miss. 2000).

[20] *See Hardy v. Brantley*, 471 So. 2d 358, 371 (Miss. 1985)("where a patient engages the services of a particular physician who then admits the patient to a hospital where the physician is on staff, the hospital is not vicariously liable for the neglect or defaults of the physician.")

suggests "for due diligence" you contact "the Board and the entity in question." Many of these hospitals have "county" or "community" in their names, but such is not necessarily indicative of their legal status. For instance, Natchez Regional Medical Center is a public hospital while Natchez Community Hospital is privately owned, and not on the list, though both its name and website suggest it is a "community hospital."[21]

With respect to physicians, the line between public versus private employment first began to be blurred when publicly employed physicians began forming practice groups and generally acted like private practitioners.[22] More importantly, physicians once in private practice who simply maintained admitting privileges at a public hospital are now actually employees of these hospitals and subject to all of the protections of the Act, including individual immunity. Some of these physicians are allowed to maintain private practices while not working at the public hospital. This makes it even more difficult to determine if a physician was privately employed or publicly employed when the negligence occurred.

In the hypothetical above, the physician who "for years" provided care and treatment to your client's mother as a private practitioner was actually under an employment contract with a public hospital at the time of the negligent act. The statute of limitations is only one year, and the specific notice provisions of §11-46-11 are required. If you are unaware of this potential issue, you may find yourself working under the assumption that the two year statute of limitations in §15-1-36 applies, only to learn it does not. And, it may be too late when you do discover the problem. The notice rule may be of little or no help to you in this circumstance.[23]

Even if you suspect that a particular physician is employed by a public hospital, there are still potential traps. *Gorton v. Rance*[24] is a good example of an awaiting minefield. Rance filed suit against Humphreys County Memorial Hospital ("HCMH") for the death of her ten-month-old son after providing appropriate 90 day written notice to the chief executive officer of HCMH under the Act.[25] Rance's child had been admitted to Dr. Gorton's service.[26] The child died at HCMH before he could be transferred to the University of Mississippi Medical Center.[27] In her complaint, Rance alleged that Gorton was an employee of HCMH.[28]

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[21] *See* www.natchezcommunityhospital.com.

[22] *See Miller*, 762 So. 2d 302.

[23] *See Blailock v. Hubbs*, 919 So. 2d 126 (Miss. 2005).

[24] *Gorton*, 52 So. 3d 351 (Miss. 2011).

[25] *Id.* at 353, 358.

[26] *Id.* at 354.

[27] *Id.*

[28] *Id.*

Gorton filed a motion for summary judgment and attached contracts and affidavits indicating that he was not an employee of HCMH but actually an employee of another public hospital, Greenwood Leflore Hospital.[29] As it turns out, Gorton was under contract with Greenwood Leflore Hospital as a "full-time employee," and as a condition of that contract he saw patients at HCMH.[30] Because Rance failed to provide timely [pre-suit] notice to Greenwood Leflore Hospital before the running of the statute of limitations, her suit was dismissed.[31]

The Court concluded, "We observe that Rance had a legal duty to conduct a due-diligence inquiry into the true employment status of potential defendants."[32] But exactly how such "due diligence" was to be accomplished is difficult to understand. There is no published list of physicians employed by public hospitals. There is no website or database one can search. Though the Mississippi Board of Medical Licensure contains license verification information and the address of physicians licensed in Mississippi, it does not contain employment information.[33] Though publicly employed, how was Rance to know that the physician who saw her ten-month-old child in Belzoni was actually employed by Greenwood Leflore Hospital 35 miles away?

IV. CONCLUSION

Practitioners need to be aware of the potential procedural pitfalls that exist in medical negligence cases, specifically those that may arise when the defendant falls under the protections of the Mississippi Tort Claims Act. Recognizing this issue early, well before the running of the one year statute of limitations applicable to such claims, may allow you to conduct sufficient "due diligence" so as to avoid the dismissal of a claim you thought you had two years to file.

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[29] *Gorton v. Rance*, 52 So. 3d at 354.

[30] *Id.*

[31] *Id.* at 359.

[32] *Id.* at 357.

[33] *See* www.msbml.ms.gov.

BP Oil Spill Claims: Too Good To Be True?

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I. Deepwater Horizon oil spill

Eleven men died in connection with the Deepwater Horizon explosion on April 20, 2010. Couple those tragic losses of life with the damages created by approximately 176,000,000[1] gallons of crude oil spewing into the Gulf of Mexico over a period of 87 days as the entire world watched, and there was ample reason to believe that British Petroleum ("BP") was doomed. Surely, no company could survive the financial punishment following something that horrendous. However, what we later learned was that BP was so large and well funded that even the largest, man-made environmental disaster in our nation's history would be a manageable setback to the oil giant.

After a change in leadership at BP, the company set its course on making amends with the Gulf Coast communities. BP said and did the right things. All appearances pointed towards the foreign corporation being proactive, especially after it agreed to the plan laid out in the roughly 1,200 page long *Deepwater Horizon* Economic and Property Damages Settlement Agreement that was entered in the District Court for the Eastern District of Louisiana.[2]

II. A claimant friendly settlement agreement

The settlement agreement provides that businesses situated anywhere in Alabama, Louisiana, Mississippi, and certain parts of Florida and Texas are located within one of the four settlement zones.[3] The zones are categorized as Zone A (on or very close to the beach), Zone B (oftentimes near wetlands areas), Zone C (primarily Gulf Coast communities located south of I-10), and Zone D (everyone else). To be considered "located" within one of the settlement zones, a business can use the physical address of its headquarters or its facilities. A multi-facility business may be able to file a consolidated claim. For example, it is not uncommon to see a claim filed for a New York based corporation that has a facility (or many facilities) situated within one (or more) of the settlement zones.

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[1]This estimate was submitted by the government's experts. BP has urged the District Court to set that figure at 103,000,000 gallons.

[2]For purposes of this article, which was originally written on May 27, 2014, only business economic loss ("BEL") claims will be discussed.

[3]Some industries are excluded from the settlement, such as insurance companies, financial institutions, oil & gas, defense contractors, real estate developers, companies selling or marketing BP branded fuel during a specific period of time, and casinos/gaming.

