

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-CA-00795-COA

MEDICOMP, INC.

APPELLANT

v.

PAUL MARSHALL

**APPELLEE/CROSS-
APPELLANT**

v.

DALE WILLIAMS, M.D.

CROSS-APPELLEE

DATE OF TRIAL COURT JUDGMENT:	4/1/2002
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	COPIAH COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	WILLIAM BIENVILLE SKIPPER ROBERT S. ADDISON GARY K. JONES
ATTORNEY FOR APPELLEE/CROSS- APPELLANT:	CARROLL RHODES
ATTORNEYS FOR CROSS-APPELLEE:	STEPHEN P. KRUGER JAN F. GADOW
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	JURY VERDICT FOR MARSHALL AND AGAINST MEDICOMP, INC.
DISPOSITION:	REVERSED AND RENDERED ON DIRECT APPEAL AND AFFIRMED ON CROSS-APPEAL - 02/24/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE SOUTHWICK, P.J., MYERS AND CHANDLER, JJ.

CHANDLER, J., FOR THE COURT:

¶1. This is the appeal of a \$1,500,000¹ jury verdict in favor of Paul Marshall against Medicomp, Inc. rendered in the Circuit Court of Copiah County. Initially, Marshall filed suit against Hardy Wilson Memorial Hospital and Dr. Dale Williams seeking damages for injuries he suffered as a result of the alleged negligent treatment of burns to his right leg. More than four years later Marshall filed a motion to amend his complaint seeking to add Medicomp as a new party to the suit. The circuit court granted Marshall's motion and held that the amended pleading would relate back to the original complaint. The amended complaint was filed the same day adding Medicomp as a party and dismissing Hardy Wilson. Medicomp denied all liability and subsequently moved for summary judgment on three separate occasions arguing that the statute of limitations had expired. The motions were all denied and a trial on the matter took place. At the close of Marshall's evidence, Dr. Williams's motion for a directed verdict was granted. Medicomp's motion for a directed verdict was denied. Medicomp's request for a peremptory instruction was also denied. After the jury verdict was rendered, Medicomp moved for a judgment notwithstanding the verdict, mistrial, new trial, and an investigation into alleged juror misconduct or in the alternative, a remittitur. All of Medicomp's post trial motions were denied and this appeal followed. Marshall cross-appeals the circuit court's directed verdict in favor of Dr. Dale Williams.

FACTS

¶2. On January 31, 1995, Marshall left his residence in Hazlehurst, Mississippi and traveled to Birmingham, Alabama to get his monthly disability check which was still being sent to his former mailing address in Birmingham. The trip required an overnight stay in Birmingham and Marshall had come prepared to spend the night at his former residence. He had also come prepared to build a fire in the

¹The circuit court judgment filed among the clerk's papers states that the amount of the verdict was "One Million Two Hundred Thousand Dollars \$1,200,000.00." This Court's disposition of the appeal renders the discrepancy moot.

fireplace because the residence had no gas or electricity. After nightfall, a fire was begun in the fireplace; however, Marshall added gasoline to the fire and spillage from the gasoline caused his clothing to ignite and resulted in the injuries that are the subject of this appeal.

¶3. Marshall drove himself to the emergency room at Baptist Princeton Hospital in Birmingham where he received treatment for a fairly significant burn to his right leg. The wound was cleaned and excised of any dead or contaminated tissue in a process commonly known as debridement. A topical burn cream and dressing was applied to the wound and pain medication and a tetanus shot were administered to Marshall. Hospital records indicate that Marshall was diagnosed with second degree burns to his leg. He was instructed to return in two days to be re-examined and to leave the dressing on the wound until that time.

¶4. The following day, February 1, 1995, Marshall drove back to his residence in Hazlehurst, arriving there at about 4:00 p.m. Sometime following his arrival home Marshall's wife removed the dressing from the wound. By 9:00 p.m. the wound had become very painful and its appearance caused enough concern that an ambulance was called to transport Marshall to the emergency room at Hardy Wilson Hospital in Hazlehurst. Marshall was examined by the on-call emergency room physician, Dr. Williams, who diagnosed him with second degree burns. Burn cream and a clean dressing was applied to Marshall's wounds. Hospital records indicate that Marshall was instructed to return at 8:00 a.m. the next day, February 2, 1995, for a whirlpool bath. He was also advised to see a local physician, Dr. Walker, on February 3, 1995. Written instructions to apply burn cream to the wound twice a day and to keep the wound wrapped until he had a chance to see Dr. Walker were also provided.

