**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2020-CA-01355**

**SRHS AMBULATORY SERVICES, INC.**

***Plaintiff - Appellant***

**VS.**

**PINEHAVEN GROUP, LLC and**
**FIRST AMERICAN TITLE COMPANY**

---

# BRIEF OF APPELLEE

## FIRST AMERICAN TITLE INSURANCE COMPANY

---

APPEAL FROM THE DECISION OF THE
CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

**ORAL ARGUMENT NOT REQUESTED**

Counsel for Appellee, First American Title Insurance Company:

G. Dewey Hembree, III (MSB #2247)
**MCGLINCHEY STAFFORD, PLLC**
1020 Highland Colony Pkwy, Ste 702
Ridgeland, MS 39157
Telephone: (769) 524-2300
Facsimile: (601) 510-5609
Email: ghembree@mcglinchey.com

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities may have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. SRHS Ambulatory Services – Appellant;
2. Singing River Health System, formerly known as the Singing River Hospital System;
3. Michael J. Bentley, Christina M. Seanor, Stevie F. Rushing, and the law firm of Bradley Arant Boult Cummings, LLP - Attorneys for Appellant;
4. Patrick R. Buchanan and the law firm of Buchanan, P.A. – Attorney for Appellant;
5. Michael J. Bruffey and MEB Professional & Legal Services – Attorney for Appellant;
6. Pinehaven Group, LLC – Appellee;
7. Charles J. Swayze, Jr., Charles J. Swayze, III, and the law firm of Whittington, Brock & Swayze, P.A. - Attorneys for Appellee (Pinehaven Group LLC);
8. First American Title Insurance Company improperly named First American Title Company – Appellee;
9. G. Dewey Hembree, III and the law firm of McGlinchey Stafford, PLLC – Attorneys for Appellee, First American Title Insurance Company; and
10. Honorable Lawrence P. Bourgeois, Jr., Circuit Judge.

So Certified: October 15, 2021.

*/s/ G. Dewey Hembree, III*
G. DEWEY HEMBREE, III (MSB 2247)
Attorney of record for Appellee, First American Title Insurance Company

## TABLE OF CONTENTS


CERTIFICATE OF INTERESTED PERSONS ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT REGARDING ORAL ARGUMENT ..... 1

STATEMENT OF ASSIGNMENT ..... 1

STATEMENT OF THE CASE ..... 1

I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW ..... 1

II. STATEMENT OF THE FACTS ..... 3

SUMMARY OF THE ARGUMENT ..... 13

ARGUMENT ..... 16

I. AMBULATORY SERVICES OWNS THE SUBJECT PROPERTY ..... 16

A. AMBULATORY SERVICES WAS CREATED BY SPECIFIC STATUTES ADOPTED BY THE MISSISSIPPI LEGISLATURE REGARDING THE PROVISION OF HEALTHCARE SERVICES TO THE GENERAL PUBLIC ..... 16

B. AMBULATORY SERVICES' PURCHASE OF THE SUBJECT PROPERTY WAS AUTHORIZED BY LAW ..... 18

C. AMBULATORY SERVICES IS NOT A COMMUNITY HOSPITAL ..... 19

D. NO STATUTE REQUIRES AMBULATORY SERVICES TO SEEK RATIFICATION OF ITS PURCHASES OF REAL PROPERTY ..... 23

E. AMBULATORY SERVICES IS ESTOPPED FROM CHALLENGING ITS OWN TITLE TO THE SUBJECT PROPERTY. ..... 28

II. AMBULATORY SERVICES IS NOT ENTITLED TO BENEFITS UNDER THE TITLE INSURANCE POLICY ..... 31

A. AMBULATORY SERVICES RECEIVED WHAT IT INTENDED ..... 32

B. AMBULATORY SERVICES KNEW OF THE ALLEGED UNRECORDED DEFECT PRIOR TO PURCHASING THE POLICY AND DID NOT DISCLOSE THIS FACT TO FIRST AMERICAN. ..... 35

C. AMBULATORY SERVICES HAS SUFFERED NO LOSS OR DAMAGE ..... 38

III. AMBULATORY SERVICES' ALLEGATIONS OF NEGLIGENCE WERE PROPERLY DISMISSED. ..... 41

A. THERE IS NO DUTY OWED BY FIRST AMERICAN OUTSIDE OF THE POLICY ..... 42

B. THERE IS NO DUTY TO PERFORM A TITLE SEARCH ..... 44

C. THE THREE YEAR STATUTE OF LIMITATIONS FOR NEGLIGENCE BARS RECOVERY ..... 48

CONCLUSION ..... 49

CERTIFICATE OF SERVICE ..... 51

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*American Tel. & Tel. Co. v. Purcell Co., Inc.*
606 So.2d 93 (Miss. 1990).....24, 29

*Baldwin v. Anderson*,
60 So. 578, 103 Miss. 462 (1913).....49

*Barnhart v. Brinegar*,
362 F.Supp. 464 (W.D. Mo. 1973).....12

*Bolivar LeFlore Medical Alliance, LLP v. Williams*,
938 So.2d 1222 (Miss. 2006).....1, 22

*Brooks v. Black*,
8 So. 332 (Miss. 1890).....38

*Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC*,
573 F.Supp.2d 1152 (E.D. Ark. 2008).....46

*Chicago Title Ins. Co. v. Commonwealth Forest Investments, Inc.*,
494 F.Supp.2d 1332 (M.D. Fla. 2007).....46

*CitiFinancial Mortgage Co. v. Washington*,
967 So.2d 16, 19 (Miss. 2007).....48

*Covington County v. Page*,
456 So.2d. 739 (Miss. 1984).....31

*Edwards v. Hillier*,
70 Miss. 803, 13 So. 692 (1893).....30, 36

*In re Evans*,
460 B.R. 848 (Bankr. S.D. Miss. 2011).....44, 45, 46

*First Am. Title Ins. Co. v. Action Acquisitions, LLC*,
187 P.3d 1107 (Ariz. 2008).....33

*Fleishour v. Stewart Title Guar. Co*.,
743 F.Supp.2d 1060, 1071 (E.D.Mo.2010).....36

*Ford v. Guarantee Abstract & Title Co., Inc.*,
553 P.2d 254, 220 Kan. 244 (1976).....45

*Green County v. Corporate Mgmt.*,
10 So.3d 424 (Miss. 2009) ..... 26

*Greenwood v. Young*,
80 So.3d 140 (Miss.Ct.App. 2012) ..... 40

*Griffith v. Entergy Mississippi, Inc.*,
203 So.3d 579, 585 (Miss. 2016) ..... 45

*Home Fed. Sav. Bank v. Ticor Title Ins. Co.*,
695 F.3d 725 (7th Cir. 2012) ..... 33

*KPMG, LLP v. Singing River Health System*,
283 So.3d 662 (Miss. 2018) ..... 32

*Lane v. Oustalet*,
873 So.2d 92 (Miss. 2004) ..... 37

*Martinez v. Department of Housing & Urban Development*,
347 F.Supp. 903 (E.D. Pa. 1972) ..... 12

*May v. LeClaire*,
78 U.S. 217, 20 L.Ed. 50, 11 Wall. 217 (1870) ..... 30, 36

*Mayor & Bd. of Aldermen, City of Clinton v. Welch*,
888 So.2d 416 (Miss. 2004) ..... 28, 31

*Moran v. Saucier*,
829 So.2d 695 (Miss.Ct.App. 2002) ..... 40

*Moser v. Fidelity National Title Insurance Company*,
2018 WL 1413346 *6 (E.D. Tex.) ..... 33

*Nall Motors, Inc. v. Iowa City*,
410 F.Supp. 111 (S.D. Iowa 1975), aff'd 533 F.2d 381 (8th Cir. 1976) ..... 12

*Paramount Farms, Inc. v. Morton*,
527 F.2d 1301 (7th Cir. 1975) ..... 12

*Peagler v. Measells*,
743 So.2d 389 (Miss.Ct.App. 1999) ..... 40

*Rhoads v. Peoples Bank & Trust Co.*,
200 Miss. 606, 27 So.2d 552 (1946) ..... 30, 36

*Rhodes v. Chicago*,
516 F.2d 1373 (7th Cir. 1975) ..... 12

*Ross v. Greenwood Utilities*,
2014 WL 419640 (August 22, 2014) ..... 29

*Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*
857 So.2d 748, 754 (Miss. 2003) ..... 43

*Rubin v. Department of Housing & Urban Development*,
347 F.Supp. 555 (E.D. Pa. 1972) ..... 12

*Shada v. Title & Tr.Co. of Fla.*,
457 So.2d 553 (Fla.Dist.Ct.App. 1984) ..... 45

*Shelter Mut. Ins. Co. v. Dale*,
914 So.2d 698 (Miss. 2005) ..... 25

*Thompson v. Jones Community Hospital*,
352 So.2d 795 (Miss. 1977) ..... 32

*U.S. Bank, N.A. v. Integrity Land Title Corp.*,
929 N.E.2d 742 (Ind. 2010) ..... 45

*United States v. 249.12 acres of land*, 414 F.Supp. 933 (W.D. Okla. 1976) ..... 12

*Wagner v. Mattiace Co.*,
938 So.2d 879 (Miss.Ct.App. 2006) ..... 48

*Whalen v. Bistes*,
45 So.3d 290 (Miss.Ct.App. 2010) ..... 37

*Whitman v. State Highway Commission*,
400 F.Supp. 1050 (W.D. Mo. 1975) ..... 12

*Will-Tex Plastics Mfg., Inc. v. Department of Housing & Urban Development*,
346 F.Supp. 654 (E.D. Pa. 1972) ..... 12

*Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co.*,
706 F.Supp. 477 (S.Dist. Miss. 1988) ..... 39, 47

*Womer v. Melody Woods Homes Corp.*,
165 Or.App. 554, 997 P.2d 873 (2000) ..... 48

**Statutes**

Miss. Code Ann. § 11-46-1(g) ..... 20

Miss. Code Ann. § 15-1-49 ..... 48

Miss. Code Ann. § 41-13-10 ..... 22

Miss. Code Ann. § 41-13-10(b) .....20

Miss. Code Ann. § 41-13-10(c) ..... *passim*

Miss. Code Ann. § 41-13-15(4) .....10, 16, 21

Miss. Code Ann. § 41-13-29(e) .....20

Miss. Code Ann. § 41-13-35 .....17, 24, 27

Miss. Code Ann. § 41-13-35(4) .....17

Miss. Code Ann. § 41-13-35(5)(g) .....26

Miss. Code Ann. § 41-13-35(5)(r) .....17, 22, 23, 27

Miss. Code Ann. § 41-13-38 .....26

Miss. Code Ann. §41-13-38(2) .....19, 23

Miss. Code Ann. § 43-37-3 .....12, 41

Miss. Code Ann. § 79-11-151 .....18, 23

1985 Miss. Laws ch. 511, § 1, eff July 1, 1985 .....13, 24

Mississippi Code Title 41 Chapter 13 .....17

Title Code 42 U.S.C.A. §4651 .....12

**Other Authorities**

J. Jackson, M. Miller & D. Campbell, 5 MS Prac. Encyclopedia of Mississippi Law (2d ed.) § 36:10 Public hospitals .....17, 24

Joyce Palomar, *Title Insurance Law* (Thomsan Reuters 2020 ed.) .....43, 44, 46

Miss.A.G.Op. 2006-00040 (W. Dal Williamson), 2006 WL 1737883, *1 (April 7, 2006) .....25

Miss.A.G.Op. 2007-00528 (Albert G. Delgadillo), 2008 WL 965692 (March 28, 2008) .....26, 27

Miss.A.G.Op. 2009-00327 (Roy Williams) 2009 WL 2517267 *2-*3 (July 3, 2009) .....26

Miss.A.G.Op. 2015-00370 (Brett K. Williams) 2015 WL 926833 (November 6, 2015) .....20, 25, 26

Miss.A.G.Op. 2016-00048 (Barry K. Cockrell), 2016 WL 3361060 (May 27, 2016) ..... 25, 26

Miss. Rules of Appellate Procedure Rule 16 ..... 1

## STATEMENT REGARDING ORAL ARGUMENT

First American Title Insurance Company improperly named herein as First American Title Company ("First American") does not request oral argument of the issues involved in this appeal. This case is controlled by a straight forward interpretation of specific Mississippi statutes, case law and contract law. The facts are undisputed and plain.