The beauty of the settlement agreement was that it was transparent and objective. Both BP and the Plaintiff's Steering Committee ("PSC") hailed this as a claimant friendly settlement. Indeed, it *was*. Determining whether or not a business qualified for a settlement was fairly easy. All that was required was: (1) knowing the business's settlement zone; and (2) having access to the business's monthly revenues during the years 2007-2011.

Although there are many ways to qualify for a BEL claim, the most common causation test employed is referred to as the V-test. In a nutshell, if a business can show a certain decrease in revenue for three consecutive months in 2010 between May and December (as compared to the same three months in the benchmark period) and show a certain increase in revenue for the same three consecutive months in 2011, then the business qualifies. (Ex: Zone A businesses, given their close proximity to the coastal waters and spilled oil, are presumed to have a loss and are automatically deemed to "pass" causation. Whereas, a Zone D business that is located further away from the coast and the spilled oil, must show at least a 15% decrease followed by a 10% or greater increase.)

When I first read the settlement agreement and learned about the V-test, my first thought was genuine disbelief. This seemed too good to be true...for Mississippi businesses. At that time, I speculated that 1 out of 10 businesses in Mississippi would qualify based upon this objective criteria. Over the past two years, and after running causation tests for hundreds of businesses, I have learned that the odds are even more favorable to businesses, as almost 1 out of 3 businesses that we have evaluated thus far actually qualify.[4]

III. Implementation of the settlement agreement

BP proposed that Patrick Juneau be appointed as the Claims Administrator for the Court Supervised Settlement Program. Mr. Juneau is a long time member of the corporate defense bar, who is well respected by the plaintiff's bar and who has served around the country in the roles of special master or mediator in numerous high profile matters. Early on, Mr. Juneau questioned the V-test and the possibility that those unharmed by the oil spill could qualify for a settlement under its objective standards. In fact, his attorney sent a letter to BP that addressed this issue and provided a hypothetical of a small accounting firm that suffered a loss in 2010 as a result of a partner's prolonged illness instead of the oil spill. In response to this letter and hypothetical, BP's attorney responded "If proper application of the methodology with accurate financial data yields a determination that causation is satisfied, *BP agrees with Class Counsel that all losses ... are presumed to be attributable to the Oil Spill. ...* Nothing in the BEL Causation Framework or

[4]Inevitably, there will be some businesses that qualify for a BEL settlement, despite the losses being caused, in whole or in part, by factors other than the oil spill. On the other side of the coin, there are businesses who indeed suffered losses as a direct result of the oil spill, but who do not qualify under the terms of the Settlement Agreement. For example, one of my clients is located in Jackson and sells food to casinos and restaurants located in Biloxi and Gulfport. Following the oil spill, my client suffered a tremendous loss in revenue as a result of the lack of tourism on the Gulf Coast in the months following the oil spill. Although my client had more than a 15% decrease in 2010, my client did not have the 10% increase needed in 2011 to pass the V-test. Granted, the "Decline Only" causation test could–theoretically–cause a business like this to qualify for a settlement, but "Decline Only" requires the additional "customer mix test," which is a virtually impossible test to pass due to the extensive documentation requirements. (See Claims Administrator's Policy 345.)

Compensation Framework provides for an offset where the claimant firm's revenue decline (and recovery, if applicable) satisfies the causation test but extraneous non-fictional data indicate that the decline was attributable to a factor wholly unrelated to the Oil Spill. *Such 'false positives' are an inevitable concomitant of an objective quantitative, data-based test."*[5] (Emphasis mine.)

Based upon the above statement from BP, as well as a similar representation from the PSC, the Claims Administrator adopted Policy 308, which had an effective date of October 10, 2012. This policy set forth that the Claims Administrator will only consider the objective, financial data when determining if a business qualifies for a settlement. To this date, BP has not appealed this policy.

At the fairness hearing before Judge Carl Barbier in December 2012, both BP and the PSC lauded the agreement as fair and stated that the Settlement Program was working well. This fairness hearing took place six months *after* the Settlement Program began processing and paying claims. Thus, both sides had ample opportunity to observe and appreciate how BEL claims would be handled and paid. Based upon the parties actively supporting class settlement approval, including BP's numerous expert witnesses who testified that the settlement was reasonable, fair, adequate, and satisfied all Rule 23 requirements (including Article III standing), the district court entered a final order approving the settlement.

The future looked very bright for businesses (and their attorneys) who were located within the settlement zones. Unfortunately, when things seem too good to be true, they generally are...and BEL claims were no different.

IV. The train is derailed

In July 2013, a three judge panel of the Fifth Circuit Court of Appeals (referred to as the "BEL panel") heard oral arguments concerning loss calculations. BP submitted the proposition that certain claimants should be required to "match" or "smooth" their revenues and expenses. BP was essentially challenging that claimants who maintained their books on a cash basis did not have records that were as accurate as those who did so on an accrual basis, and this caused loss calculations to be skewed more favorably for cash basis claimants. This was a legitimate argument, though it would have behooved everyone involved had BP made the argument much earlier in the process.

Although the appeal focused *solely* on BP's gripe with loss calculations, Judge Edith Clement believed that causation should be an issue too. Below is part of the exchange between Judge Clement and Ted Olson (former United States Solicitor General and now BP's attorney):

Judge Clement:	I have a question, sir. In your reply brief, you said the only issue in this appeal is the lost profits calculation and you were talking about how variable profit is to be calculated. ... My problem is I think the real issue in the case is causation and consideration. If you look at [Exhibit] 4B, where is BP's consideration for agreeing to pay those claims without proving they were caused by the Oil Spill? ...
Ted Olson:	It was part of a compromise...

[5]See also the letter dated September 28, 2012 from BP counsel, Mark Holstein, to the Claims Administrator. Also, the Joint Proposed Findings submitted by BP support this notion.