¶5. What happened the next day, February 2, 2003, was a matter of considerable controversy at the trial. Marshall testified that he showed up as scheduled at the emergency room at Hardy Wilson for his whirlpool bath and was told to go down the hall a few doors to the physical therapy department. He

testified that when he arrived there he was told that there was no therapist on duty to give him the bath and that there would not be a therapist there that day. He testified that an appointment was then made for him to come in the next day.

¶6. Medicomp employees testified that Marshall called the physical therapy department on February 2, 2003, and an appointment was made over the telephone for him to come in the following day, February 3, 2003. All of the witnesses agreed that Marshall came in as scheduled on February 3, 2003, but that, once again, there was no one available to give him a whirlpool bath.

¶7. Marshall testified that he became upset and frustrated when he learned that he would not be able to receive his bath as scheduled. He stated that he was in a lot of pain from his wound and begged to be allowed to see the emergency room doctor or to be given transportation to a hospital in Jackson. He said his pleas were ignored and he was simply told that he would have to leave because there was no one to treat him.

¶8. To the contrary, Medicomp and Hardy Wilson personnel testified that Marshall was given the option of seeing the emergency room doctor and an offer was made to drive him a short distance away to Dr. Walker's office where he already had a 4:00 p.m. appointment for that same day; but, Marshall refused all offers of help. Instead, he became more and more belligerent to the point that law enforcement had to be summoned to remove him from the premises.

¶9. Marshall's wife testified that she learned of the commotion at the hospital and went there. She testified that she calmed her husband down and convinced him to go with her to Dr. Walker's office. When they arrived at Dr. Walker's office, Marshall was refused treatment because Mrs. Marshall had a past due account with the doctor.

¶10. Mrs. Marshall then drove her husband to Kings Daughters Hospital in Brookhaven where he was immediately admitted and remained for seventeen days for treatment of second and third degree burns to his leg, some of which had become infected. Marshall's lawsuit sought compensation for the actions and inactions of Hardy Wilson, Dr. Dale Williams and Medicomp in their treatment of his injury.

¶11. Medicomp submits that the trial court erred in granting Marshall's motion to amend his complaint and in denying Medicomp's numerous motions for dismissal, when the limitation period applicable to Marshall's claims had obviously expired. Additionally, Medicomp alleges that the trial court erred in permitting Marshall to argue that the statute of limitations was tolled based upon the doctrine of fraudulent concealment, when Marshall never pleaded or proved the necessary elements of fraudulent concealment. Finding merit in Medicomp's arguments, this Court reverses and renders.

ANALYSIS

1. statute of limitations

¶12. Marshall sued on various legal theories including violation of the Emergency Medical Treatment and Labor Act (EMTLA), negligence and breach of contract. When Marshall rested his case in chief Medicomp made a motion for a directed verdict challenging the sufficiency of the evidence on Marshall's various theories. Counsel for Marshall, Mr. Rhodes, responded that, "In the pretrial order, he is only pursuing . . . the negligence claim against Medicomp." The trial court then inquired as follows:

THE COURT: So apparently there's a contract claim; is that right?

MR. RHODES: Your Honor, this will be one as a matter of law. We're just claiming he's a beneficiary under this contract that Medicomp had with Hardy Wilson where Medicomp disagreed [sic] to provide physical therapy for Hardy Wilson. He's not a signatore [sic] to that contract. That was on the basis of that.

THE COURT: As far as any claim where the --

MR. RHODES: EMTLA?

THE COURT: Yeah.

MR. RHODES: We're not asserting those claims, Your Honor. We did not put them forward in the pretrial order.

THE COURT: All right, sir.

MR. FOSTER [counsel for Medicomp]: May I briefly respond? With respect to the breach of contract claim, there's been no evidence that the contract was breached, so Medicomp deserves a directed verdict on that claim.

THE COURT: He said he's not pursuing that.

MR. FOSTER: Are you not bringing the breach of contract in --

MR. RHODES: No.

¶13. As is plainly evident from the preceding excerpt, negligence was the only cause of action Marshall was advancing at the time of trial. A cause of action in negligence is governed by the two-year statute of limitations of Mississippi Code Annotated section 15-1-36 (Rev. 2003). That statute provides that suit must be brought "within two years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered." The alleged omission was failure to have staff available. That information was known on the day or days that it occurred; thus, the statute of limitations would have expired no later than February 3, 1997.