## STATEMENT OF ASSIGNMENT

There is no requirement that the Supreme Court should retain jurisdiction over this appeal. Mississippi case law has previously interpreted the meaning of "community hospitals" as said term applies to subsidiaries of community hospitals in Mississippi similar to the entity in this matter.[1] Further, the facts of the case do not present an unresolved question under Mississippi tort law. The case does not involve any of the issues identified in Rule 16(b) or (d) of the Mississippi Rules of Appellate Procedure nor does the case involve the overruling of any cases previously decided by the Mississippi Supreme Court.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

In its Statement of the Case, SRHS Ambulatory Services, Inc. ("Ambulatory Services") implies that it is the victim of circumstances beyond its control and that it acted quickly to protect public property.[2] The record does not support this assertion. Ambulatory Services entered into the real estate contract and purchased the property in question only after considering the very issue it now claims to have recently discovered. This litigation, which Ambulatory Services now characterizes as a campaign to recover public funds, was filed many years after the discovery and

[1] *See Bolivar LeFlore Medical Alliance, LLP v. Williams*, 938 So.2d 1222, 1231 (Miss. 2006).
[2] *See* Brief of Appellant p. 2.

disposition of the exact issue now raised. Ambulatory Services seeks relief from the courts from what it perceives as one bad real estate purchase, yet it ignores the same issue on many other more profitable real estate purchases made in the same manner. Ambulatory Services is soliciting this Court, Pinehaven Group, LLC ("Pinehaven") and First American to protect it from itself.

Ambulatory Services filed this lawsuit to challenge its own title to its real property. The lawsuit asserts a claim for benefits under a title insurance policy which was not requested by Ambulatory Services until well after the purchase of this property was closed. The claim submitted by Ambulatory Services focused on certain Mississippi statutes while disregarding others. Ambulatory Services seeks relief from First American for an alleged failure to inform Ambulatory Services of a potential problem with its purchase of real property months **after** the purchase occurred.

Ambulatory Services purchased twelve acres of land in East Harrison County, Mississippi from Pinehaven on December 17, 2007 ("Subject Transaction").[3] This lawsuit originated ten years later in 2017 in the Chancery Court of the Second Judicial District of Harrison County, Mississippi. Initially, Ambulatory Services filed only against Pinehaven and it later amended its complaint to add First American.[4] The case was transferred to the Circuit Court of Harrison County and extensive discovery was conducted by all parties.[5] Each of the parties filed motions for declaratory judgment and/or for summary judgment, alleging that there were no material issues of fact.[6] The Circuit Court denied Ambulatory Services Second Revised Motion for Summary Judgment and

[3] R. 55-58; 2355.
[4] R. 48; 104.
[5] R. 993-995; 158-992.
[6] R. 347; 1027; 1252

granted First American's Motion for Summary Judgment on November 13, 2020.[7] The Court granted Pinehaven's Motion for Declaratory Judgment on December 2, 2020.[8]

## II. STATEMENT OF THE FACTS

Ambulatory Services is a Mississippi Non-Profit Corporation created in August of 1998.[9] The Articles of Incorporation state:

> This Corporation is a Mississippi non-profit corporation and is not organized for the private gain of any person. It is organized under the Mississippi non-profit corporation law for charitable purposes. The Corporation is organized solely to operate for the benefit of, to perform the functions of and/or to carry out the purposes of the Singing River Hospital System located in Jackson County, Mississippi which is a hospital as defined in the Section 170(b)(1)(A)(iii) of the Internal Revenue Code of 1954, as amended (the "Supported Organization") and **to acquire property, real, personal, or mixed, by purchase, gift, devise or bequest, unconditionally, or in trust for the benefit of the Supported Organization within the limitations of these Articles** (emphasis added)**;**[10]

The Bylaws of Ambulatory Services state in part:

> Contracts. The board of directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation, and such authority may be general or confined to specific instances.[11]

The sole member of Ambulatory Services is the Singing River Health System, formerly known as the Singing River Hospital System.[12] Per the creation documents, Ambulatory Services is a charitable corporation which was designed from its inception to be a separate and distinct entity from the hospital system.[13] Chris Anderson, who was the CEO of the Singing River Hospital System at the time of the Subject Transaction, testified that hospitals frequently set up separate

[7] R. 2350-2354; 2355-2368.
[8] R. 2369-2379.
[9] R. 372-375.
[10] *Id.*
[11] R. 382.
[12] R. 376.
[13] R. 365; 856; 929-930; 951; and 1084-1090.

subsidiaries to help provide health care services.[14] He further testified that Ambulatory Services was created "to operate businesses that involved other owners, joint ventures or partnerships or things like that, that it needed to be set up as a distinct entity to hold an interest in those ventures."[15] Through its own operations and through partnerships with physicians and health care providers, Ambulatory Services has generated significant revenue over the years which was transferred back to the Singing River Health System.[16]

Ambulatory Services is governed by its own separate board of directors ("Board of Directors").[17] It possesses its own tax identification number and files its own separate tax returns.[18] It maintains its own bank accounts.[19] The Board of Directors meets on a regular basis in order to conduct the business of the corporation and the board maintains minutes of those meetings.[20]

Historically, Ambulatory Services has never sought approval for any of its real estate transactions. Since its incorporation in 1998, Ambulatory Services has bought, sold and mortgaged numerous parcels of real property.[21] No evidence was offered by Ambulatory Services of the ratification by the Jackson County Board of Supervisors ("Board of Supervisors") of any purchase, sale or encumbrance of any real property by Ambulatory Services. Darryl Dryden, the attorney who represented Ambulatory Services at the closing of the Subject Transaction, testified that he looked through the minutes of the Board of Supervisors and he could not find any evidence

[14] R. 946-947.
[15] R. 811-812.
[16] R. 1084; 1906-1924.
[17] R. 808; 1066-1067.
[18] R. 1934.
[19] *Id.*
[20] R. 951; 1084; 1904-1905; 1936-1938.
[21] R. 398-426;1048-1049; 1106-1138; 1564; 1761-1797. Some transactions are actually with the Board of Supervisors of Jackson County, Mississippi. William Guice (discussed infra) is named as a trustee for a local bank on at least one Deed of Trust executed by Ambulatory Services.

of ratification of transactions by Ambulatory Services.[22] Ambulatory Services testified at its deposition that it has not made any investigation of these multiple other transactions.[23] No proof of the ratification by the Board of Supervisors of even a single purchase was offered.

The properties owned by Ambulatory Services include vacant land, clinics, surgery centers and a fitness center.[24] Chris Anderson, the former CEO of the Singing River Hospital System offered the following testimony;

> Q. Do you recall ever getting the approval for the Board of Supervisors of Jackson County for any of these separate facilities, not hospitals, but the other facilities?
>
> A. I don't remember going to the Board of Supervisors for approval for -- for projects or facilities.[25]

Greg Shoemaker, the CEO of Ambulatory Services at the time of the Subject Transaction, testified that Ambulatory Services already owned interests in several parcels of land when he became CEO.[26] He testified at his deposition that:

> It never entered my mind that I needed to get ratification. I looked at my articles of incorporation of operating principles that said what I needed to do and I thought I acted accordingly. . . . The best I can recollect is my articles of incorporation allowed us to buy property.[27]

Darryl Dryden testified that he previously closed a purchase of real property for Ambulatory Services in 2002 and there was no ratification by the Board of Supervisors for that purchase.[28]

After Hurricane Katrina, Ambulatory Services began searching to acquire more real property in the vicinity of the D'Iberville area in Harrison County, Mississippi, in an area where

---

[22] R. 1478-1479.
[23] R. 1101-1102.
[24] R. 397-400; 1048-1049; 1564; 1926.
[25] R. 947-948.
[26] R. 1926.
[27] R. 1935.
[28] R. 1039.

Mississippi State Highway No. 67 was being reconstructed and expanded to four lanes.[29] There were no specific plans for this project other than a general purpose of locating healthcare and related facilities which did not include a hospital.[30] Greg Shoemaker testified that he employed a real estate agent to assist him in locating a suitable property.[31]

As with all of its prior real estate transactions, Ambulatory Services acted on its own and did not seek ratification by the Board of Supervisors for its purchase of this real property. On July 30, 2007, the Board of Directors of Ambulatory Services voted to enter into a contract with Pinehaven for the purchase of 12 acres[32] described in Exhibit "A" attached to the Amended Complaint ("Subject Property").[33]

The Trustees of the Singing River Health System ("Trustees") are the governing body of the Singing River Health System.[34] Five days prior to the action by the Board of Directors of Ambulatory Services, the Trustees voted on July 25, 2007 to support Ambulatory Services' purchase of the Subject Property and to authorize the appropriation and transfer of fifty thousand dollars ($50,000.00) to Ambulatory Services contingent upon Ambulatory Services executing a contract with Pinehaven.[35] The Trustees Resolution determined that the appropriation of these funds would benefit the community served by the Trustees, and the Trustees specifically discussed whether or not the Board of Supervisors of Jackson County, Mississippi should be notified about this purchase.[36] On October 31, 2007, the Trustees unanimously approved a second resolution appropriating the additional funds necessary for Ambulatory Services to purchase the Subject

[29] R. 1929-1935.
[30] R. 836-837; 1932.
[31] R. 1933.
[32] R. 1088; 1092-1099.
[33] R. 120.
[34] R. 859.
[35] R. 1944-1945.
[36] *Id.*

Property after first determining that said appropriation would benefit the community served by the Trustees.[37]

Ambulatory Services retained Daryl Dryden as its attorney to represent it in its purchase of the Subject Property.[38] Mr. Dryden reviewed the resolutions and contract documents and worked with Greg Shoemaker to consummate the purchase.[39] For his abstracting work at the 2007 closing, Mr. Dryden used the services of First American Abstract Company, which was located in Gulfport, Mississippi.[40] First American Abstract Company is a separate entity from First American Title Insurance Company and is not a party to this litigation.[41] The parties to this transaction did not contemplate the issuance of title insurance policy and First American was not involved in the December 2007 closing of the purchase by Ambulatory Services.[42]

Both Mr. Dryden, as the attorney for Ambulatory Services, and Mr. Shoemaker, as the CEO of Ambulatory Services, concluded prior to closing that the contract to buy and the purchase of the Subject Property by Ambulatory Services were properly authorized.[43] Mr. Dryden testified about his specific review of the ratification issue **prior to** consummating the purchase of the Subject Property as follows:

> Q. All right. And were any issues discussed about the corporate status of Ambulatory Services?
>
> A. No, not that I recall as far as First American goes.
>
> Q. Right.
>
> A. No. As far as I recall. There were at closing, but not with them.

---

[37] R. 535.
[38] R. 517; 1036-1037; 1468; 1950.
[39] R. 1950-1954.
[40] R. 1033; 1799-1801.
[41] R. *Id.* and Electronic Exhibits D-1, D-2 from October 2, 2018 hearing below.
[42] R. 1032-1033; 1472.
[43] R. 1953-1954; 1935.

Q. Okay. What was discussed at closing?

A. Just the statute that references a community hospital when purchasing land. That statute is kind of at the core of the complaint that was filed.

Q. So that was discussed at closing?

A. It was.

Q. Tell me about that.

A. The lawyers, those of us that were dealing with it, read that and went back and forth on does that apply to us and concluded that it doesn't. And the only documents -- I don't remember researching it. I remember looking at annotations. But we went on the Secretary of State's site and downloaded what was on there for Ambulatory Services, Inc. and looked at these resolutions, and we felt very comfortable.

Q. Okay. And so this was discussed at or prior to closing?

A. Yeah. Because, see, the closing wasn't at our office. But in the process of doing all of this stuff and getting comfort levels, that's one of the things that we looked at and discussed.

Q. All right. And you were doing that on behalf of Ambulatory Services?

A. Yes.

Q. Okay. And did you disclose this information to First American or had that already been put to bed by that time?

A. It was completely put to bed by that time. And I could have discussed it with First American, but I wouldn't -- I wouldn't think so. Had I not been comfortable with it, I would not have closed.[44]

. . .

Q. All right. And you were talking at the closing, you said the attorneys, you and I guess the attorneys for Pinehaven discussed the statute which is the heart of the claim in this lawsuit?