Judge Clement:	Where's the consideration?
Ted Olson:	The consideration is the consideration of the settlement class as a whole. But the causation issue is going to be different with respect to each particular claimant. Judgments were made with respect to compromises on a proof of causation. ...
Judge Dennis:	Well, your major consideration is no one can bring suit against you on the oil spill outside of this class action, which you have announced you settled.
Ted Olson:	Exactly, your honor.
Judge Clement:	They couldn't bring suit against you anyway if it wasn't caused by-
Ted Olson:	They could bring suit. They'd have to prove causation. They could bring [suit] - they could. And this is a compromise of tens of thousands of claims. But the important thing, and the issue that we're talking about here, is, assuming causation, assuming that a claimant gets through the door and is now entitled to prove lost profits; we then come to what everyone agrees in this case. ... This appeal presents a straightforward question of contract interpretation. ...

Based upon the above exchange, anyone (whether a lawyer or not) could tell that BP was *not* appealing causation, but was, instead, defending it. And why would BP contest causation? After all, BP co-authored the causation formulas (including the V-test), BP instructed the Claims Administrator on how to interpret the causation tests, BP watched the Claims Administrator apply and pay claims based upon the causation tests set forth in Exhibit 4B over a six month period, and BP informed the district court at the fairness hearing that it approved of the settlement agreement and the Settlement Program's administration of it. However, following the oral arguments, BP decided to seize the opportunity presented to it, knowing that one appellate judge appeared willing and ready to change the agreement.

In October 2013, the BEL panel issued its ruling. This ruling remanded to the district court the issue of "matching" revenues and expenses for loss calculations (i.e., the only issue that BP presented to the Fifth Circuit Court of Appeals), and instructed the district court to stay the payment of insufficiently matched claims.[6] Judge Clement clarified the ruling on December 2, 2013 and instructed the district court to also consider BP's newfound argument concerning causation. Within a few weeks, the district court entered its Order finding that BP was judicially estopped from contesting causation. However, the stay remained in place.

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[6]For all intents and purposes, this caused *all* BEL claims to be stayed because the Claims Administrator was not given any guidance on how to determine if a claim was sufficiently matched. In December 2013, the district court entered an order that stayed all BEL claims.

V. The train is late, but it's back on track

Almost eight months have passed since a BEL claim was paid, but the outlook for claimants is positive. On January 10, 2014, the certification panel of the Fifth Circuit Court of Appeals, by a 2-1 vote, affirmed the certification of the settlement class. Thereafter, on March 3, 2014, the BEL panel affirmed causation by a 2-1 vote. Former Mississippi Court of Appeals judge and current Fifth Circuit judge, Leslie H. Southwick, wrote for the majority of the BEL panel and was the key, swing vote in that decision. Judge Southwick correctly pointed out that some of the BEL causation tests were "...not as protective of BP's present concerns as might have been achievable, but they are the protections that were accepted by the parties and approved by the district court. It was a contractual concession by BP to limit the issue of factual causation in the processing of claims."[7] That pretty succinctly sums it up.

Aggrieved with both the certification panel's and the BEL panel's respective decisions, BP filed petitions for rehearing *en banc*. On May 19, 2014, by a vote of 8-5, the Fifth Circuit Court of Appeals denied BP's petitions. Subsequently, on May 27, 2014, the Fifth Circuit denied BP's motion for stay of issuance of the mandate. The issuance of the mandate is an important event because, once it is issued, then the Claims Administrator is authorized to resume paying BEL claims.[8]

Despite these recent setbacks to BP's efforts, there is some very good news for the global oil company. As a result of the Fifth Circuit's remand in October 2013, the Claims Administrator adopted Policy 495 (i.e., the "matching" policy). The district court approved this policy on May 5, 2014. This policy appears to go well beyond what the Fifth Circuit instructed[9], which could cause another remand based upon the PSC's expected appeal. Regardless of whether the policy is left intact or certain provisions are changed, the policy will absolutely save BP billions of dollars in BEL payments.[10]

Certainly, almost everyone involved expects BP to file a petition for writ of certiorari with the Supreme Court. BP itself has stated that it will ask the Supreme Court for relief. However, most "experts" who follow the Supreme Court do not believe certiorari will be granted for several reasons, including: (1) this is essentially a contract dispute; (2) the Supreme Court has recently denied certiorari in several cases with similar Article III standing concerns; and (3) there is no split of authority amongst the circuits over the relevant issues.

Although claimants have every right to be optimistic at the present time, these BEL claims have been a roller coaster of ups and downs over the past two years. If the Supreme Court grants certiorari, then BP will have another bite at the apple, and claimants will again be sitting on pins and needles awaiting their fate.

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[7] *In re Deepwater Horizon*, 744 F.3d 370, 377 (5th Cir. 2014) ("*Deepwater Horizon III*").

[8] Subsequent to drafting this article, the mandate issued on May 28, 2014.

[9] Not only does Policy 495 modify the loss calculations for businesses that are deemed to have insufficiently matched financials, it changes causation tests for certain industries.

[10] This author speculates that the policy, in its current form, will reduce the total amount of BP's payout for BEL claims by 20-50%.

ADVOCACY IN AN "ATMOSPHERE OF VIOLENCE"

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I.
INTRODUCTION AND GENERAL LAW

It's a nightmare you hope never happens. You or a loved one is attacked at a shopping center or while visiting an apartment complex. Can a landowner be liable for the criminal acts of responsible simply because the incident happened on their premises, that is not always the case. This article addresses Mississippi law of premises liability and highlights the most common issues in negligent security cases.

As with any case, you should first start with the law. When a case involves "conditions or activities" on the land of another, premises liability law applies. *Double Quick v. Moore, Inc.* 73 So.3d 1162, 1165 (Miss. 2011). This is true even if the claim is based on a theory of negligent security. To recover damages, a plaintiff must show (1) the duty owed to him; (2) a breach of that duty; (3) damages; and (4) a causal connection between the breach and the damages, such that the breach is the proximate cause of the plaintiff's injury. *Id.* at 1166. In order to determine the duty owed, the first step is to determine the status of the injured party. *Stribling v. Rushings, Inc.*, 2013 WL 70927 (Miss. App. 2013). An "invitee" is someone who enters the premises of another to the express or implied invitation of the owner or occupant for their mutual advantage. *Fenelon v. Jackson Metrocenter Mall LTD*, 2012 WL 5915311 (Miss. App. 2012). A "licensee" is someone who enters the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner. *Id.* A "trespasser" is one who enters another's property for his own purposes, pleasure or convenience without permission or inducement. *Titus v. Williams*, 844 So.2d 459, 467 (Miss. 2003).