¶14. Notwithstanding his counsel's declarations to the contrary to the trial court, Marshall attempts to resurrect his breach of contract cause of action in this appeal. Apparently conceding that the statute of limitations on that cause of action had expired prior to his suing Medicomp, he argues to this Court that the statute of limitations on that action was tolled by Medicomp's alleged fraudulent concealment of

Medicomp's breach of its contract with Hardy Wilson to have a licensed physical therapist on duty on February 2 and 3, 1995.

2. fraudulent concealment

¶15. The supreme court case of *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000), holds that in order for a court to find fraudulent concealment "there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." Marshall must first prove that Medicomp "engaged in affirmative acts of concealment" and that he acted with due diligence in attempting to discover Medicomp's role, but was unable to do so. *Id.* In this regard, it must first be noted that Marshall did not plead fraudulent concealment with sufficient particularity in either his motion for leave to amend or in his amended complaint. Marshall's motion for leave to amend states:

The Plaintiff, Paul Marshall, recently discovered from defendant, Hardy Wilson Memorial Hospital, that Hardy Wilson Memorial Hospital had a contract with Medicomp, Inc., to provide services which form the basis of this lawsuit, and plaintiff desires to make Medicomp, Inc. a party to this action.

Justice requires that leave to amend be granted in the instant case. Since pertinent facts concerning liability were recently discovered by plaintiff, and those facts were fraudulently concealed from him for several years, he should be permitted to pursue those facts.

¶16. Marshall only makes the allegation that pertinent facts were fraudulently concealed. He fails entirely to identify any act or conduct of an affirmative nature on the part of Medicomp that was designed to prevent and which did prevent his discovery of the claim. Equally deficient are the fraudulent concealment allegations in his amended complaint which merely states:

Defendants, Medicomp, Inc. and Hardy Wilson, fraudulently concealed the cause of action plaintiff, Paul Marshall, had against them for their failure and refusal to give him a whirlpool bath on February 1, 2, and 3, 1995.

Plaintiff, Paul Marshall, could not have discovered defendants, Medicomp, Inc. and Hardy Wilson, fraudulent concealment, with reasonable diligence before February 8, 1999 when the attorney for these defendants wrote plaintiff's counsel a letter advising of the contract between these defendants to provide a licensed physical therapist to administer whirlpool baths for Hardy Wilson.

¶17. There was simply no basis on which the trial court could make a finding of fraudulent concealment from Marshall's pleadings that would justify the tolling of the statute of limitations. Additionally, there is nothing in the record to support a charge of fraudulent concealment.

¶18. The object of a fraudulent concealment claim is concealment of the *cause of the injury* which in turn conceals the identity of the causing agent. In order for this Court to affirm the ruling of the trial court in granting the motion to amend on the basis that Medicomp's fraudulent concealment tolled the running of the statute of limitations, this Court must find that: (1) Medicomp knew that it had caused Marshall's injuries; (2) engaged in affirmative acts to conceal its role in causing his injury; and, (3) Marshall acted with due diligence in attempting to discover the cause of his injuries, but was unable to do so because of Medicomp's affirmative acts of concealment. The facts do not support such a finding.

¶19. With immense respect for the position taken by the dissenting opinion, it appears that this opinion's holding has been misconstrued. The dissenting opinion states that "the trial court did not err in ordering the amended complaint to relate back to the date of filing of the original complaint." This opinion holds that the trial court erred in granting the motion to amend the complaint, as a result, the question of whether or not the amended complaint would relate back became a moot issue.

¶20. Before arriving at the conclusion that the trial court erred, we examined the record to determine the basis upon which the trial court made its decision to grant the motion to amend the complaint to add a new party and new factual allegations more than eighteen months after the filing of the original lawsuit and more than four years after the cause of action arose. The trial court's order which granted the motion

provided no guidance as it merely granted the motion and held that the amended complaint "shall relate back to the date of the original filing." We were therefore left to examine the motion itself and the amended complaint.

¶21. The motion to amend, unlike the valiant and well-reasoned argument set forth in the dissenting opinion, did not argue Mississippi Rule of Civil Procedure 15(c), but argued instead that Marshall had only recently learned of a contract between Hardy Wilson and Medicomp in which Medicomp agreed to provide services which formed the basis of the lawsuit and other "pertinent facts concerning liability." Marshall claimed that he had only recently learned of these matters because they had been "fraudulently concealed from him for several years." The allegations of fraudulent concealment were mirrored in the amended complaint that was later filed.