A. No. In our office we pulled that code section and looked at it, pulled the Secretary of State's website and the data on SRHS Ambulatory Services, Inc. And in our mind, SRHS Ambulatory Services, Inc. is not a community hospital.

Q. But that was an internal discussion, that didn't include the Pinehaven attorneys?

[44] R. 1038.

A. No, no. That was just our office.

Q. So the discussion was whether or not SRHS Ambulatory Services was a community hospital?

A. Well, and whether or not SRHS Ambulatory Services required any action by the board of supervisors.

Q. So that was initially discussed, was whether or not – at that time before closing, you discussed internally whether or not this transaction needed to be ratified?

A. Yes.[45]

Thereafter, the purchase of the Subject Property by Ambulatory Services was closed on December 17, 2007, and a Warranty Deed was recorded transferring title to Ambulatory Services on December 18, 2007.[46] Since title insurance was not contemplated at closing, no preliminary title opinion or title insurance binder was issued for this transaction.

In January of 2008, Greg Shoemaker informed the Board of Directors of Ambulatory Services that the land purchase had been finalized.[47] Mr. Dryden testified that he was approached after the closing in February of 2008 and requested to issue an owner's policy of title insurance to Ambulatory Services.[48] Mr. Dryden's law firm was a policy issuing agent for First American.[49] On March 3, 2008, Mr. Dryden mailed an Owner's Policy of Title Insurance dated effective December 18, 2007 ("Policy") in response to the request from Ambulatory Services made in February 2008.[50] The Policy was effective one day **after** the purchase price was paid by Ambulatory Services and it was issued by Williams, Heidelberg, Steinberger and McElhaney, P.A., the law firm which employed Mr. Dryden.[51]

---

[45] R. 2233-2234.
[46] R. 117-120.
[47] R. 1938.
[48] R. 1472.
[49] R. 576-577.
[50] R. 1040-1047.
[51] *Id.*

In 2015, an attorney, William Guice, purportedly wrote a letter to the Trustees (and not Ambulatory Services) questioning why real estate purchased by Ambulatory Services was not appraised prior to the purchase.[52] Mr. Guice was also purportedly quoted in a newspaper article.[53] However, copies of the letter and the newspaper article do not appear in the record below. From correspondence in the Record, it appears that Mr. Guice recommended that the Trustees file a suit to set aside the various real estate purchases made by Ambulatory Services, but no suit was ever filed by the Trustees.[54]

On February 23, 2017, approximately two years after the alleged comments by Mr. Guice and more than nine years after its purchase of the Subject Property, Ambulatory Services filed a title insurance policy claim with First American.[55] In its claim submission, Ambulatory Services alleged that its 2007 purchase of the Subject Property was void "because the Jackson County Board of Supervisors did not ratify" the contract with Pinehaven pursuant to Mississippi Code Ann. § 41-13-15(4).[56] On March 9, 2017, Ambulatory Services filed suit solely against Pinehaven, alleging its purchase of the Subject Property from Pinehaven was void because Ambulatory Services was a "Community Hospital" and because the Jackson County Board of Supervisors failed to ratify the transaction.[57] Despite the pending claim for insurance coverage, Ambulatory Services did not inform First American of the lawsuit it had filed against Pinehaven.[58]

On March 22, 2017, Braxton Wagnon, Senior Claims Counsel of First American sent a letter and a detailed email to counsel for Ambulatory Services seeking additional information about

[52] R. 1165
[53] R. 1616-1628.
[54] *Id.*
[55] R. 1139-1141.
[56] *Id.*
[57] R. 48-63.
[58] R. 1180.

the title insurance claim.[59] The email specifically requested copies of documents evidencing the intent of any persons or entities to challenge the insured's title to the Subject Property.[60] On April 6, 2017, Counsel for Ambulatory Services sent correspondence to Mr. Wagnon and provided copies of the various documents associated with the underlying transaction.[61] In this correspondence, Counsel still did not identify any party currently asserting Ambulatory Services' title was defective nor did he disclose the pending litigation with Pinehaven.[62] The correspondence did state that no "written notices or communications" about the lack of ratification by the Board of Supervisors were given by Ambulatory Services or its representatives to First American or its agent prior to the issuance of the Policy.[63] Counsel for Ambulatory Services also stated that no request to ratify the transaction was ever made by the Singing River Health System or Ambulatory Services to the Board of Supervisors.[64] The correspondence identified the alleged February 2015 correspondence from Mr. Guice, but despite the passage of more than two years since the Guice letter, it provided no evidence of subsequent lawsuits or legal challenges by anyone based upon said allegations.[65]

On May 2, 2017, First American issued a letter denying coverage for the claim of Ambulatory Services.[66] Specifically, the basis for the denial of the claim was that there was no evidence of an adverse claim to title to the Subject Property and that certain Exclusions of the Policy applied because: (1) any title defect arose from an excluded statute; (2) to the extent that any ratification by the Board of Supervisors was required, any title defect was created, suffered,

[59] R. 1151-53.
[60] *Id.*
[61] R. 1154-1162.
[62] *Id.*
[63] R. 1159.
[64] *Id.*
[65] *Id.*
[66] R. 1163-1167.

assumed or agreed to by Ambulatory Services' inaction or failure to act to obtain said ratification; (3) Ambulatory Services did not notify First American prior to the issuance of the Policy that ratification of the contract was supposedly required; and (4) Ambulatory Services had not sustained a loss or damage which would give rise to indemnity under the policy.[67]

On May 5, 2017, counsel for Ambulatory Services requested that First American reconsider its claim.[68] On May 16, 2017, First American responded and reiterated its denial of coverage pursuant to the provisions of the Policy.[69]

On June 7, 2017, Ambulatory Services filed an Amended Complaint adding First American as a defendant to the pending litigation with Pinehaven.[70] The pleading includes the prior lack of ratification claim against Pinehaven and a claim that First American was negligent in failing to list an exception in the Policy that the subject transaction was in violation of Mississippi Code Ann. § 43-37-3, which statute was not mentioned in the prior claim for coverage under the Policy.[71] Ambulatory Services also alleged it is entitled to benefits under the Policy and that First American unreasonably denied its request for said benefits.[72]

---

[67] *Id.*
[68] R. 1168-1169.
[69] R. 1170-1173.
[70] R. 104-133.
[71] R. 111. Ambulatory Services did not raise this statute in its Brief. First American notes that 42 U.S.C.A. §4651 is the federal equivalent to Miss. Code Ann. §43-37-3. Numerous courts throughout the country have stated that this federal act does not provide a private cause of action for parties charging violations of said act. *See Will-Tex Plastics Mfg., Inc. v. Department of Housing & Urban Development*, 346 F.Supp. 654 (E.D. Pa. 1972), aff'd without op. 478 F.2d 1399 (3rd Cir. 1973), *Rubin v. Department of Housing & Urban Development*, 347 F.Supp. 555 (E.D. Pa. 1972), *Martinez v. Department of Housing & Urban Development*, 347 F.Supp. 903 (E.D. Pa. 1972), *Rhodes v. Chicago*, 516 F.2d 1373 (7th Cir. 1975), *Paramount Farms, Inc. v. Morton*, 527 F.2d 1301 (7th Cir. 1975), *Barnhart v. Brinegar*, 362 F.Supp. 464 (W.D. Mo. 1973), *Whitman v. State Highway Commission*, 400 F.Supp. 1050 (W.D. Mo. 1975), *Nall Motors, Inc. v. Iowa City*, 410 F.Supp. 111 (S.D. Iowa 1975), aff'd 533 F.2d 381 (8th Cir. 1976), *United States v. 249.12 acres of land*, 414 F.Supp. 933 (W.D. Okla. 1976). First American would argue that no private cause of action exists for a violation of Miss. Code Ann. §43-37-3 as well.
[72] *Id.*

During the pending litigation, a supplemental claim for coverage under the Policy was submitted by Ambulatory Services on January 12, 2018.[73] A denial of the supplemental claim was issued on February 16, 2018.[74]

Since its purchase in 2007, Ambulatory Services has possessed the Subject Property, paid the ad valorem taxes[75] and even listed the property for sale for the sum of $4.2 million dollars.[76] At the hearing on the motions below in 2018, it was noted by counsel that a "For Sale" sign remained on the Subject Property.[77]

To this date, no entity or person has filed a legal challenge or recorded any claim in the local land records adverse to Ambulatory Services' title to the Subject Property. Neither the Trustees nor the Board of Supervisors are parties to this litigation and no proof was offered that either entity has legally or otherwise filed a challenge to the validity of Ambulatory Services' title to the Subject Property or any of its other real property holdings. The only entity that has raised any question regarding Ambulatory Services' title to the Subject Property is – Ambulatory Services.

## SUMMARY OF THE ARGUMENT

Ambulatory Services owns the Subject Property. Ambulatory Services was created by the Singing River Hospital System pursuant to a broad legislative mandate to provide healthcare services to the public.[78] It purchased the Subject Property in the same manner as it purchased numerous other parcels of real property over the years. Ambulatory Services offered no proof that it ever obtained ratification by the Jackson County Board of Supervisors of a single purchase of

[73] R. 1174-1175.
[74] R. 1177-1186.
[75] R. 1957-1958.
[76] R. 1959-1974.
[77] R. 2556.
[78] *See* 1985 Miss. Laws ch. 511, § 1, eff July 1, 1985.

real property. Now it maintains that the purchase of the Subject Property should have been ratified by the Jackson County Board of Supervisors.

Ambulatory Services is not a "community hospital" as defined by Miss. Code Ann. § 41-13-10(c). There is no statute or case law which requires Ambulatory Services to seek ratification of its purchases of real property from the Jackson County Board of Supervisors. All of the actions taken by Ambulatory Services in the purchase of the Subject Property were authorized by statute.

Ambulatory Services should be estopped from pursuing its claims to void its own title to the Subject Property. Although Ambulatory Services claims that it did not "discover" the alleged issue until 2015, the record reflects that Ambulatory Services own attorney thoroughly reviewed the ratification requirement prior to the purchase of the Subject Property in 2007 and determined that no ratification by the Board of Supervisors was necessary. The CEO of Ambulatory Services testified that his actions in purchasing the Subject Property were justified. Ambulatory Services did not rely upon the Policy in closing the transaction as it was not requested or issued until months later.

Ambulatory services has possessed the Subject Property and paid taxes on the property since December of 2007. It is a separate corporate entity which properly authorized the purchase of the Subject Property on its minutes. In moving forward with the purchase after the review by its counsel, Ambulatory Services represented that it had the authority to consummate the transaction. Ambulatory Services now seeks to change its position and asserts that the transaction was not properly authorized. It would be patently unfair to allow Ambulatory Services to change its interpretation of the law so long after the fact and to pursue damages against the defendants who relied on the public records, the legal authorities cited and the representations and actions of Ambulatory Services.

Ambulatory Services is not entitled to benefits under terms of the Policy. It received the bargain that it sought. By the time Ambulatory Services purchased the Policy, the transaction was closed, the funds had been paid, and its deed to the Subject Property had been recorded. Ambulatory Services' attorney reviewed the issue, which now forms the basis for the claim, prior to the purchase. Neither he nor his law firm were representing First American when the determination was made to move forward with closing. Ambulatory Services has purchased numerous other parcels without any evidence of ratification by the Board of Supervisors. Ambulatory Services knew or should have known that no ratification of the transaction occurred. By moving forward with the purchase without ratification, it created the alleged defect in its title.

There is nothing which appears in the land records regarding the title claim now asserted by Ambulatory Service. Although Ambulatory Services was aware of the alleged issue prior to closing, it did not disclose the issue to First American in writing or otherwise. There has been no proof of damages offered by Ambulatory Services and no third party has legally challenged the title to the Subject Property or claimed ownership of said property.

The relationship between Ambulatory Services and First American in this matter arises from the existence of the Policy. First American owed no duty to Ambulatory Services beyond the terms and conditions of the Policy. The title search conducted prior to closing was initiated by the attorney for Ambulatory Services. First American did not participate in the closing of the transaction and no title binder or title commitment was issued by First American. Because of this fact, it was not possible for Ambulatory Services to rely upon any action taken by First American in its purchase of the Subject Property.