The majority of premises liability cases concern injuries to occupants, guests, or customers of a business premises. Thus, the invitee standard most often applies. Counsel should not, however, take for granted the status of the injured party but rather should investigate the facts of each case, and compare those facts to applicable case law, to confirm the injured party's status. *See e.g.*, *Handy v. Nejam*, 111 So.3d 610 (Miss. 2013)(holding injured party was originally invitee but converted to trespasser at time of pool drowning).

Once the status of the injured party is determined, the next step is to address duty. Landowners and managers owe a duty to invitees to exercise reasonable care to keep the business premises in a "reasonably safe condition." *Stribling* at ¶ 9. In addition, they must employ reasonable care to protect an invitee from "reasonably foreseeable injuries at the hands of another." *Id.* An assault on the premises is "reasonably foreseeable" if the defendant had either: (1) "actual or constructive knowledge of the assailant's violent nature," or (2) "actual or constructive knowledge (that) an atmosphere of violence existed on the premises." *Id.* at ¶ 10. In assessing "atmosphere of violence," relevant factors include "the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises" and "the frequency of criminal activity on the premises." *Id.* With that law in mind, it is time to assess your client.

II.
CLIENT SCREENING - AVOIDING COMMON MISTAKES

The scenario is not uncommon. You receive a call from a potential client who was injured. They come to your office for the initial client interview. From the very beginning, you should evaluate your client as if the case was going to trial. You should ask the potential client about liability, damages, and other relevant facts. You should also ask yourself whether the client would make a good impression to a jury. Is your client sympathetic, or do they seem greedy?

Once you are hired, there are several common mistakes to avoid at the beginning of a negligent security case. First, you cannot treat a negligent security case like a run of the mill automobile accident. While all cases should be screened thoroughly, the vetting process in a negligent security case is different from other personal injury cases. A typical factual scenario involves a client that was a tenant or guest at an apartment complex who was attacked or shot. Of course, one instantly feels sympathy for the victim of a senseless violent crime. However, a common mistake is to assume that your potential client is an innocent victim. At the outset, you must determine whether your client instigated, or was somehow involved, in the altercation. If your client started the fight, or was involved in an ongoing dispute that preceded it, the chances of winning a negligent security case greatly diminish.

Second, many practitioners overlook the fact that negligent security cases involve facets of both civil and criminal justice. Usually, the criminal investigation produces valuable information such as police reports, names of witnesses, etc. Also, as the victim, your client has a right to be informed about the relevant events in the underlying criminal case such as plea hearings and trial. Thus, the District Attorney's Victim Rights Coordinator should be contacted by you early in the litigation.

Finally, few people involved in negligent security cases utilize the Mississippi Crime Victims' Compensation Act which sets up a Victim's Compensation Fund. The Fund is part of the Attorney General's Office and provides financial assistance to innocent victims of violent crime. It covers expenses for medical/dental treatment, rehabilitation, and lost wages for eligible victims. While the benefits are capped, the Fund helps crime victims when they need it most. While these general tips will help get you started, there are other pitfalls discussed below that can derail a good case.

III.
REMOVAL AND REMAND

One of those pitfalls is jurisdiction. Premises liability cases are often filed in state court venues that are unfavorable for the defense. Thus, one of the first things a defendant should do is consider whether grounds exist to remove the case to federal court based on diversity jurisdiction. In these types of cases, the plaintiff is almost always a Mississippi resident. Out-of-state entities, by comparison, often own and manage the property where the incident occurred. The defendant should, therefore, consider removing the case based on diversity within thirty (30) days after service of the Complaint. 28 U.S.C. § 1446. Following removal, the defendant then has twenty-one (21) days to file an answer after having received the Complaint or Summons, or seven days to file an answer following the notice of removal, whichever time period is longer. Fed. R. Civ. P. 81(c)(2).

Case trends show that plaintiffs are defeating diversity jurisdiction in two ways. First, they name the on-site property manager, who is usually a Mississippi resident, as a defendant. However, the mere act of naming the property manager as a defendant can be insufficient to defeat diversity. "Improper joinder" exists when the complaint alleges only conclusory and generic allegations against the in-state defendant. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell v. Atlantic v. Twombly*, 550 U.S. 544 (2007). Plaintiffs are generally required to state specific facts showing personal responsibility of the in-state defendant.

Second, plaintiffs defeat diversity by naming the assailant, who is most often an in-state resident, as a defendant. There is some caution with this approach, however, because it arguably removes the focus from the premises owner's alleged lack of security, and places it on the assailant's criminal conduct. Nevertheless, with the difficulty defendants have with apportioning fault to the assailant under Mississippi Code § 85-5-7, the reward of defeating diversity often trumps the risk of complicating the lawsuit by naming the assailant as an actual party.

IV.
PROVING AN ATMOSPHERE OF VIOLENCE THROUGH CRIME STATISTICS AND OTHER EVIDENCE

Once the lawsuit has been filed and jurisdiction established, it is time to prove your case. An important issue in a negligent security case is whether an atmosphere of violence can be proved. The most common method to show an atmosphere of violence is through the use of crime statistics such as "calls for service" or "offense listings." These statistics should be obtained from law enforcement with a subpoena. The data received should include the offense number, date of call, time of call, address of caller, and how the call was initially coded by law enforcement (e.g. murder, assault, trespassing, etc.). If the crime statistics show a high number of reported crimes, an inference is created that an atmosphere of violence exists which triggers the defendant's duty to take reasonable security measures.

Whether calls for service were sufficient evidence of an atmosphere of violence was the question in *Davis v. Christian Brotherhood Homes of Jackson, Mississippi*. 957 So. 2d. 390 (Miss. Ct. App. 2007). In *Davis*, a young man was shot and killed in the parking lot of Christian Brotherhood Apartments in Jackson, Mississippi. The Court of Appeals addressed the reasoning of allowing crime statistics at or around a premises to prove an atmosphere of violence.