¶22. Without more from the trial court we must conclude that in granting the motion to amend, the court adopted the reasons set forth in the motion. As explained in other portions of this opinion, that was error. It appears obvious that the fraudulent concealment argument was advanced as a "savings" option because without it the statute of limitations on negligence actions would have barred any action against Medicomp at that time.

¶23. It would be patently unfair for this Court to adopt the reasoning of the dissenting opinion which advances an argument on behalf of a party that never advanced the argument itself, and which, by implication, the opposing party never had an opportunity to address, and to then, as the dissent suggests, rule that the opposing party cannot now assert a defense to the argument for the first time on appeal.

¶24. Medicomp makes other claims of error on the part of the trial court having to do with jury misconduct, remittitur, whether the jury award was exorbitant, and the denial of various post trial motions; however, the decision by this Court to reverse and render the jury verdict nullifies those issues.

Cross-Appeal

1. directed verdict in favor of Dr. Williams

¶25. In his cross-appeal, Marshall contends that granting Dr. Williams's motion for a directed verdict constituted reversible error. This Court conducts a de novo review of motions for directed verdict, and considers the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence presented at trial. *Houston v. York*, 755 So.2d 495 (¶ 12) (Miss. Ct. App.1999). A directed verdict should not be granted unless, on the basis of those facts and inferences, no question of fact remains on which reasonable minds could differ. Otherwise, the matter should be submitted to the jury. *Id.*

¶26. Marshall argues that the question of whether Dr. Williams was negligent in not referring him to a surgeon or burn center following his visit to the emergency room at Hardy Wilson was a question of fact that the jury should have been allowed to answer. Marshall's medical expert, Dr. Moses Young, testified on direct examination that he did not personally examine Marshall's wound; but, that he reviewed Marshall's medical records from Hardy Wilson and Kings Daughters Hospital and came to the conclusion that "based upon the degree of burn that he had, I think he should have immediately been referred to either . . . a surgeon or burn unit."

¶27. On cross-examination, Dr. Young responded as follows:

Q. Now, the criteria for transfer is what this section is talking about, right? Now, the first paragraph says, "The American Burn Association has identified the following types of burns, injuries that usually require referrals to a burn center." Look at number 2. Well, first of all, look at number 1. It says, "Partial thickness and full thickness burns greater than 10 percent of the total body surface area in patients under 10 and over 50, right?"

A. Right.

Q. Mr. Marshall doesn't fall in that category, does he?

A. Not according to the age.

Q. Mr. Marshall falls into the next category doesn't he? Partial thickness, which is second degree burns you were talking about, right?

A. Right.

Q. And full thickness, which is the third degree burns. So in other words, second degree and third degree burns greater than 20 percent of the body surface in other age groups, which would include Mr. Marshall, correct?

A. Correct.

Q. So according to the American Burn Association's criteria for people you should refer to burn centers, Mr. Marshall didn't need to be referred to a burn center, did he?

A. Not according to this.

Q. Not according to the ATLS manual; is that correct?

A. Right. Correct. According to the manual.

Q. This is the book that you were certified under in 1992, right?

A. Right.

Q. And this is the book that you follow in your treatment in emergency rooms, too, correct?

A. Correct.

¶28. What is readily apparent from the foregoing excerpt is that Marshall's own expert agreed that based on Dr. Williams's diagnosis at the time he saw Marshall in the emergency room there was no indication that Marshall needed to be transferred to a surgeon or burn center and the treatment he rendered was appropriate and within the standard of care. In accordance with this Court's standard of review, on the basis of those facts and inferences, no question of fact remained on which reasonable minds could differ on the issue; therefore, a directed verdict was proper.

¶29. Marshall further argues that, in granting the motion for directed verdict, the trial court invaded the province of the jury by deciding that Marshall's expert witness had recanted his testimony when, to the contrary, the expert witness testified on re-direct examination that he had not recanted his testimony. This Court notes that Marshall's expert, Dr. Young, had based his opinion that Dr. Williams should have immediately transferred Marshall to a surgeon or burn center on the assumption that, at the time Marshall was seen by Dr. Williams, Marshall had a "deep partial thickness" second degree burn which all authorities agreed would have required transfer. However, when cross-examined on this point Dr. Young testified as follows:

Q. And what that means, as I understand it is, when you get bacteria in a wound -- if you've got a second degree wound as it was diagnosed by both of these physicians here, it can rapidly convert to a third degree wound, correct?