Ambulatory Services has no claim for negligence against First American. There is no duty for title insurers to include exceptions to coverage in title policies. Title insurance does not work

to clear title to real property. Tile insurance policies are contracts to indemnify the insureds against actual monetary loss. There is no evidence that First American engaged in any "gratuitous undertaking" to do anything more than is set forth in the Policy. Any claims for negligence by Ambulatory Services are barred by the three (3) year statute of limitations. This Court should affirm the decision of the Circuit Court of Harrison County, Mississippi and dismiss Ambulatory Services' claims against First American.

## ARGUMENT

### I. AMBULATORY SERVICES OWNS THE SUBJECT PROPERTY

In its brief, Ambulatory Services presents four questions as the basis for its appeal of the dismissal of its claims in the proceedings below.[79] The argument embarks on a critical self-analysis by Ambulatory Services of the manner of its own existence. First, Ambulatory Services asks if it may be considered to be a "community hospital" as defined by Miss. Code Ann. § 41-13-10(c).[80] Second, assuming that it is not a "community hospital", Ambulatory Services asks if it is still bound by Miss. Code Ann. § 41-13-15(4) in its acquisition of real property.[81] The answer to both of these questions is "no".

#### A. AMBULATORY SERVICES WAS CREATED BY SPECIFIC STATUTES ADOPTED BY THE MISSISSIPPI LEGISLATURE REGARDING THE PROVISION OF HEALTHCARE SERVICES TO THE GENERAL PUBLIC

For an analysis of the issues raised in this proceeding, it is helpful to understand how Ambulatory Services was formed. In 1998, the Trustees created Ambulatory Services by filing its Articles of Incorporation.[82] It is actually the Trustees and not Ambulatory Services who are

[79] *Brief of Appellant* p. 1.
[80] *Id.*
[81] *Id.*
[82] R. 372-375; see also *Brief of Appellant* pp. 4-5.

governed by the statutes set out in Title 41 Chapter 13 of the Mississippi Code related to community hospitals.[83] The general powers and duties of the Trustees are specifically enumerated in Miss. Code Ann. § 41-13-35. In 1985, the Mississippi Legislature amended § 41-13-35 to include the following subsection:

> (4) The decisions of said board of trustees of the community hospital shall be valid and binding unless expressly prohibited by applicable statutory or constitutional provisions.[84]

A statement of legislative intent as to the powers of the trustees of community hospitals was included in the 1985 law and it stated:

> It is the intent and purpose of this act to clarify and expand the power of boards of trustees of community hospitals so as to allow such community hospitals to operate efficiently, to offer competitive health care services, to respond more effectively to new developments and regulatory changes in the health care area, and to continue to serve and promote the health and welfare of the citizens of the State of Mississippi. **This act shall be liberally construed so as to give effect to such intent and purpose** (emphasis added).[85]

Ambulatory Services has not raised any constitutional arguments in this case and the arguments relied upon in its brief are based upon the statutes governing the conduct of the trustees of community hospitals and their acquisition of property. Record legal title to the Subject Property in this case was never acquired by the board of trustees of a community hospital.

The Trustees established Ambulatory Services in 1998 pursuant to Miss. Code Ann. § 41-13-35(5)(r) which states in part:

> (5) The power of the board of trustees shall specifically include, but not be limited to, the following authority:
>
> (r) To establish as an organizational part of the hospital or to aid in establishing **as a separate entity** (emphasis added) from the hospital, hospital auxiliaries designed to aid the hospital, its patients, and/or families and visitors of patients, and **when**

[83] *See* J. Jackson, M. Miller & D. Campbell, 5 MS Prac. Encyclopedia of Mississippi Law (2d ed.) § 36:10 Public hospitals.
[84] § 41-13-35(4).
[85] *See* Jackson, *supra*, § 36:10, citing 1985 Miss. Laws ch. 511, § 1, eff July 1, 1985.

> **the auxiliary is established as a separate entity from the hospital** (emphasis added), the board of trustees may cooperate with the auxiliary in its operations as the board of trustees deems appropriate;

It is undisputed that the Trustees established Ambulatory Services as a separate entity from the community hospital.[86] The Mississippi Legislature gave the Trustees the broad power to establish this separate entity for healthcare purposes. Ambulatory Services has operated and was intended to function as a completely separate non-profit corporation.[87] The documentation produced in this case verifies that Ambulatory Services' purpose is to provide health care services to the general public and these services benefit the area served by the Trustees.[88]

### B. AMBULATORY SERVICES' PURCHASE OF THE SUBJECT PROPERTY WAS AUTHORIZED BY LAW

The record below establishes that Ambulatory Services is a Mississippi non-profit corporation.[89] The powers of non-profit corporations are governed by Miss. Code Ann. § 79-11-151 which states in part:

> Each corporation shall have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized including, **without limitation** (emphasis added),
> . . .
> (d) **To purchase, take, receive, lease, take by gift, devise or bequest, or** otherwise acquire**, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated** (emphasis added) . . .

The Corrected Articles of Incorporation of Ambulatory Services state that it is authorized to "acquire property, real, personal, or mixed, by purchase, gift, devise or bequest, **unconditionally** (emphasis added), or in trust for the benefit of the Supported Organization . . ."[90] Ambulatory

[86] R. 372-375.
[87] R. 365; 811-812; 814; 833; 856; 929-930; 951; and 1084-1090.
[88] R. 372-375.
[89] R. 104; 372-375.
[90] R. 374.

Services' corporate bylaws state that "The board of directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation . . ."[91] Therefore, Ambulatory Services has the statutory and corporate power to purchase and own real property unconditionally in its own separate name.

Likewise, the Trustees were statutorily authorized pursuant to Miss. Code Ann. §41-13-38(2) to assist Ambulatory Services as follows:

> . . .(2) The board of trustees may provide financial assistance or provide grants to nonprofit health care provider groups and other recognized nonprofit entities and charities where it is determined by the board that such action will benefit the health or welfare of the citizens of the service area.

This liberally construed power unequivocally authorizes trustees of community hospitals to provide **public** funds to nonprofit health care providers when such action will benefit the health or welfare of the citizens of its service area. The legislature determined that the expenditure of these public funds in this manner serves a public purpose and meets a public need. In July of 2007, the Board of Directors, which is the governing authority of Ambulatory Services, voted to enter into a contract with Pinehaven for the purchase of the Subject Property.[92] The Trustees agreed to provide financial services to this nonprofit corporation for the purchase of the property.[93] Each of these actions involved the expenditure of public funds for healthcare purposes and each of these actions was authorized by statute.

### C. AMBULATORY SERVICES IS NOT A COMMUNITY HOSPITAL

Ambulatory Services argues that it is a "community hospital" as defined by Miss. Code Ann. § 41-13-10(c).[94] The statute states:

---

[91] R. 382.
[92] R. 401; 1105.
[93] R. 1944-1945; 535.
[94] *See Brief of Appellant* p. 15.

> (c) "Community hospital" shall mean any hospital, nursing home and/or related health facilities or programs, including, without limitation, ambulatory surgical facilities, intermediate care facilities, after-hours clinics, home health agencies and rehabilitation facilities, established and acquired by boards of trustees or by one or more owners which is governed, operated and maintained by a board of trustees.

The term "board of trustees" is defined in Miss. Code Ann. § 41-13-10(b) as follows:

> (b) "Board of trustees" shall mean the board appointed pursuant to Section 41-13-29, to operate a community hospital.

Miss. Code Ann. § 41-13-29(e) provides that the Jackson County Board of Supervisors appoints the Trustees of the Singing River Health System. The definition of "community hospital" in § 41-13-10(c) does not describe the term "community hospital" by the using a type of organization (i.e. partnership, corporation, limited liability company, etc.). Rather, it references specific structures, programs or facilities created by a board of trustees or owners. Obviously, the legislature could have expanded the definition of a community hospital and inserted the terms "subsidiary" or "instrumentality" if the intent was to include such separate entities in this definition as was done with the Mississippi Tort Claims Act.[95]

Instead, the definition uses references to certain physical facilities which are presumed to exist. The definition employs the use of terms such as a "hospital", a "nursing home" or "related health facilities." In this case, the Trustees of the Singing River Health System actually operate two separate community hospitals.[96] Ambulatory Services does not own or operate either hospital. This matter does not relate to either hospital. It involves undeveloped land that sits vacant more than thirteen years after its purchase.[97] The Subject Property was never intended to be used as a

[95] *See* Miss. Code Ann. § 11-46-1(g).
[96] R. 868. *See also* Miss.A.G.Op. 2015-00370 (Brett K. Williams) 2015 WL 926833 (November 6, 2015).
[97] R. 371; 401; 1165.

hospital.[98] It would be impossible to characterize the property as it existed at the time of purchase, or at any time thereafter, as a hospital or any other type of facility identified in the statute.

Ambulatory Services argues that it should be treated as a board of trustees of a community hospital, and for the first time since its formation in 1998, argues that it has no independent authority to purchase land.[99] While boards of supervisors and trustees of community hospitals "may" acquire and hold real estate for health care purposes, the statute relied upon by Ambulatory Services for this premise does not state that this is the only way such services and facilities may exist.[100]

The "community hospital" definition employed in § 41-13-10(c) also uses language that a hospital or facility is "established and acquired by boards of trustees or by one or more owners which is governed, operated and maintained by a board of trustees." At times, Ambulatory Services argues in its brief that it is a healthcare facility.[101] Ambulatory Services is not a hospital nor a facility. Ambulatory Services is a separate corporation and it is not governed by a board of trustees. Ambulatory Services is governed by a separate board of directors ("Board of Directors").[102] It possesses its own tax identification number and files its own separate tax returns.[103] It maintains its own bank accounts.[104] The Board of Directors meets on a regular basis in order to conduct the business of the corporation and maintains minutes of those meetings.[105]

---

[98] R. 836-837.
[99] *See* Brief of Appellant pp. 20-30 citing Miss. Code Ann. § 41-13-15(4).
[100] *See* Miss. Code Ann. § 41-13-15(4) which states in part "Owners and boards of trustees, acting jointly or severally, **may acquire** and hold real estate . . ."
[101] See Brief of Appellant at pp. 1, 15, 18, 20, 22-24.
[102] R. 808; 1065-1081.
[103] R. 1934.
[104] *Id.*
[105] R. 1904-1905; 1936-1938.

The Board of Directors is the governing body of Ambulatory Services and the corporation is a statutorily authorized separate entity from the Trustees.[106]

Ambulatory Services argues that it should be treated as an "instrumentality" of the Trustees and cites the case of *Bolivar Leflore Med. All., LLP v. Williams,* 938 So.2d 1222 (Miss. 2006).[107] The term "instrumentality" arose in this case from the language used in the Mississippi Tort Claims Act, which defines the term "political subdivision" among other things as a "community hospital as defined in Section 41-13-10, Mississippi Code of 1972 . . . or other *instrumentality* thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or sue or be sued in its own name."[108] The present case does not involve the Mississippi Tort Claims Act and, as previously noted, Miss. Code Ann. § 41-13-10 does not use the term "instrumentality." The *Bolivar* case involved an entity known as the Bolivar Leflore Medical Alliance, LLP ("BLMA").[109] The record disclosed that BLMA was a family medical clinic created by an agreement between the Greenwood Leflore Hospital and some physicians.[110] The Mississippi Supreme Court held that BLMA was not a "community hospital" because it was not "governed, operated and maintained by a board of trustees as contemplated by Miss. Code Ann. § 41-13-10(c).[111] While there are no physicians involved in the ownership of Ambulatory Services, the same legal analogy from *Bolivar* applies in this case as Ambulatory Services is a completely separate entity governed, operated and maintained by a separate Board of Directors and not governed by a board of trustees as defined by statute.

---

[106] *See* Miss. Code Ann. § 41-13-35(5)(r).
[107] Brief of Appellant at pp. 16, 24 and 26.
[108] *See Bolivar Leflore Med. All., LLP,* 938 So.2d at 1226-1227.
[109] *Id.* at 1223.
[110] *Id.*
[111] *Id.* at 1231.