The Court in *Davis* found that occurrences and patterns of criminal activity on or around the premises prior to the subject incident are relevant factors in determining whether an "atmosphere of violence" exists on the premises. *Id*. Several residents and current and former employees of CBA testified to witnessing numerous violent incidents occurring on or in the vicinity of the premises. The plaintiffs described several first-hand accounts of gun violence at the apartment complex. In addition, the owner of CBA's former security company testified that one of his guards was shot while on duty at the apartment complex, and he heard gunshots in the area on several occasions. *Id*. Thus, there was actual notice of criminal activity.

In *Davis*, the crime statistics from the Jackson Police Department showed that the vicinity encompassing the CBA had approximately 676 reports of crimes against a person within a three-year period.(e.g. murder, rape, assault…). Also, within a four and a half year period, there were several hundred reported violent criminal incidents involving the Jackson Police Department at the apartment complex itself. The plaintiffs argued that these numerous calls for service showed constructive notice to the defendant of an atmosphere of violence. Of course, the defendant claimed it had no knowledge of any violent crimes on the property. Further, the defendant argued that a call made to report a crime is not evidence that a crime actually occurred.

The Court of Appeals disagreed with the defendant and held that while calls for service are not conclusive to show that a specific crime occurred, "the crime statistics and activity log are at least *some* evidence that violent crimes were frequently committed at or in the vicinity of CBA. *Id*. at 402-403. Furthermore, "there is ample authority for the use of such reports and statistics in determining whether criminal activity was reasonably foreseeable." *Id.* Thus, the Court found that the Jackson Police Department crime statistics were properly considered to establish evidence of an atmosphere of violence. *Id.*; s*ee also Doe v. Miss. State Fed'n*, 941 So.2d 820, 829-830 (Miss. Ct. App. 2006).

However, the Mississippi Supreme Court recently held in a 4-3 opinion that crime statistics may not always be sufficient to show an atmosphere of violence. In *Kroger v. Knox*, an elderly woman was attacked in the parking lot of a grocery store in Jackson, Mississippi. *Kroger Co. v. Knox*, 98 So.3d 441 (Miss. 2012). The plaintiff was rendered blind in one eye from the beating. As a result, the plaintiff filed suit alleging that the store was on notice of high crime on and around the premises and that the defendant failed to take reasonable security measures.

At trial, the plaintiff submitted evidence of Jackson Police Department crime statistics showing reports of many violent crimes in the parking lot, including rapes, assaults, and purse snatchings. The store manager also admitted that the store was located in a high crime area.

> Q: What was the reason for bringing HO (Hinds County Sheriff Officers) inside the store?
>
> A: [**T]he I-55 corridor had a lot of crime going on in it… and we were trying to make sure that we did not.** And when we say Sherriff's department on the inside, that kind of misleading because they also would stand in the foyer and **also go outside and patrol the sidewalk and make sure that the outside was also secure.**
>
> Tr. 278:1-20
>
> . . . . .
>
> Q. So when you wrote this report up and you signed it ... ?

A. Yes, sir.
Q. **That put you on notice as the Kroger manager that women are getting their purses snatched and they're trying to stop it from occurring, correct?**
A. Yes, sir.

Tr. 314:12-315:26

Not only did the store admit knowledge of violence in the area, but they admitted awareness of violence in the parking lot for the two years prior to the incident. (Tr. 296:6-14).

Despite these admissions, the Mississippi Supreme Court looked carefully at the amount of actual, not merely reported, crime on the premises to determine whether the store was aware of an atmosphere of violence. It held that a few similar incidents, over the course of three years, were insufficient to establish that the store was put on notice of an atmosphere of violence. *Knox*, at 441. Interestingly, the majority gave little to no weight to ten additional calls for service involving violent crimes against the person. The Court found that the plaintiff "presented no police reports or other evidence verifying the accuracy of the calls." *Knox*, at 444. The Court found that "police incident reports are prepared by the responding officers when they confirm that a crime has occurred. Here, we do not have them." *Knox*, at 444-445 (citing *Tillman v. Wendy's Int'l, Inc.*, 252 F.3d 434 (5th Cir. 2001)). Without considering these reported crimes, the Court found there was not sufficient proof of an atmosphere of violence and therefore no duty of the premises owner to protect its customers. *Knox*, at 444-445. Since *Knox*, a question is whether the Court has abolished constructive notice through crime statistics for proving an "atmosphere of violence." This question remains unanswered since there have been no other appellate cases examining crime statistics relating to an atmosphere of violence.

V.
EXPERT WITNESSES

The next crucial step in negligent security cases is the selection of expert witnesses. Usually, each side will obtain competing security or law enforcement experts. The plaintiff's expert will generally opine that the business was located in a high crime area and that the security measures used, if any, were inadequate. The defense expert will generally opine that the business is extremely safe and that any security measures used were reasonable. Thus, premises liability cases often become a "battle of the experts."

Expert witnesses must use a scientific methodology and other facts in compliance with *Daubert*, MRCP 26, and MRE 702. *Daubert* and its progeny, along with Mississippi Rule of Evidence 702 ("Rule 702"), require the basis of an expert's testimony to be examined by the judge. This examination is to ensure that it is supported by a professional standard and valid method of inquiry. The expert testimony must be both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Rule 702 indicates that testimony dealing with "scientific, technical or other specialized knowledge" needs to assist the "trier of fact to understand the evidence or to determine a fact in issue." An expert is qualified by "knowledge, skill, experience, training or education." Miss. R. Evid. 702. Expert testimony should be a

product of reliable principles and methods based on adequate facts or data formed by a reliable application of the principles and methods to the facts of the case. *Id.*

Many expert reports fail to meet the standards of *Daubert*. The most common reason is that the expert's methodology is based on insufficient data. At a minimum, an expert in a negligent security case should rely upon a physical walk around and inspection of the property, relevant pleadings, Calls for Service for the property and vicinity, depositions, documents produced by the defendants in discovery, and the defendant's designation of expert witnesses. Experts should also review and rely on industry standards. *See, Security Adequate... or Not? The Complete Guide to Premises Liability Litigation*; Chris E. McGoey, CPP; *Physical Security*, ASIS. Organizations such as the American Society for Industrial Security ("ASIS") and H.U.D. have promulgated minimum standards that can be used to show violations from industry practice. Experts can use such violations of industry standards to show evidence of negligence.