A. Correct.

* * *

Q. Okay, sir. Isn't the most likely series of events in this case the following: Mr. Marshall sustained second degree burns and was treated at the hospital in Birmingham, diagnosed second degree burns, at Hardy Wilson was diagnosed by Dr. Williams as second degree burns, he had second degree burns. Those burns sometime after he left Dr. Williams' care became infected and rapidly progressed to the level of the third degree that was found at King's Daughters Hospital. Isn't that the most likely case situation looking at all the records and all these medical texts and your education and training?

A. That's a strong possibility.

Q. It's more likely than not that those second degree burns got infected and became third degree burns than it is that two board certified ER physicians are going to misdiagnose it and call it second when it's really third, right?

A. Correct.

Q. And if these were second degree burns, which had not converted to third degree burns because there wasn't any infection when Dr. Williams treated him -- if these were

second degree burns when Dr. Williams treated him, then Dr. Williams treated him appropriately and complied with the standard of care, didn't he?

A. Yes.

Q. And if that is the case, then Mr. -- Dr. Williams didn't do anything wrong, did he, sir?

A. Not according to that.

Q. Not according to what?

A. Not according to his care.

¶30. When this Court applies its appellate standard of review on the granting of a directed verdict to this testimonial evidence and considers it in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence, it is left with the firm conviction that the directed verdict was properly granted. The trial court is affirmed on this issue.

¶31. THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT IS REVERSED AND RENDERED ON THE DIRECT APPEAL AND IS AFFIRMED ON THE CROSS-APPEAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE/CROSS-APPELLANT.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, LEE, MYERS AND GRIFFIS, JJ., CONCUR. KING, P.J., CONCURS IN RESULT ONLY. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, J.

IRVING, J., DISSENTING:

¶32. The majority reverses and renders the \$1,500,000 judgment Marshall obtained against Medicomp, Inc. because, in the view of the majority, the statute of limitation had run prior to Marshall's filing an amended complaint to add Medicomp as a defendant. I respectfully dissent for two reasons.

¶33. First, I believe that the amended complaint related back to the filing of the original complaint, and was therefore timely filed. Second, the critical issue is not whether the cause of action against Medicomp

was fraudulently concealed, thereby concealing Medicomp's identity, as the majority suggests, but whether there was a fraudulent concealment of Medicomp's identity as a player in the transaction or occurrence giving rise to Marshall's claim. This distinction is important. As to the issues as I have framed them, there was a plethora of evidence to support both the decision of the trial judge to allow the amended complaint to relate back, and the finding of the jury of concealment of Medicomp's role which in essence was a concealment of Medicomp's identity. However, as will be discussed in the succeeding paragraphs, I do not believe the survival of Marshall's judgment depends solely on whether there was concealment of any nature because there is sufficient evidence to find that the trial court did not err in ordering the amended complaint to relate back to the date of the filing of the original complaint.

¶34. On January 30, 1997, Marshall filed his original complaint against Hardy Wilson Memorial Hospital and Dr. Dale Williams. The gravamen of the complaint was medical negligence occurring on January 31, 1995. The medical negligence was centered around the alleged failure of the defendants to diagnose, properly treat, and stabilize Marshall for burns to his hands and leg.

¶35. On February 8, 1999, counsel for Dr. Williams wrote Marshall's counsel a letter containing the following pertinent information:

As we discussed, enclosed is a copy of the physical therapy contract between Hardy Wilson Memorial Hospital and Medicomp, Inc. which was in effect at the time of Mr. Marshall's treatment. *I was not aware of this agreement until recently.* Under the terms of this contract and consistent with the hospital's policy and procedure for physical therapy, Medicomp was to provide a physical therapist, on a regular basis, to the hospital. The hospital policy also stated that "in event of illness or at vacation period of a registered physical therapist, Medicomp will supply the department with a substitute registered physical therapist." Our understanding is that on February 2 and 3, 1995, Medicomp's registered physical therapist was sick and that no substitute was provided. A licensed physical therapist assistant was on duty at the hospital when Mr. Marshall returned but he, by law, was not licensed to do an initial evaluation which must be performed before therapy is instituted. At the time Dr. Williams ordered the physical therapy and discharged

Mr. Marshall, he had no reason to believe that Medicomp would not provide a therapist as scheduled.

(emphasis added).

¶36. On June 9, 1999, Marshall filed a motion to amend his complaint. The motion alleged that Marshall had "recently discovered from defendant, Hardy Wilson Memorial Hospital, that Hardy Wilson Memorial Hospital had a contract with Medicomp, Inc. to provide services which form the basis of this lawsuit, and plaintiff desires to make Medicomp, Inc. a party to this action." The motion alleged that "[t]he amendment should relate back to the original pleading since it arose out of conduct set forth in the original pleading." On June 14, 1999, the trial court granted Marshall's motion to amend his complaint to add Medicomp as a defendant. The order specifically provided that the amended complaint "shall relate back to the date of original filing."