## D. NO STATUTE REQUIRES AMBULATORY SERVICES TO SEEK RATIFICATION OF ITS PURCHASES OF REAL PROPERTY

Alternatively, Ambulatory Services argues that even if it is not a community hospital, the statutory provisions regarding the provision of healthcare to the public should be interpreted in a "practical" manner when it comes to the ratification issue.[112] Stated another way, the argument seeks new authority for courts to impose a requirement of ratification to the Subject Transaction when the statutes do not. The argument is characterized as if Ambulatory Services or the Trustees improperly expended "public funds" in purchasing the Subject Property for healthcare related purposes.[113]

The obvious response to this argument is that the statutes at issue authorize the transfer/expenditure of public funds for healthcare related purposes. The transaction did not happen by accident nor is there any proof that it was ill-conceived. A board of trustees (without the approval from an owner of a community hospital) may provide financial assistance or grants "to recognized nonprofit entities and charities where it is determined by the board that such action will benefit the health or welfare of the citizens of the service area."[114] The Trustees were legally authorized to appropriate funds to Ambulatory Services. Ambulatory Services was lawfully created.[115] Ambulatory Services is a separate corporation which is authorized to acquire and own real estate.[116] None of the statutes authorizing these procedures require ratification by the local board of supervisors.

---

[112] *See Brief of Appellant* p. 25.
[113] *See Brief of Appellant* pp. 24-30.
[114] Miss. Code Ann. § 41-13-38(2).
[115] Miss. Code Ann. § 41-13-35(5)(r).
[116] *See* Miss. Code Ann. § 79-11-151; *Articles of Incorporation* R. 372-375; Bylaws R. 376-393.

In adopting the revisions to Miss. Code Ann. § 41-13-35 in 1985, the Mississippi Legislature clarified and expanded the powers of boards of trustees of community hospitals.[117] The Legislature purposely intended to allow the community hospitals to operate efficiently so as to offer competitive health care services and to respond more effectively to new developments and regulatory changes in the health care area.[118] The Legislature wanted these organizations to continue to serve and promote the health and welfare of the citizens of the State of Mississippi.[119] Courts should liberally construe this law so as to give effect to this intent and purpose.[120]

The non-statutory ratification argument employed by Ambulatory Services infers that it and the Trustees are one and the same.[121] However, the record reflects that the entities were separate businesses and operated as such.[122] The former CEO of the Singing River Hospital System testified that he was advised by counsel that Ambulatory Services was required to be set up as a completely distinct entity so that it could hold various interests in joint ventures and partnerships.[123] This fact echoes the intent expressed in the 1985 revisions to Miss. Code Ann. § 41-13-35 to address the changing needs for the provision of health care.[124] It is a well settled rule of law in Mississippi that a corporation is a legal entity separate and distinct from its shareholders.[125] Thus, having separate subsidiaries offers another option for providing improved healthcare to the local citizens. It has been noted that the creation of such an entity allows the new

---

[117] *See* Jackson, *supra*, § 36:10, citing 1985 Miss. Laws ch. 511, § 1, eff July 1, 1985.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Brief of Appellant* p. 25.
[122] R. 398-426; 808; 811-812; 929; 1904-1905; 1934; 1936-1938; 1048-1049; 1106-1138; 1564; 1761-1797.
[123] R. 811-812.
[124] *See* 1985 Miss. Laws ch. 511, § 1, eff July 1, 1985.
[125] *See American Tel. & Tel. Co. v. Purcell Co., Inc.* 606 So.2d 93, 97 (Miss. 1990), citing *Skinner v. Skinner*, 509 So.2d 867, 870 (Miss. 1987) et al (citations omitted).

entity to obtain a separate number from the federal agency known as the Center for Medicare/Medicaid Services and be of great assistance to healthcare providers for accounting and contracting services.[126]

Ambulatory Services cites a Mississippi Attorney General's Opinion in an attempt to support its argument for the application of a ratification requirement for the Subject Transaction.[127] The opinion was issued after Ambulatory Services purchased the Subject Property. While such opinions sometimes offer insight into various issues, the opinions are not binding precedent upon this Court.[128] To give the opinion some context, it is worth noting that there have been numerous attorney general opinions issued on the topic of county and/or municipality owned hospitals and the related issue of what is a "community hospital."

While the Attorney General has on occasion been reluctant to comment on the legality of a board of trustees of a community hospital creating a separate corporation or limited liability company, the office has opined that a separate non-profit corporation created by community hospital is not a "community hospital" as defined in Miss. Code Ann. §41-13-10(c).[129] In another instance, the Attorney General responded to a request by Counsel for the Trustees of the Singing River Health System in 2015.[130] The two questions proposed were: (1) Can Ambulatory Services purchase or acquire property in its own name? and (2) Can Ambulatory Services sell property that

---

[126] *See* Miss.A.G.Op. 2006-00040 (W. Dal Williamson), 2006 WL 1737883, *1 (April 7, 2006).
[127] *Brief of Appellant* pp. 25-28.
[128] *See Shelter Mut. Ins. Co. v. Dale,* 914 So.2d 698, 703 (Miss. 2005), citing *In re Assessment of Ad Valorem Taxes on Leasehold Interest Held by Reed Mfg., Inc. ex rel. Itawamba County Bd. of Sup'rs,* 854 So.2d 1066, 1071 (Miss.2003) (citing *City of Durant v. Laws Constr. Co.,* 721 So.2d 598, 604 (Miss.1998)).
[129] *See* Miss.A.G.Op. (W. Dal Williamson), 2006 WL 1737883, *1 (April 7, 2006) and Miss.A.G.Op. 2016-00048 (Barry K. Cockrell), 2016 WL 3361060 (May 27, 2016).
[130] *See* Miss.A.G.Op. 2015-00370 (Brett K. Williams) 2015 WL 926833 (November 6, 2015). It is unclear if this request was in response to the incidents described in Ambulatory Services brief regarding communications between William Guice and the Trustees.

was never used for medical purposes without ratification from the local board of supervisors?[131] The request did not relate to the Subject Property, but rather to the acquisition by Ambulatory Services of other land and a vacant building formerly used as a restaurant which was never used for any medical purpose.[132] The Attorney General declined to offer an opinion in response to either question.[133]

The Attorney General has opined that a board of trustees of a community hospital may create a subsidiary for the purposes of operating medical clinics and provide funds to said subsidiary per the authority granted by Miss. Code Ann. § 41-13-38.[134] The Attorney General has also opined that ratification of a proposed transaction whereby Ambulatory Services would sell stock in one of its subsidiaries was not required since the subsidiary was not a "community hospital."[135] The Attorney General also has recognize the boards of trustees of community hospitals do have some limited authority to acquire property in their own name and independently of the local board of supervisors under Miss. Code Ann. § 41-13-35(5)(g) per the decision of the Mississippi Supreme Court in *Green County v. Corporate Mgmt.*, 10 So.3d 424, 431 (Miss. 2009).[136] The opinion notes that no ratification of the acquisition of property in this manner is required, but that ratification may be required prior to selling such property.[137]

Nevertheless, Ambulatory Services argues that the 2008 Attorney General Opinion given to counsel for the Board of Trustees of the Magnolia Regional Health Center ("Magnolia Opinion") stands for the proposition that ratification was necessary in Ambulatory Services

---

[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *See* Miss.A.G.Op. 2007-00528 (Albert G. Delgadillo), 2008 WL 965692 (March 28, 2008).
[135] *See* Miss.A.G.Op. 2016-00048 (Barry K. Cockrell), 2016 WL 3361060 (May 27, 2016).
[136] *See* Miss.A.G.Op. 2009-00327 (Roy Williams) 2009 WL 2517267 *2-*3 (July 3, 2009).
[137] *Id.* *2.

purchase of the Subject Property in this case.[138] The facts in the Magnolia Opinion involved a subsidiary formed solely for the purpose of holding title to real estate for the benefit of the Trustees of the community hospital.[139] Ambulatory Services does not exist solely for the purpose of holding real property for the benefit of the Trustees. It is a completely separate fully operational entity formed pursuant to the authority granted by Miss. Code Ann. Miss. Code Ann. § 41-13-35(5)(r). On the same date as the Magnolia Opinion, the Attorney General issued another opinion to the same attorney for the same client stating that a board of trustees could form a non-profit corporation whose purpose included **owning** a medical clinic for use by the public and provide funds to the non-profit as long as the trustees determined that the funds "will benefit the health or welfare of the citizens of the service area" ("Magnolia 2 Opinion").[140] This procedure is exactly how Ambulatory Services acquired the Subject Property.

As established in the record for this case, Ambulatory Services operates surgery centers, clinics, fitness centers and even owns vacant lands and abandoned restaurants. There is no proof of the Board of Supervisors ever ratifying a single purchase of real estate by Ambulatory Services. Ambulatory Services' argument in this case is at odds with the way it has operated for many years. The argument is also in contrast with the broad powers given by the 1985 amendment to Miss. Code Ann. § 41-13-35 discussed earlier and could have an impact not only on the other properties and facilities owned by Ambulatory Services but on many other subsidiaries created by hospitals throughout Mississippi.

---

[138] *Brief of Appellant* pp. 25-28.
[139] *See* Miss.A.G.Op. 2007-00527 (Albert G. Delgadillo), 2008 WL 965691 (March 28, 2008) regarding the formation of a Section 501(c)(2) title holding company incapable of operating separately on its own outside the income from the specific property.
[140] *See* Miss.A.G.Op. 2007-00528 (Albert G. Delgadillo), 2008 WL 965692 (March 28, 2008) regarding the formation of a Section 501(c)(3) corporation similar to Ambulatory Services.

## E. AMBULATORY SERVICES IS ESTOPPED FROM CHALLENGING ITS OWN TITLE TO THE SUBJECT PROPERTY.

The Mississippi Supreme Court has defined equitable estoppel as:

> the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.
>
> The doctrine of estoppel is based upon the ground of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon.[141]

The Circuit Court determined that Ambulatory Services should be estopped from changing its position regarding its authority to acquire the Subject Property almost ten (10) years after its purchase.[142] Ambulatory Services argues that the Circuit Court erred in determining that it was estopped from pursuing its claims in this case.[143] Ambulatory Services bases its argument upon the alleged contents (or lack of content) in the minutes of the Jackson County Board of Supervisors.[144] It argues that the "minutes rule" trumps all equitable arguments and cites authorities related to the conduct of parties contracting with local boards.[145]

The "minutes rule" does not apply in this case. There was no contract with a board of supervisors that needs to be enforced. The contract at issue was between Pinehaven and Ambulatory Services, a separate non-profit corporation established pursuant to Mississippi law. The contract at issue **was approved** in the minutes of the Board of Directors of Ambulatory

---

[141] *See Mayor & Bd. of Aldermen, City of Clinton v. Welch,* 888 So.2d 416, 424 (Miss. 2004), citing *Koval v. Koval,* 576 So.2d 134, 137 (Miss.1991).
[142] R. 2367.
[143] *See* Brief of Appellant pp. 30-32.
[144] *Id.*
[145] *Id.*

Services.[146] Ambulatory Services speaks through the content of its minutes.[147] The Mississippi Supreme Court has held:

> The rule is well established that a corporation is a legal entity separate and distinct from its shareholders.[148] . . . A corporation, through its Articles of Incorporation, By–Laws and state statutes, is given the authority to act provided the proper formalities are followed.[149] . . . Although a corporation is vested with the authority to act, valid affirmative action on the part of the corporation is required in order to transform the authority to act into a resolution to act and subsequent action.[150]
>
> A corporation speaks and acts through its records and minutes.[151]
>
> . . . A formal corporate resolution is not the only evidence of corporate action, however, corporate records and minutes constitute the best evidence of corporate action.[152]
>
> . . . If corporate records and minutes of the action are available, parol evidence is not admissible to prove the corporation action, personal knowledge of corporate action is always admissible.[153]

This is true even if Ambulatory Services is deemed to be a public corporation.[154] Through the testimony of its prior CEO, its attorney and through the evidence of its prior purchases and its corporate minutes, Ambulatory Services represented that it had the authority given through its Articles of Incorporation and Bylaws to enter into the subject contract and purchase. There has been no legal attack upon or adverse claim asserted against Ambulatory Service's title to the

---

[146] R. 1092-1099.
[147] *See American Tel. & Tel. Co. v. Purcell Co., Inc.,* 606 So.2d at p. 97.
[148] *Id.* citing *Skinner v. Skinner*, 509 So.2d at p. 870, citing *Bruno v. Southeastern Services, Inc*., 385 So.2d 620 (Miss.1980), *Fairchild, et al. v. Keyes*, 448 So.2d 292 (Miss.1984), and *Vickers v. First Mississippi National Bank*, 458 So.2d 1055 (Miss.1984). Accord *U.S. v. State Tax Commission of State of Miss*., 505 F.2d 633 (5th Cir.1974) and *Childers v. Beaver Dam Plantation, Inc.,* 360 F.Supp. 331 (N.D.Miss 1973) (applying Mississippi law).
[149] *Id.* citing *Jackson Redevelopment Authority v. King, Inc.,* 364 So.2d 1104, 1110–11 (Miss.1978); 18 C.J.S. Corporations.
[150] *Id.* citing *Mississippi Power & Light Co. v. Conerly*, 460 So.2d 107, 112 (Miss.1984); *Jackson Redevelopment Authority v. King, Inc.*, 364 So.2d 1104, 1110–11 (Miss.1978); *Mississippi Power & Light Company v. Blake*, 236 Miss. 207, 217, 109 So.2d 657 (1959).
[151] *Id.* citing 18 C.J.S. Corporations § 191, § 554; 19 C.J.S. Corporations § 751.
[152] *Id.* citing 32A C.J.S. Evidence, § 810.
[153] *Id.*
[154] *See Ross v. Greenwood Utilities,* 2014 WL 419640 (N.Dist. MS) (August 22, 2014).