An expert's report should be detailed and contain opinions, bases for opinions, and materials relied upon. The report should not provide conclusory allegations of negligence. Instead, using the scientific method, the expert should consider such things as the nature of the premises, crime demographics, the location of the premises, and crime foreseeability. Once these factors are considered, the expert may apply these concepts to the facts of your specific case to form their opinions. Of course, the expert's education, training, and experience should also be used to develop opinions. The use of these reliable principles will make your expert "*Daubert* proof," and allow your case to proceed to trial.

VI.
RECENT CASE SUMMARY

The final step in assessing your case is to attempt to project the outcome if it were to be appealed. Since 2010, Mississippi's appellate courts have addressed at least eight premises liability cases involving the criminal acts of third parties, and one premises case involving a pool drowning. The plaintiff has prevailed in only one of those cases. Thus, as detailed below, a clear trend has emerged in favor of defendants.

- *Handy v. Nejam*, 111 So.3d 610 (Miss. 2013) - Seventeen year old boy drowned in a swimming pool while visiting his uncle. The trial court held that the deceased was an invitee, no duty was breached, and that summary judgment should be granted to the defendant. The Mississippi Supreme Court reversed the grant of summary judgment, finding that the young man converted from an invitee to a trespasser when he swam in the apartment swimming pool unaccompanied by his uncle.

- *Stribling v. Rushing's Inc.*, 2013 WL 70927 (Miss. App. Jan. 8, 2013) - Customer at the Piggly Wiggly on Meadowbrook Road in Jackson was shot in the store parking lot by a Piggly Wiggly employee. Trial court granted summary judgment based on customer's failure to prove foreseeability or causation. Mississippi Court of Appeals affirmed, reasoning that there was no argument or confrontation between the employee and the customer, or any other facts that would have established reasonable notice to Piggly Wiggly, either actual or constructive, that the shooting was going to happen.

- *Fenelon v. Jackson Metrocenter Mall LTD*, 2012 WL 5915311 (Miss. App. Nov. 27, 2012) - Customer was car-jacked in the Metrocenter parking lot. Trial court granted

summary judgment. Mississippi Court of Appeals affirmed, reminding that premises liability is not a strict liability tort, and reasoning that Metrocenter had security measures in place, and that plaintiff failed to prove that the alleged inadequate security measures were the cause-in-fact of the carjacking. "Neither Plaintiff nor her expert has articulated any standard of care that was breached by the security that day, and has not stated how any different security measures would have prevented this theft."

- *Kroger v. Knox*, 98 So.3d 441 (Miss. 2012) - Customer assaulted and robbed in the Kroger parking lot on I-55 in Jackson. Plaintiff settled with security company for $1 million dollars before trial. Case tried, and jury returned $2.5 million verdict. Mississippi Supreme Court reverses and renders. Court holds that four criminal incidents on Kroger's property in the previous three years were insufficient to establish an atmosphere of violence; general knowledge of crime on the I-55 corridor is not enough to establish atmosphere of violence; and mere "calls for service," without proof of whether they actually resulted in crimes, were insufficient to establish atmosphere of violence.

- *Wackenhut Corp. v. Fortune*, 87 So. 3d 1083 (Miss. Ct. App. 2012) - After an earlier encounter with the restaurant manager, Ernie Fortune went into McDonald's and began being disruptive and hostile. It was later determined that the Fortune had a blood alcohol level of .276. Fortune claims that the manager pushed him outside and beat on him. The manager claims that she acted in self-defense because Fortune had a knife. Fortune denied having a knife, but one was later found at the scene. The trial court divided fault and attributed 75% to the security company and its employees. The Court of Appeals held that the trial court erred in not giving a contributory negligence instruction given the manner in which Fortune behaved and the fact that there was a knife at the scene.

- *Double Quick, Inc. v. Moore*, 73 So.3d 1162 (Miss. 2011) - Individual fatally shot after intervening in convenience store parking lot argument that began inside the store. Trial court denied summary judgment. Defendant sought, and was granted, interlocutory appeal. Mississippi Supreme Court reverses and renders, holding that Plaintiff failed to prove either an atmosphere of violence on the premises, or Double Quick's actual or constructive knowledge of the violent propensities of the shooter.

- *InTown Lessee Assoc. v. Howard*, 67 So.3d 711 (Miss. 2011) - Couple badly beaten and robbed at InTown extended stay motel on I-55 in Jackson. Substantial proof at trial of prior violent crime on the premises, and InTown's management not addressing the problem despite notice. Jury returned $4 million verdict. Mississippi Supreme Court affirms, holding that "the substantial evidence by the plaintiff was more than legally sufficient, and included a stipulation that InTown's management and employees had been the victims of three armed robberies that had closely preceded these attacks. InTown rested without calling a single witness to rebut the plaintiffs' substantial lay and expert witness testimony."

- *Ellis v. Gresham Service Stations, Inc.*, 55 So.3d 1123 (Miss. 2011) - Convenience store patron was brutally beaten behind the store by unknown assailants. Trial court granted summary judgment. Mississippi Court of Appeals affirms, reasoning that crime statistics

were insufficient to establish an atmosphere of violence. Twelve incidents over a 10 year period were insufficient. More particularly, five prior "crimes to the person" were distinguishable in that each was precipitated by some sort of pre-existing dispute between individuals who knew each other and who brought their conflicts onto the property with no forewarning to Double Quick.

- *Double Quick v. Lymas*, 50 So.3d 292 (Miss. 2010) - Patron was shot in parking lot of convenience store. Jury returned verdict of $4.17 million. Trial Court reduced the award to $1.67 million based on $1 million cap on non-economic damages. Plaintiff and Defendant both appealed. Mississippi Supreme Court reverses and renders in favor of defendant, holding that Plaintiff's expert testimony was too speculative and lacked necessary specifics to establish causation.

These cases show that jury verdicts in negligent security cases tend to be large. But there has been a recent trend of success for the defense on appeal. In the end, each case must stand on its own merits. If the plaintiff can prove that an "atmosphere of violence" existed on the premises such that the incident was reasonably foreseeable, a premises liability claim based on negligent security remains a viable and potentially powerful cause of action under Mississippi law.