¶37. Marshall filed his amended complaint on the date of the order permitting its filing. In the amended complaint, Marshall alleged, inter alia, that:

On November 18, 1994, Hardy Wilson and Medicomp, Inc. entered into a written contract whereby defendant, Medicomp, Inc. agreed to provide staff, personnel, and competent and licensed professionals to staff and operate the Copiah Wellness and Rehabilitation Center and provide licensed physical therapists to administer whirlpool baths for Hardy Wilson for a period of two years. Plaintiff, Paul Marshall, was a beneficiary under this contract.

On February 1, 2, and 3, 1995, defendant, Medicomp, Inc., failed and refused to give plaintiff, Paul Marshall, a whirlpool bath when he returned those mornings.

Defendant, Medicomp, Inc., and Hardy Wilson, fraudulently concealed the cause of action plaintiff, Paul Marshall, had against them for their failure and refusal to give him a whirlpool bath on February 1, 2, and 3, 1995.

Defendant, Medicomp, Inc. and Hardy Wilson, fraudulently concealed the cause of action plaintiff, Paul Marshall, had against them for their failure and refusal to give him a whirlpool bath on February 1, 2, and 3, 1995.

Plaintiff, Paul Marshall, could not have discovered defendant's Medicomp, Inc.'s and Hardy Wilson, [sic] fraudulent concealment, with reasonable diligence before February 8, 1999, when the attorney for these defendants wrote plaintiff's counsel a letter advising of the contract between these defendants to provide a licensed physical therapist to administer whirlpool baths for Hardy Wilson.

¶38. The majority fails to discuss the application of Rule 15(c) and devotes its entire discussion to whether the evidence supports a theory of fraudulent concealment so as to toll the statute of limitations. In my judgment, the majority misses the point for two reasons. First, while Marshall did allege fraudulent concealment, Rule 15(c) does not require proof that the identity of the party sought to be added by amendment must have been concealed. Second, although Marshall alleged fraudulent concealment of the claim against Medicomp, what he was actually alleging is not that the claim against Medicomp was concealed but that the identity of Medicomp, as the perpetrator of the injury, was concealed. All parties understood that that was what was being alleged. I will return to this point later in the opinion after addressing the conditions or requirements that must be met before an amendment may relate back to the date of the filing of the initial pleading.

¶39. Rule 15(c) of the Mississippi Rules of Civil Procedure provides in part as follows:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

¶40. I first note that, if the amendment relates back to the date of the filing of the initial pleading and the initial pleading was timely filed and served, there is no need or requirement that the statute of limitation be tolled because the amendment relates back to a time prior to the running of the statute of limitation. In order for the amended complaint in this case to relate back to the date of the filing of the initial complaint, Marshall had to show: (1) that the claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint, (2) that within 120 days after the filing of the original complaint, Medicomp had received such notice of the institution of Marshall's lawsuit that it would not be prejudiced in maintaining its defense on the merits, and (3) Medicomp knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. M.R.C.P. 15(c).

1. Same Transaction or Occurrence

¶41. It is not open to legitimate debate that the claim asserted against Medicomp in the amended complaint arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original complaint. The original complaint alleged negligence in the diagnosis and treatment of Marshall's injury. The provision of whirlpool baths was a part of the treatment prescribed.

2. Notice of Marshall's Lawsuit by Medicomp Prior to May 30, 1997

¶42. I first note that Medicomp did not allege or contend in any of the pleadings filed in the trial court that it had no notice of Marshall's lawsuit prior to May 30, 1997. Medicomp's position then was that the statute of limitation had run before Marshall brought it into the lawsuit. It was not contended in the trial court that the amended complaint should not relate back, pursuant to the provisions of Rule 15(c), because Medicomp did not receive notice of the lawsuit against Hardy Wilson by May 30, 1997, which was the 120th day following the filing of Marshall's original complaint. In its answer to the amended complaint, as

well as in its motions for summary judgment and motion for judgment notwithstanding the verdict, Medicomp's temporal arguments were based not on the temporal requirement of Rule 15(c) but the temporal pronouncement of the statute of limitation. I discuss those next.

¶43. In its answer to the amended lawsuit, filed on February 1, 2000, Medicomp alleged as its second defense that "Plaintiff's claims are barred by the applicable statute of limitations." The "relation back" provision of Rule 15(c) is not a statute of limitations.