Subject Property. It would be unequitable to allow Ambulatory Services to change its position related to its authority to purchase real estate almost ten years after the fact and seek to void its own legal title to its real property.

The record reflects that Ambulatory Services is a separate legal entity from the Jackson County Board of Supervisors.[155] Neither the Trustees nor the Jackson County Board of Supervisors ("Jackson County") are parties to this litigation. Neither entity offered any testimony concerning any facts related to the case. Ambulatory Services took a position that it could purchase real property without seeking ratification from the Jackson County Board of Supervisors. Similarly, Ambulatory Services purchased numerous other parcels of real property and no evidence was offered that any of said other purchases were ever ratified by the Board of Supervisors.[156] Ambulatory Services represented that it had the authority to enter into the Subject Transaction.[157] Both the CEO of Ambulatory Services and its attorney, Mr. Dryden, concluded prior to closing that ratification by the Board of Supervisors of the purchase of the Subject property was not required.[158] In this circumstance, Mr. Dryden's knowledge and prior review of the issue is imputed to Ambulatory Services.[159] It is also worth noting that Mr. Dryden still does not believe that the Board of Supervisors needed to do anything regarding the transaction.[160]

Ambulatory Services has exercised ownership, occupied and paid taxes on the property for in excess of ten (10) years.[161] The lawsuit represents an unprecedented change in position of

[155] R. 365; 372-375; 811-812; 814; 833; 856; 929-930; 951; and 1084-1090.
[156] R. 398-428;1048-1049; 1106-1138; 1564; 1743-1758; 1761-1797.
[157] R. 122-125.
[158] R. 1953-1954; 1935.
[159] *See Rhoads v. Peoples Bank & Trust Co.,* 200 Miss. 606, 614, 27 So.2d 552, 553 (1946), *Edwards v. Hillier,* 70 Miss. 803, 13 So. 692, 693 (1893), *May v. LeClaire,* 78 U.S. 217, 233, 20 L.Ed. 50, 11 Wall. 217 (1870), citing *Le Neve v. Le Neve,* 2 White's Leading Cases in Equity, 23.
[160] R. 1480.
[161] R. 117-120; 1957-1958; 1959-1974.

Ambulatory Services regarding its own ability and that of many other similar corporations to own property. Ambulatory Services now seeks damages from Pinehaven and First American based solely upon this change in position. It should be estopped from changing its position on this issue.

Ambulatory Services places great emphasis on a "public funds" argument in support of its challenge to the imposition of the estoppel defense.[162] Public corporations are not immune from the doctrine of equitable estoppel.[163] In the *Mayor & Board of Aldermen, City of Clinton* case, the Supreme Court held that a city was bound by the city's building inspector determining that a treehouse was authorized under the zoning ordinance and was estopped from later changing its position.[164] Ambulatory Services should be bound by the actions of its Board of Directors, CEO and attorney in this matter.

In another case, the Supreme Court applied equitable estoppel against a county claiming title to real property after the county had taken inconsistent positions regarding its ownership of property over time, including collecting taxes on the parcel from others for many years.[165] The inconsistent activities by Ambulatory Services, including its purchase, sale and ownership of other properties and the payment of taxes upon all of its real estate parcels, should be considered in shielding Pinehaven and First American from this new and inconsistent claim asserted so many years after the purchase of the Subject Property.

## II. AMBULATORY SERVICES IS NOT ENTITLED TO BENEFITS UNDER THE TITLE INSURANCE POLICY

Ambulatory Services argues that the Policy which it purchased months after the closing of the Subject Transaction should provide it coverage for its alleged title defect discussed *supra.*[166]

---

[162] *See* Brief of Appellant pp. 30-32.
[163] *See Mayor & Bd. of Aldermen, City of Clinton,* 888 So.2d at 424 (citations omitted).
[164] *See Mayor & Bd. of Aldermen, City of Clinton,* 888 So.2d at 427.
[165] *See Covington County v. Page,* 456 So.2d. 739, 741-742 (Miss. 1984).
[166] *See* Brief of Appellant pp. 33-41.

Ambulatory Services never alleges a cause of action for breach of contract, choosing instead to allege that it is simply entitled to benefits under the terms of the Policy.[167]

As part of its overall discussion of insurance coverage, Ambulatory Services again argues that Pinehaven had the duty to seek ratification for the transaction.[168] Ambulatory Services recites the "minute rule" to justify coverage under the Policy and it cites the case of *KPMG, LLP v. Singing River Health System,* 283 So.3d 662, 674 (Miss. 2018), which states, " . . . it is the responsibility of the entity contracting with the Board, not the responsibility of the Board itself, to ensure that the contract is legal and properly recorded on the minutes of the board."[169] As discussed *supra,* the facts of this case do not support the use of the "minute rule" argument to void title and trigger coverage by the Policy. The is no statute which requires Pinehaven to interact with the Board of Trustees or the Board of Supervisors in this transaction. Pinehaven did not contract to sell land to the Trustees or to the Board of Supervisors. Pinehaven contracted with Ambulatory Services and the contract was approved in the minutes of Ambulatory Services, the contracting entity.[170] Pinehaven met its duty. There is no violation of the "minute rule" and hence, there is no title defect and there is no coverage.

### A. AMBULATORY SERVICES RECEIVED WHAT IT INTENDED

The only connection between Ambulatory Services and First American in this matter is the Policy. The Policy is an ALTA Owner's Policy and is a standard form title insurance policy

[167] *See* Amended Complaint at ¶ 39, R. 111.
[168] *Id.* pp. 36-37.
[169] *See KPMG, LLP,* 283 So.3d at 674, citing *Wellness, Inc. v. Pearl River Cty. Hosp.,* 178 So.3d 1287, 1291 (Miss. 2015).
[170] R. 1092-1099. All that is necessary is that "enough of the terms and conditions of the contract are contained in the minutes for a determination of the liabilities and obligations of the contracting parties without the necessity of resorting to other evidence." *See Thompson v. Jones Community Hospital,* 352 So.2d 795, 797 (Miss. 1977).

adopted in 1992.[171] It is widely used by various title insurance companies in the United States.[172] The Policy states in part:

> EXCLUSIONS FROM COVERAGE
>
> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> (a) created, suffered, assumed or agreed to by the insured claimant;[173]

As the Circuit Court noted, many courts have ruled that the language contained in exclusion 3(a) of the Policy "'is intended to protect the insurer from liability for matters caused by the insured's own intentional misconduct, breach of duty, or otherwise inequitable dealings.'"[174] Courts have also held that this exclusion to coverage "**applies whenever the insured intended the act causing the defect** (emphasis added), not only when the insured intended the defect or when the insured engaged in misconduct."[175] Otherwise, courts have noted, the insured could use title insurance to make a windfall profit.[176] Some courts have required insurers to establish that the defect, lien or encumbrance resulted from some intentional misconduct or inequitable dealings by the insured or the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property involved.[177] As discussed hereafter, the

---

[171] R. 129; 2360.
[172] R. 2360-2361, citing *Klein v. American Land Title Association*, 926 F. Supp. 2d 193, 196 n.3 (Dist. Ct. DC 2013).
[173] R. 130.
[174] R. 1210, citing *Moser v. Fidelity National Title Insurance Company,* 2018 WL 1413346 *6 (E.D. Tex.), citing *Home Fed. Sav. Bank v. Ticor Title Ins. Co.*, 695 F.3d 725, 732 (7th Cir. 2012) (collecting cases); *see First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 187 P.3d 1107, 1113 (Ariz. 2008) ("Title insurance principally protects against unknown and unknowable risks caused by third-party conduct, not intentional acts of the policyholder.").
[175] *See First Am. Title Ins. Co. v. Action Acquisitions, LLC* at p. 1113.
[176] *Id.* (citing *Am.Sav. & Loan Ass'n. v. Lawyers Title Ins. Corp.,* 594 F.2d 780, 784 (6th Cir. 1986).
[177] *See Home Federal Savings Bank v. Ticor Title Insurance Company,* 695 F.3d 725, 732-733 (7th Cir. 2012), citing *Brown v. St. Paul Title Ins. Co.,* 634 F.2d 1103, 1107-08 n. 8 (8th Cir. 1980).

evidence establishes that Ambulatory Services intended to purchase the property in its own name, willingly entered into the transaction after a review by its attorney and voluntarily created and assumed the risk that no ratification of its purchase was required.

Ambulatory Services takes issue with the Circuit Court's determination that it made "an affirmative decision to not seek ratification" and thereby "created its own title defect."[178] The record reflects the following information which indicates that Ambulatory Services willingly moved forward with the transaction with full knowledge of the situation and the statutes it relies upon for its claim. First American made a detailed response on this issue in its denial of Ambulatory Services' claim.[179] Ambulatory Services has purchased numerous parcels of land and is unable to offer any proof that it or anyone else ever obtained ratification of these purchases by the Jackson County Board of Supervisors.[180] The properties owned by Ambulatory Services include vacant land, clinics, surgery centers and a fitness center.[181] Ambulatory Services obviously participated in each of the transactions to purchase all of this real property. It knew that no ratification of the transactions was ever sought or occurred. Its CEO testified that it never occurred to him that ratification was required. Ambulatory Services' attorney actually reviewed the ratification issue on behalf of his client prior to the closing of the purchase of the Subject property and made an affirmative decision that ratification was not necessary.[182] The purchase of title insurance was not contemplated when this decision to purchase the real estate was made.[183]

All of these facts support the Circuit Court's determination that Ambulatory Services made an informed and intentional decision to proceed with the transaction without ratification of its

[178] *See* Brief of Appellant p. 36, citing R. 2361.
[179] R. 1163-1167; 1170-1173; 1177-1186.
[180] R. 398-426;1048-1049; 1106-1138; 1564; 1761-1797.
[181] R. 397-400; 1048-1049; 1564.
[182] R. 1038.
[183] R. 1472.

purchase by the Board of Supervisors. Since the absence of ratification is the entire basis for a title claim, then the purchase of an insurance policy after the fact by this insured under these facts cannot be allowed to cover the alleged defect created or assumed by the insured at closing.[184] This Policy exclusion justifies the denial of coverage.[185]

### B. AMBULATORY SERVICES KNEW OF THE ALLEGED UNRECORDED DEFECT PRIOR TO PURCHASING THE POLICY AND DID NOT DISCLOSE THIS FACT TO FIRST AMERICAN.

The alleged title defect asserted by Ambulatory Services for which benefits are sought is that the transaction was not ratified by the Board of Supervisors of Jackson County. This alleged defect is not based upon any document recorded in the land records of Harrison County, Mississippi. The only document from the land records identified by Ambulatory Services in its Amended Complaint is the deed it received to the Subject Property.[186] Ambulatory Services questions the Circuit Court's determination that section 3(b) of the Policy excludes coverage for its title claim.[187] The Policy states:

> EXCLUSIONS FROM COVERAGE
>
> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> . . .
>
> (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;[188]

[184] *See* R. 2361-2362 and authorities cited therein.
[185] R. 130.
[186] R. 117-120.
[187] *See* Brief of Appellant at pp. 37-39.
[188] R. 130.