BEATING PLAINTIFF'S UNTIMELY PRODUCT LIABILITY CLAIM IN THE FACE OF ALLEGED FRAUDULENT CONCEALMENT

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I. The Dilemma

The statute of limitations is a simple, straightforward defense. Plaintiff waited too long to pursue claims against your client. Case dismissed. But a plaintiff can circumvent that defense by claiming fraudulent concealment, i.e., your client somehow prevented plaintiff from learning of her claims. In Mississippi, "fraudulent concealment" tolls the running of the statute of limitations. *See* Miss. Code Ann. §15-1-67 (West 1972). Plaintiff's claims will not accrue when she was injured or diagnosed, but instead, much later – when she discovered, or with reasonable diligence should have discovered, your client's alleged acts of concealment. *Id*. That delay can destroy your statute of limitations defense.

As an example, pharmaceutical product liability cases commonly include allegations of fraudulent concealment. Plaintiff ingests a drug and experiences a side effect or gets a disease. Neither she nor her doctors are aware of an association between the drug and her condition. Many years later, a new, high profile epidemiological study suggests a possible link. Plaintiff seizes upon that potential link and wants to sue the drug manufacturer for failure to warn. To save her otherwise untimely claims, plaintiff alleges that the company knew years earlier of the "true risk" of her particular side effect or disease but concealed that "true risk" from the public by including no warning (or an inadequate one) in the product labeling. Plaintiff argues that her claims did not accrue until the "true risk" was brought to light by the new epidemiological study.

In the complex world of drug research and development, pinpointing when and how a particular risk became established, let alone known by the drug manufacturer, can be a murky, difficult subject. Plaintiffs seize upon this uncertainty and use it to their advantage. Yet allegations of fraudulent concealment in this context can be undermined and defeated.

II. Using The Heavy Burden of Proof Against Plaintiff

The court should be apprised at the outset that plaintiff bears a heavy burden and that vague allegations of concealment are not legally adequate to toll the statute of limitations. Mississippi law sets a "high standard" in order to "prov[e] fraudulent concealment." *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608, 614 n.8 (Miss. 2008). The plaintiff must prove fraudulent concealment for tolling purposes by clear and convincing evidence, even at the summary judgment stage, just as she would if she asserted a fraud claim. *Stevens v. Lake*, 615 So. 2d 1177, 1181 (Miss. 1993); *Estate of Smiley*, 530 So. 2d 18, 26 (Miss. 1988). The judge must view the evidence presented "through the prism of the substantive evidentiary burden." *Lake*, 615 So. 2d at 1181 (quoting *Haygood v. First Nat'l Bank of New Albany*, 517 So. 2d 553, 555 (Miss. 1987)). To withstand summary judgment, plaintiff's evidence of the company's alleged fraudulent concealment must be "so clear that no hypothetical reasonable juror hearing the proof could conclude otherwise." *Windfield v. Dover Corp.*, 740 F. Supp. 1230, 1236 (S.D. Miss. 1990) (Lee, J.). Essentially, the court must find that the defendant "lied" to the plaintiff about some wrong it committed that gave rise to her claims. *Lake*, 615 So. 2d at1181.

III. Creating Obstacles From the Elements of Plaintiff's Fraudulent Concealment Claim

Bear in mind that there is a vast difference between an alleged failure to warn of a risk plaintiff says the company knew or should have known about, which is a damages claim, and the alleged *fraudulent* concealment of a known risk, which is a tolling argument. The two essential elements of fraudulent concealment should be used as separate, difficult obstacles for the plaintiff to overcome.

First, plaintiff must show "an affirmative act to conceal the underlying tortious conduct." *Smith v. First Family Fin. Services, Inc.*, 436 F. Supp. 2d 836, 840-41 (S.D. Miss. 2006) (Lee, J.). The act must have been specifically designed to prevent her discovery of the claim and, further, must actually have done so. *Windham*, 972 So. 2d at 614 n. 8; *Ill. Cent. R. Co. v. Guy*, 682 F.3d 381, 394 (5th Cir. 2012). The act of concealment cannot be both a basis of the plaintiff's substantive claims and a basis for fraudulent concealment too. *See, e.g., Whitaker v. Limeco Corp.*, 32 So. 3d 429, 438 (Miss. 2010) ("The trial court aptly stated the law that an act cannot be both an act of fraud in the inducement and an act of fraudulent concealment."). The act of concealment "must have occurred after and apart from the discrete acts upon which the cause of action is premised." *Smith*, 436 F. Supp. 2d at 840-41. Second, plaintiff must demonstrate that she was unable to discover "the factual basis for [her] claims despite the exercise of due diligence." *Smith*, 436 F. Supp. 2d at 840-41. Plaintiffs often cannot satisfy these two prongs of the test with the requisite level of proof.

A. Plaintiff Must Come Forward With Clear And Convincing Evidence Of Affirmative Acts Of Concealment.

To establish the fraudulent character of the manufacturer's alleged concealment of her warnings-related claims, a plaintiff must prove that the company actually knew of an established risk of the disease or side effect *at the time* she was taking the medication, failed to disclose it, and then *after the fact* intentionally and successfully took affirmative action to conceal it from her. *See Scharff v. Wyeth*, No. 2:10-CV-220, 2011 WL 3320501, at *11 (M.D. Ala. Aug. 2, 2011) (holding that "a breach of the duty to warn by a manufacturer does not toll the statute of limitations" because "a mere failure or refusal to warn, without more, while actionable, does not

rise to the level of fraudulent concealment") (quoting *Cazales v. Johns-Manville Sales Corp.*, 435 So.2d 55, 58 (Ala. 1983)). *Bonds v. Modern Woodmen of America*, No. 3:13OVO59, 2014 WL 1255426, at *3 (N.D. Miss. March 25, 2014) (Acts of concealment must be affirmative in nature and occur after the conduct which forms the basis of the claim). Demonstrating that a "knowable" risk became known (or should have become known) to the company as science evolved yet remained undisclosed (or inadequately disclosed), simply is not, without more, fraudulent concealment.