¶44. In its motion for summary judgment, filed on May 2, 2000, Medicomp alleged:

7. Each cause of action alleged against Medicomp accrued for statute of limitations purposes on February 3, 1995, at the latest.

8. The EMTALA [Emergency Medical Treatment and Labor Act] contains a two-year limitations period. *See* 42 U.S.C.A. § 1395dd(d)(2)(C). The limitations period expired February 3, 1997. Plaintiff's EMTALA claim against Medicomp is time-barred.

9. Plaintiff's negligence claims are governed by Miss. Code Ann. § 15-1-36 which sets out a two-year limitations period. That period expired February 3, 1997. Thus, Plaintiff's negligence per se and negligence claims are time-barred.

10. Plaintiff's breach of contract claim is governed by Miss. Code Ann. § 15-1-49. That statute sets out the catch-all limitations period of three years. Plaintiff's breach of contract claim expired February 3, 1998 and is time-barred.

¶45. In the renewal of its motion for summary judgment, filed on February 4, 2002, Medicomp alleged the following:

12. Each cause of action alleged against Medicomp accrued for statute of limitations purposes on February 3, 1995, at the latest.

13. Plaintiff's negligence claims are governed by Miss. Code Ann. § 15-1-36 which sets out a two-year limitations period. That period expired February 3, 1997. Thus, Plaintiff's negligence per se and negligence claims are time-barred.

¶46. In its motion for judgment notwithstanding the verdict, Medicomp did not address the application, or lack thereof, of Rule 15(c) to the facts of this case. It limited its discussion to an attempt to show that any evidence of fraudulent concealment of Marshall's cause of action was woefully lacking.

¶47. I should note that, although Medicomp in its answer to the amended complaint did not question the propriety of the amended complaint relating back to the original complaint, it did, in its motion for summary judgment, allege that the amended complaint did not relate back to the original complaint. This was the first time that Medicomp had raised a Rule 15(c) objection, but even then, the specific objection was not temporally based. This is what Medicomp alleged:

11. The amended complaint does not correct a mistake concerning the identity of the proper party. Instead, it adds factual allegations and seeks to add another party outside the limitations period. Plaintiff's amended complaint thus does not relate back to the filing of his original complaint and it should be dismissed as against Medicomp.

It is clear from the language quoted above that Medicomp's contention was that the amended complaint did not relate back because it added another party, not that it did not relate back because Medicomp did not receive notice of the original lawsuit within 120 days of the filing of the original complaint. Therefore, since Medicomp did not place the specific issue of lack of notice before the trial court, it cannot now assert that issue on appeal for the first time, for it is well settled in the jurisprudence of this state that a trial court cannot be put in error on a matter not presented to it for decision. *Marcum v. Hancock County Sch. Dist.*, 741 So. 2d 234, 238 (¶20) (Miss. 1999).

3. Mistake as to Identity of the Party

¶48. In his original complaint, Marshall alleged that he received improper treatment. The whirlpool baths were part of the treatment ordered. These baths were not performed as ordered because of negligence on the part of Medicomp. Of course, Marshall thought that the physical therapy department of Hardy

Wilson was run by employees of Hardy Wilson. No posted signs explained otherwise. Therefore, Marshall was justified in initially believing that it was Hardy Wilson which was negligent in not providing the whirlpool baths. It seems reasonable to me that Medicomp knew or should have known that, but for Marshall's mistaken belief concerning the identity of the entity responsible for operating the physical therapy department of Hardy Wilson, he would have named Medicomp as a defendant.

¶49. Medicomp argues that Marshall's lawsuit against it is a different cause of action naming an additional party rather than the same cause of action substituting a party. Medicomp relies heavily on the fact that whirlpool baths and the treatment period of February 1 through 3, 1995, are not mentioned in the original lawsuit. I see at least two problems with this argument. First, the original cause of action was a medical negligence cause of action alleging, inter alia, negligence in the treatment of Marshall's injury. The amended complaint alleges a medical negligence cause of action arising out of the medical treatment Marshall received for his injuries. As I have already observed, the whirlpool baths were a part of Marshall's medical treatment. It was not necessary that all treatment be spelled out in the original complaint. Apparently, Medicomp has forgotten that Mississippi is a notice pleading jurisdiction. Second, Medicomp did not raise a Rule 15(c) defense in its answer to the amended complaint, nor did it raise it by a separate motion to dismiss at the time it filed its answer. Medicomp was required to raise that defense at that time. Otherwise, it was waived. M.R.C.P. 12.