In its opinion, the Circuit Court cited the case of *Fleishour v. Stewart Title Guar. Co*., 743 F.Supp.2d 1060, 1071 (E.D.Mo.2010).[189] The *Fleishour* court, in reviewing the same Exclusion 3(b) provision of a policy issued by Stewart Title Guaranty Company, interpreted the provision to allow the imputation of the actual knowledge of the insured's real estate broker to her principal and enforced the exclusion of coverage.[190]

Here, Ambulatory Services' own attorney, Daryl Dryden, reviewed the ratification issue on behalf of Ambulatory Services prior to closing and determined that ratification by the Board of Supervisors was not necessary for the Subject Transaction.[191] It is undisputed that Mr. Dryden was acting solely in his capacity as attorney for Ambulatory Services at the time he made this investigation and determination.[192] He admitted that he reviewed the sole basis of Ambulatory Services' Amended Complaint prior to closing and determined that the Board of Supervisors did not need to ratify the transaction.[193] His examination of the statutes and legal authority regarding ratification displays his actual knowledge of the exact off-record defect that Ambulatory Services now relies upon for its claim. This actual knowledge of Mr. Dryden of the alleged issue prior to closing the purchase is imputed to Ambulatory Services, his client.[194]

The recorded documents regarding the Subject Property contain no reference or notice of the alleged ratification issue that was reviewed and known by Ambulatory Services prior to its purchase of the Subject Property and prior to its request for the Policy. Ambulatory Services failed to advise First American of this off-record matter prior to the issuance of the Policy in March of

---

[189] R. 2362.
[190] *Id.* p. 1071, citing *Rainey v. Foland,* 555 S.W.2d 88, 92 (Mo.Ct.App. 1977).
[191] R. 1038.
[192] *Id.*
[193] R. 1038; 2233-2234.
[194] *See Rhoads* 200 Miss. at p. 614, 27 So.2d 552, 553 (1946). *See also Edwards* 70 Miss. 803, 13 So. 692, 693 (1893) and *May,* 78 U.S. at p. 233, 20 L.Ed. 50, 11 Wall. 217 (1870), citations omitted.

2008.[195] Ambulatory Services' failure to identify this alleged defect falls squarely within Exclusion 3(b) of the Policy.

To the extent that Ambulatory Services claims that Mr. Dryden became a dual agent when his law firm was later retained to issue the title policy, the evidence reflects that his knowledge was not actually shared with First American because the issue "was completely put to bed" by the time the title policy was requested.[196] As noted, his knowledge should not automatically be imputed to First American.[197] Courts have said that "In matters involving a dual agency, the agent must act 'with a heightened sense of duty and conduct to assure that he serves both masters' interests fully.'"[198] "And an agent may never act to the detriment of his principal."[199] Technically, Mr. Dryden was an agent of the law firm which was the policy issuing agent of First American.[200] At best, Mr. Dryden was acting for his law firm as a dual agent when he subsequently issued the Policy on behalf of his firm in March of 2008 and his knowledge should not be automatically imputed to First American at that time.[201] It would be unfair to allow Mr. Dryden to allegedly create the defect while working solely for Ambulatory Services and then bind First American to unknowingly cover such a claim after the fact. Finally, it is undisputed that the matter was not disclosed to First American in writing.[202] The exclusion from insurance coverage under section 3(b) of the Policy applies.

---

[195] R. 1038; 1159.
[196] R. 1038.
[197] *See Lane v. Oustalet,* 873 So.2d 92, 95-97 (Miss. 2004).
[198] *See Whalen v. Bistes,* 45 So.3d 290, 294 (Miss.Ct.App. 2010), quoting *Lane,* 873 So.2d at 97 (¶ 20).
[199] *Id.* quoting *Lane,* 873 So.2d (¶ 18), citing *Lee Hawkins Realty, Inc. v. Moss,* 724 So.2d 1116, 1119 (Miss.Ct.App. 1998).
[200] R. 1034.
[201] *See Lane,* 873 So.2d at pp. 95-97.
[202] R. 1159.

### C. AMBULATORY SERVICES HAS SUFFERED NO LOSS OR DAMAGE

Ambulatory Services further challenges the Circuit Court's determination that section 3(c) of the Policy excludes coverage for its title claim.[203] The Policy states:

> EXCLUSIONS FROM COVERAGE
>
> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> . . .
>
> (c) resulting in no loss or damage to the insured claimant;[204]

Ambulatory Services is the record owner of the Subject Property and readily admits that no one has filed any legal challenge to its title. Yet, Ambulatory Services argues that its title to the Subject Property is void because it cannot claim ownership of the property and that certain public and private statements of an attorney have rendered the Subject Property unmarketable.[205]

First American disputes that Ambulatory Services' title to the Subject Property is void per the arguments *supra* and further argues that Ambulatory Services has suffered no actual monetary loss. Ambulatory Services argues that it has suffered a "total failure of title" and it should be compensated for the purchase price that it paid for the Subject Property.[206] In support of this measure of damages argument, it cites the case of *Brooks v. Black,* 8 So. 332, 335 (Miss. 1890).[207] The *Brooks* case involved a breach of warranty of title and not a title insurance policy.[208] First American did not warrant title to the Subject Property. Title policies are contracts for indemnity

---

[203] *See* Brief of Appellant at pp. 39-41.
[204] R. 130.
[205] *See* Brief of Appellant at pp. 39-40.
[206] *Id.*
[207] *Id.*
[208] *See Brooks* 8 So. at 333.

and there is no duty imposed upon title insurance companies to clear title to the insured property.[209] The Policy involved in this case was not a guaranty agreement and First American owed no duty to Ambulatory Services outside of the terms stated therein.

No proof of actual monetary loss or other loss has been offered by Ambulatory Services. No party has challenged its title and no court has been asked to, much less determined, that Ambulatory Services' deed to the Subject Property is void. Since December of 2007, record title in the Subject Property has remained in Ambulatory Services and it has possessed and paid all ad valorem taxes due for said property.[210] Neither the attorney who purportedly made public and private statements in 2015 regarding an alleged ratification requirement nor anyone else has filed any legal action based upon these statements. The Trustees have not challenged Ambulatory Services' title to this property or any of the numerous other parcels owned by Ambulatory Services. The Board of Supervisors have not challenged the title to the Subject Property or any other parcel acquired by Ambulatory Services. No third parties have initiated any legal action challenging Ambulatory Services' title to the Subject Property. No proof was offered of the filing of any instruments in the land records of Harrison County which have impacted Ambulatory Services' title to the Subject Property. In short, the only party that claims that Ambulatory Services' title has any defect at all is - Ambulatory Services.

Ambulatory Services continues to enjoy the use of the Subject Property without interference from anyone. It offered no evidence of the current value of the Subject Property. The record reflects that Ambulatory Services offered the property for sale in 2013 for the sum of $4.2

[209] *See Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co.,* 706 F.Supp. 477, 483 (S.Dist. Miss. 1988)**,** citing *Childs v. Mississippi Valley Title Ins. Co*., 359 So.2d 1146 (Ala. 1978) (company owed no duty to take affirmative action to clear title).
[210] R. 1957-1958.

million dollars.[211] Ambulatory Services asserts that it could find no buyers for the Subject Property, but offered no evidence that the lack of offers related to the assertion that it did not have title to the property. Even at the time of the hearings in court below, Ambulatory Services had the property listed for sale.

Ambulatory Services also takes issue with the Circuit Court's observation regarding its obvious adverse possession of the property.[212] While this comment by the Court deals more with the simple fact that Ambulatory Services has full and unchallenged ownership and use of the property as opposed to the claims of Ambulatory Services to benefits of the Policy, it is a factor regarding the challenge by Ambulatory Services to the title to the Subject Property. The Circuit Court's Opinion simply notes the difficulty anyone faces in challenging the record title and occupation of the Subject Property by Ambulatory Services since December of 2007. After all, even a void deed can support a claim of ownership by adverse possession.[213] The argument advanced by Ambulatory Services that Pinehaven permitted the use of the Subject Property is not supported by the evidence and the mere failure to evict someone from property does not constitute permissive use.[214] However, it is telling that Ambulatory Services would take issue with any argument that supported its title to the property.

---

[211] R. 1959-1974.

[212] *See* Brief of Appellant p. 40-41.

[213] The Mississippi Court of Appeals "found no merit" in the argument that a grantee of a void deed could not adversely possess the property against the grantor of said deed. *See Greenwood v. Young,* 80 So.3d 140, 147 (Miss.Ct.App. 2012).

[214] *See* Brief of Appellant p. 40 n.10. It cites *Moran v. Saucier,* 829 So.2d 695, 699-700 (Miss.Ct.App. 2002). In *Moran,* there was actual evidence of permission being granted to the occupier who did not have record title to the subject property. There is no evidence of permission being given by Pinehaven in this case. "The failure to evict . . . does not constitute permissive use" in an adverse possession case. *See Peagler v. Measells,* 743 So.2d 389, 392 (Miss.Ct.App. 1999).

## III. AMBULATORY SERVICES' ALLEGATIONS OF NEGLIGENCE WERE PROPERLY DISMISSED.

Ambulatory Services argues that First American was negligent. It's Amended Complaint states in part:

> 36. The Defendant First American Title Insurance Company had a duty to ensure that the title the Plaintiff received was a marketable title free from defects and/or other issues.
>
> 37. First American Title Company[215] was negligent when, among other things, it failed to list as an exception to the title that the subject contract and/or transaction had not been ratified . . .[216]

On appeal, Ambulatory Services argues that First American was negligent in the manner that a title search was conducted.[217] The record reflects that First American did not conduct a title search. According to the testimony of Daryl Dryden, he normally performed his own title abstracting work, but in this case, he requested the initial title abstract work from First American Abstract Company, located in Gulfport, MS.[218] First American Abstract Company is a separate company from First American Title Insurance Company and is not a party to this litigation.[219] There is no evidence that First American retained the services of First American Abstract Company for the closing. As discussed, it is undisputed that Daryl Dryden represented only Ambulatory Services at the closing of the Subject Transaction.[220] Mr. Dryden's law firm was not requested by Ambulatory Services to issue an owner's policy of title insurance until February of

---

[215] First American Title Insurance Company voluntarily entered its appearance in this case as the proper defendant which issued the Policy to Ambulatory Services. R. 143-157.
[216] First American notes that Ambulatory Services pleadings claim that Ambulatory Services failed to comply with § 43-37-3 in its purchase of the Subject Property. R. 111. This allegation was not part of the initial title claim submitted to First American. R. 1139-1140. After the litigation was filed, First American noted that the issue was not disclosed and reviewed this issue in a subsequent 2018 claim of Ambulatory Services and denied the claim based upon Exclusion 3(a) of the Policy. R. 1177-1186.
[217] *See* Brief of Appellant pp. 42-44.
[218] R. 1033; 1035; 1799-1801 and Electronic Exhibit to the Record D-1.
[219] R. Electronic Exhibit to the Record D-2.
[220] R. 1036-1038;1467-1468.

2008, two months after closing.[221] He had no contact with First American regarding this transaction prior to that time.

The negligence claim of Ambulatory Services, as phrased, does not actually relate to items appearing in the local land records. Even if the transaction had been ratified by the Board of Supervisors, no evidence of said act would have ever been discovered by an abstractor searching the land records. The report prepared by First American Abstract Company dated December 6, 2007 depicts Pinehaven as the record owner of the Subject Property.[222] This information is correct. Mr. Dryden testified that a subsequent report was prepared in February of 2008 depicting Ambulatory Services as the owner, but he did not have a copy of this report.[223] Assuming that this is true, then there would have been no error in the work of an abstractor in reviewing the local land records in February 2008.