When a new, high profile epidemiological study is published after plaintiff ingested the drug, evolution of the science is very often all that plaintiff can demonstrate. Such a subsequent study usually does not, in and of itself, prove that *at the time* plaintiff ingested the drug, there were established risks of the disease or side effect known to the company but concealed from her *after* her diagnosis. In fact, in most instances, the new study is actually evidence that neither plaintiff nor her doctors, nor the medical and scientific communities knew the specifics of the "real risks" of the side effect or disease until the study was published (after plaintiff ingested the medication). Any medical articles, "Dear Doctor" letters or proposed label changes based on the subsequent study data also are not evidence of a cover up of the company's knowledge of risk as it existed when plaintiff ingested the drugs.

Similarly, acts related only to the company's continued interaction (as the science developed) with the FDA and the medical community to support, monitor, and defend its products are not affirmative that conceal past conduct. If the medication at issue in the case remained on the market, the company was legally entitled – and indeed required – to continue to support and monitor it. This duty necessitates ongoing evaluation of the evolving science as new articles and studies are published and, where appropriate, reinforcement of the basis of the warnings.

In an analogous situation, Mississippi federal courts have held that, in the face of an ever changing legal environment, a manufacturer does *not* engage in "fraudulent concealment" by continuing to promote and defend its products in the market. In *Zeigler v. Ford Motor Co.*, the plaintiff's son died in a rollover accident in a Ford Bronco II. Later, alleged defects in the Bronco II were publicized in the national media. No. 3:95-CV-161, Slip Op. (S.D. Miss. Dec. 7, 2005), *aff'd* 99 F.3d 1134, 1996 WL 595602 (5th Cir. 1996). Plaintiff claimed she did not learn of these problems until she read a newspaper article more than seven years after her son died. She contended that the limitations period was tolled because Ford had fraudulently concealed information regarding defects in its Bronco II by "defend[ing] its vehicles in the media and in court" and by "acknowledg[ing] that a cause of action existed" but "assert[ing] that potential litigants would not prevail." *Zeigler*, No. 3:95-CV-161, Slip Op. at 4.

The court categorically found that this type of conduct on the part of Ford could not possibly constitute fraudulent concealment and that to hold otherwise "would *eviscerate the statute of limitations.*" *Id.* at 4 (emphasis added). The Fifth Circuit agreed, holding that plaintiff's claim "that Ford defended the safety and quality of the Bronco II in the news media at a time when Ford was aware of the vehicle's defects" was not fraudulent concealment. The Fifth Circuit also held that plaintiff's claim "that Ford did not disclose certain inculpatory internal documents to her before she filed suit" was not fraudulent concealment. *Zeigler*, 1996 WL 595602, at *2. ("As noted by the district court, if it were to accept [plaintiff's] theory that Ford's defense of the Bronco II constituted fraudulent concealment, then fraudulent concealment could be raised successfully against any manufacturer that defended allegations that its product was defective. *Such a result would effectively subsume the statute of limitations.*") (emphasis added).

B. Plaintiff Must Demonstrate Failure to Discover Despite Reasonable Diligence.

If a plaintiff's failure to discover her claims was not caused by concealing acts by the defendant, then she cannot establish fraudulent concealment. *Zeigler*, No. 3:95-CV-161, Slip Op. at 4-5 (plaintiff's failure to learn of her cause of action due to the rural isolation of her hometown held *not* to be concealment due to any affirmative acts by Ford). Moreover, plaintiff must establish that she was unable to discover "the factual basis for [her] claims despite the exercise of due diligence." *Smith*, 436 F. Supp. 2d at 840-41; *accord Stephens v. Equitable Life Assurance Soc'y*, 850 So. 2d 78, 83 (Miss. 2003). Quite often, in the circumstance where a new epidemiological study has stirred up litigation, the plaintiff will have done nothing to try to discover the cause of her disease or side effect. A plaintiff who has not undertaken ***any*** investigation into the cause of her disease or side effect from the time of her diagnosis to the time of her "discovery of her illness" cannot successfully claim fraudulent concealment tolling. First, she has ***no*** proof that she exercised any "diligence" in investigating her cause of action. Second, she also cannot demonstrate, in the face of her own total inaction, that anything the company did prevented her from discovering her claims.

The Fifth Circuit has held that, as a matter of law, "[c]omplete inaction cannot be considered reasonable diligence" in the specific context of fraudulent concealment:

> Despite the loss of her son in a one-car accident, at no time during the seven and one-half years following decedent's tragic death did Zeigler do anything at all to determine if she might have a cause of action. Yet Mississippi law required her to exercise reasonable diligence. ***Complete inaction cannot be considered reasonable diligence.***

Zeigler, 1996 WL 595602, at *3 (emphasis added); *see also Trevino v. Wyeth*, No. 1:05cv329, Slip Op. at 2 (S.D. Miss. Feb. 14, 2013) (a drug product liability case). *Bonds*, 2014 WL, 125546, at *3.

Plaintiff must establish both that she looked for her claims and that she could not discover them *because the defendant concealed them*. *See Robinson v. Cobb*, 763 So. 2d 883, 888-89 (Miss. 2000). Simply put, plaintiff must first search for a claim in order to allege that she is unable to find it due to the actions of another. In the face of total inaction, plaintiff would simply be asking the court to assume that, *if* she had searched for potential claims, the company's actions would have stopped her from finding them. Such a hypothetical assumption is not evidence of fraudulent concealment.

Thus, "Dear Doctor" letters and purportedly "ghostwritten articles" should be disregarded by the court as evidence of fraudulent concealment if plaintiff has admittedly not reviewed them. They could not have affected her ability to discover her claims and file suit and thus are not probative evidence of fraudulent concealment.

IV. Conclusion

Fraudulent concealment of a known risk and failure to warn of a known or knowable risk are two distinct and different animals. The substance and timing of every piece of evidence offered by plaintiff in support of a fraudulent concealment allegation must be analyzed with this distinction in mind. When pressed for actual evidence to support a fraudulent concealment allegation, plaintiff often will simply not be able to come forward with adequate proof necessary to meet the heavy burden of proof required of her to succeed on that claim.

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