¶50. Finally, I briefly address the concealment issue. As I noted in the first portion of this dissent, I do not think the real issue was one of concealment of the cause of action but concealment of Medicomp's identity as a player or responsible party in the administration of Hardy Wilson's physical therapy department. The parties talked about concealment of the cause of action when in fact they were talking about concealment of Medicomp's identity. I agree with the majority that there was no concealment of

Marshall's cause of action, but there was plenty of evidence of concealment of Medicomp's identity vis-a-vis the administration of Hardy Wilson's physical therapy department. In my opinion, whether Marshall was mistaken as to the identity of the entity operating Hardy Wilson's physical therapy was a question of fact to be resolved by the jury. This issue was presented to the jury pursuant to a special interrogatory, and it resolved the issue against Medicomp. I would not disturb the jury's determination.

¶51. In summary, I dissent, because I do not believe that the trial judge abused his discretion in allowing the amended complaint to be filed with the proviso that it related back to the original complaint. I think Medicomp waived any objection to the relating back provision when it made no objection in its answer to the amended complaint. I also believe Marshall met the criteria of the relation-back provision of Rule 15(c).

¶52. The majority attempts to sidestep the arguments made here by suggesting that this writer has misconstrued its holding. In suggesting that the dissent has misconstrued its holding, the majority explains that it found fault with the trial court's granting the motion to amend, thereby making the "relation back" provision of Rule 15 (c) a moot issue. The majority also asserts that Marshall's motion to amend "did not argue Mississippi Rule of Civil Procedure 15(c)." Majority opinion at (¶21). With gracious respect for the majority, I beg to differ on both points. Quite the contrary, it is the majority which has misread Marshall's motion to amend and misunderstood the criteria set forth in Rule 15 for allowing amendments. The motion to amend plainly alleged in paragraph 3 that "[t]he amendment should relate back to the original pleading since it arose out of conduct set forth in the original pleading." Also, in paragraph 1 of the motion to amend, Marshall alleged:

The plaintiff, Paul Marshall, recently discovered from defendant, Hard Wilson Memorial Hospital, that Hardy Wilson Memorial Hospital had a contract with Medicomp, Inc. to

provide services which form the basis of this lawsuit, and plaintiff desires to make Medicomp, Inc. a party to this action.

¶53. Section (a) of Rule 15 provides, inter alia, that "leave [to amend] shall be freely given when justice requires." M.R.C.P. 15 (a). While it is true that Marshall's motion also alleged that certain facts had been fraudulently concealed from him, that allegation must be considered in the overall context. Regarding the matter of fraudulent concealment, the motion alleged in paragraph 2 that "[s]ince pertinent facts concerning liability were recently discovered by plaintiff, and those facts were fraudulently concealed from him for several years, he should be permitted to pursue those facts."

¶54. When all the allegations of the motion for leave to amend are considered in context, the obvious conclusion is that Marshall was alleging (1) that he did not know of the contractual role between Medicomp and Hardy Wilson regarding Medicomp's contractual responsibility for provision of Whirlpool baths to Hardy Wilson's patients, and (2) that since Medicomp was directly responsible for provision of Whirlpool baths to Hardy Wilson's patients, it bore some liability for its failure and refusal to give him a whirlpool bath on February 1, 2, and 3, 1995.

¶55. In light of these facts, it escapes logic for the majority to accuse the dissent of "advancing an argument on behalf of a party that never advanced the argument itself, and which, by implication, the opposing party never had an opportunity to address." Majority opinion at (¶23). Medicomp had all the opportunity in the world to raise whatever defenses it wanted to raise in its answer to the amended complaint. It chose to make a straight limitation of action argument, arguing that the statute of limitation had run on Marshall's claim because of the period of time which had elapsed since it refused and or failed to give Marshall a Whirlpool bath as ordered by the doctor for Hardy Wilson. It should be very obvious to even a first year law student that an amendment to a lawsuit which relates back to the original lawsuit

obviates any statute of limitations defenses, provided the original lawsuit was filed timely. Yet, when Medicomp filed its answer to the amended complaint, it did not attack the "relation back" provision of the order allowing the amendment. Indeed, it was required to do so. Since it did not, it should not now be tossed the lifeline which the majority so generously gives to it by suggesting that the trial court erred in allowing the amendment.

¶56. For the reasons discussed above, I respectfully dissent. I would affirm the judgment of the trial court.

THOMAS, J., JOINS THIS SEPARATE WRITTEN OPINION.