### A. THERE IS NO DUTY OWED BY FIRST AMERICAN OUTSIDE OF THE POLICY

Ambulatory Services' negligence argument is based upon its newly adopted interpretation of law governing its own actions and is not based upon what appears in the land records. The Amended Complaint charges that First American had a duty "to list as an exception to the title" that the transaction was not ratified. There is no duty for an insurer to do such a thing. The argument ignores the fact that First American was not involved in the closing of the transaction and could not have taken any action to prevent the alleged illicit acquisition of the Subject Property by placing any language in the Policy. When the Policy was issued in March of 2008, the deal was complete and the alleged damaged title was created. No provision in the Policy could change this fact or prevent the alleged loss. First American did not cause Ambulatory Services to take

[221] R. 1472.
[222] R. 1033; 1035; 1799-1801 and Electronic Exhibit to the Record D-1.
[223] *Id.*

title to the Subject Property. The Policy was dated the day after the payment of the funds by Ambulatory Services to Pinehaven.[224] Any provision in the Policy would have been useless to Ambulatory Services after payment was made.

The argument that First American was negligent by failing to include an exception in the Policy is a fallacy. Title insurance policies contain pre-printed general exceptions from coverage and special exceptions that are inserted on an individual basis.[225] Title insurance policies do not insure against a loss encompassed in these exceptions.[226] If First American had listed an exception in the Policy stating "the subject contract and/or transaction had not been ratified"[227] as alleged in the Amended Complaint, no coverage for this claim would have existed. An insurer does not have a separate duty to include a contractual provision which eliminates coverage under the policy. Such a duty makes no sense.

Ambulatory Services' negligence claim is difficult to understand because it is not based upon the facts. It is based upon Ambulatory Services' new interpretation of the law. There is no duty to state the law in an insurance policy. The Circuit Court noted that "[E]very person must be presumed to know the law . . . and must abide the consequences of his contracts and actions."[228] Ambulatory Services did not rely upon First American's actions in purchasing the Subject Property. Even if First American had such a duty to disclose the law, the timing of the transaction made such a duty useless as the Policy was issued **after** the deal closed and Ambulatory Services owned the Subject Property. Ambulatory Services purchased the Subject Property on the advice

[224] R. 105 at ¶ 6; R. 118; 1040-1047.
[225] *See* Joyce Palomar, *Title Insurance Law,* Function of policy exceptions § 7:1 (Thomsan Reuters, 2020 ed.).
[226] *Id.*
[227] *See Amended Complaint* ¶ 37, R. 111.
[228] R. 2358-2359 citing *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.* 857 So.2d 748, 754 (Miss. 2003), citing *Farragut v. Massey,* 612 So.2d 325, 329 (Miss. 1992) (quoting *McCorkle v. Hughes,* 244 So.2d 386, 388 (Miss. 1971)).

of its attorney and closed the purchase of the Subject Property without the ratification by anyone and without a title binder or title policy in place. It followed the same procedure in this purchase as it followed with all of the other properties it purchased. If a violation of the law occurred, it occurred prior to the issuance of the Policy and prior to any action taken by First American.

### B. THERE IS NO DUTY TO PERFORM A TITLE SEARCH

Ambulatory Services argues that "Mississippi law should recognize that, if a title insurer undertakes to issue a policy insuring against title defects, then it assumes a duty to search for title defects and use reasonable care in performing the search."[229] Ambulatory Services further argues that the Circuit Court erred in adopting the analysis of the law by Judge Olack on the issue of the independent "duty on a title insurance company to search for and report defects in title - for the benefit of the insured – before issuing a title commitment."[230] The facts related to the timing of First American's involvement in the Subject Transaction do not support Ambulatory Services' argument for imposition of a duty. Ambulatory Services had already purchased the property and became the record owner in December of 2007. Greg Shoemaker reported to the Board of Directors of Ambulatory Services in January of 2008 that the purchase of the Subject Property had been finalized.[231] First American could not have assumed any duty until February of 2008, when the process of issuing the Policy was started.

Traditionally, title insurance companies issue a title binder or commitment prior to closing, disclosing the terms and conditions by which a title insurance policy will be issued.[232] This traditional approach was not followed in this case.[233] Mr. Dryden ordered an abstract title search

---

[229] *See* Brief of Appellant p. 43.
[230] *Id.* and *see In re Evans,* 460 B.R. 848, 881 (Bankr. S.D. Miss. 2011).
[231] R. 1938.
[232] *See* Palomar, Title Insurance Commitment or binder, § 5:29.
[233] R. 1032-1034.

on behalf of Ambulatory Services prior to closing, but no title binder or commitment was issued by First American.[234] The cases relied upon by Ambulatory Services in its argument involve the issuance of a title binder or commitment prior to closing.[235] This is a key factual distinction because there was no prior intent of First American to insure and hence no conditions related to title for closing were ever issued. Ambulatory Services' attorney, Mr. Dryden, did not think that title insurance was being purchased and did not find out that Ambulatory Services wished to purchase a title policy until February of 2008.[236] The approach for this transaction by Mr. Dryden is similar to the 1950's approach used in Kansas real estate transactions as discussed in the *Ford* case cited by Ambulatory Services.[237] Mr. Dryden, acting as the attorney for Ambulatory Services, reviewed the title abstract report and made his recommendations for preliminary matters to be addressed prior to the purchase by his client.

The argument for the existence of a cause of action for negligence requires the existence of a duty.[238] In the *Evans* case, Judge Olack noted that "A title company's business is to insure title, not to report on a condition of title or to guarantee good title, unless the title company voluntarily undertakes that additional duty."[239] He then conducted his analysis of the law on the issue from around the country at that time and made an *Eerie* guess that Mississippi would adopt

---

[234] *Id.*
[235] *See* Brief of Appellant p. 43, citing *Ford v. Guarantee Abstract & Title Co., Inc.,* 553 P.2d 254, 262-263, 220 Kan. 244, 254 (1976), *U.S. Bank, N.A. v. Integrity Land Title Corp.,* 929 N.E.2d 742 (Ind. 2010) and *Shada v. Title & Tr.Co. of Fla.,* 457 So.2d 553 (Fla.Dist.Ct.App. 1984).
[236] *Id.* and R. 1472.
[237] *See* Brief of Appellant p. 43 and *Ford v. Guarantee Abstract & Title Co., Inc.,* at pp. 262-263, 220 Kan. at p. 254.
[238] R. 2358, citing *Griffith v. Entergy Mississippi, Inc.*, 203 So.3d 579, 585 (Miss. 2016), citing *Enter. Leasing Co. S. Cent. v. Bardin*, 8 So.3d 866, 868 (Miss. 2009) (citing *Laurel Yamaha, Inc. v. Freeman*, 956 So.2d 897, 904 (Miss. 2007)).
[239] *See Evans,* 460 B.R. at p. 877.

the majority view that a title insurer owes no independent duty to the insured and a cause of action for negligence could not be had.[240]

Today, the approximate split of opinions between the majority view versus the minority view is 25 states in the majority and 15 states in the minority with 4 states having opinions in both camps.[241] Arkansas is one of the jurisdictions adopting the majority view. In rendering an opinion on the matter, the Eastern District of Arkansas stated the view's general premise as follows:

> The duty of a title insurer is governed by the policy. If the title insurance company issues a policy of title insurance, the insured's title is unmarketable, and there are no applicable exceptions or exclusions, the title insurer is liable whether it exercised reasonable care or not. The insured need not prove that the title insurance company failed to exercise reasonable care. Conversely, it is no defense to a claim on the title insurance policy that the insured failed to exercise reasonable care. The issues are decided by applying the terms of the policy to the facts, not by analyzing fault. It is the holding of this Court that, absent a request for a title report, Arkansas law does not recognize a claim of negligence by an insured against the title insurance company for lack of reasonable care in searching and disclosing the state of title.[242]

Florida courts have noted that "the alleged negligence in failing to discover encumbrances or any breach of duty to conduct a reasonable search and examination of title and disclose encumbrances is a breach of the Title Policy and that recovery for damages from such breach are governed by the Title Policy."[243] "In other words, the Court found that any breach of the duty to make a thorough and competent search of record title amounted to a breach of the title policy."[244]

---

[240] *Id.* at pp.881-883. It is worth noting that his observation of a "slight majority of jurisdictions" refusing to impose tort liability comes after eliminating states with statutes barring such tort claims.
[241] *See* Palomar, Nature of title insurer's duty to search and disclose defects in title, § 12:3.
[242] *See Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC,* 573 F.Supp.2d 1152, 1159 (E.D. Ark. 2008).
[243] *See Chicago Title Ins. Co. v. Commonwealth Forest Investments, Inc.,* 494 F.Supp.2d 1332, 1336 (M.D. Fla. 2007).
[244] *Id.* citing *Lawyer's Title Ins. Corp. v. D.S.C. of Newark Ents., Inc.*, 544 So.2d 1070, 1072 (Fla. 4th DCA 1989).

Other Mississippi courts have stated that "Title policies are contracts for indemnity and there is no duty to clear title to the property."[245] The Policy in this case states "This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant . . .".[246] There was no separate duty assumed by First American in 2008 to act beyond the issuance of a title policy in this case.

In its brief, Ambulatory Services argues that Mr. Dryden was employed by First American prior to the transaction.[247] The citations to the record by Ambulatory Services for this point do not support this assertion.[248] First American would urge the court to review the parts of the record cited by Ambulatory Services on this issue. The record citations merely note that Mr. Dryden was employed by the "Williams Heidelburg" law firm,[249] that Mr. Dryden was unfamiliar with the agreement between his firm and First American[250] and that the "Williams Heidelberg" firm was a policy-issuing agent for First American.[251] The record does not reflect that First American was retained prior to the purchase of the Subject Property by Ambulatory Services. Mr. Dryden did not even know that title insurance was to be purchased until February of 2008 and the Policy was not delivered to Ambulatory Services until March of 2008.[252] Mr. Dryden was not acting on behalf of First American prior to or at closing. Because of this fact, there is no argument that First American could have had any knowledge of the alleged ratification issue prior to closing and indeed it had no duty or even ability to caution the parties about the transaction. First American

---

[245] R. 2359 citing *Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co.,* 706 F.Supp. 477, 483 (S.Dist. Miss. 1988)**,** citing *Childs v. Mississippi Valley Title Ins. Co*., 359 So.2d 1146 (Ala. 1978).
[246]R. 130 at ¶ 7.
[247] *See* Brief of Appellant p. 45.
[248] *Id.*
[249] R. 1942.
[250] R. 1956.
[251] R. 1812.
[252] R. 1032-1039; 1040-1047; 1142-1149.

was simply not involved in the closing process. There was no ability for First American to foresee any possible harm nor was there the opportunity to be a part of any alleged causation of damage when Ambulatory Service paid Pinehaven for and received its deed to the Subject Property on December 17, 2007.[253]

The only duties assumed by First American were the contractual duties outlined in the Policy. The issuance of the Policy was its only undertaking in this matter.

Ambulatory Services argues that the "gratuitous undertaking" doctrine applies to First American.[254] In order for a plaintiff to recover under this doctrine, he or she must show detrimental reliance on the performance or undertaking.[255] The abstract given to Ambulatory Services' attorney prior to closing states, "This title search does not insure or warrant the validity or enforceability of any document included in the search, nor is it intended to be a policy of title insurance, an opinion of title nor any type of guaranty or warranty of title."[256] Any reliance by Ambulatory Services upon this document is unwarranted.[257] It is undisputed that any action taken by First American occurred after the closing of the transaction. Ambulatory Services paid Pinehaven and received its deed at closing without the reliance upon any action by First American. There was no gratuitous undertaking by First American in the case.

### C. THE THREE YEAR STATUTE OF LIMITATIONS FOR NEGLIGENCE BARS RECOVERY

Finally, the Circuit Court held that the negligence claim of Ambulatory Services was barred by the applicable three (3) year statute of limitations.[258] Miss. Code Ann. § 15-1-49 states in part:

---

[253] R. 117-120; 1100.
[254] *See* Brief of Appellant pp. 44-46.
[255] *See Wagner v. Mattiace Co.,* 938 So.2d 879, 885 (Miss.Ct.App. 2006)
[256] R. 1801 and Electronic Exhibit to the Record D-1.
[257] *See Womer v. Melody Woods Homes Corp.,* 165 Or.App. 554, 560, 997 P.2d 873, 875-76 (2000).
[258] R. 2359 citing *CitiFinancial Mortgage Co. v. Washington,* 967 So.2d 16, 19 (Miss. 2007), citing Miss. Code Ann. § 15-1-49.

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after,
>
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. . . .

Ambulatory Services' alleged injury is not latent. Ambulatory Services contends that its alleged injury is a matter of law regarding the use of public funds and that this law is presumably known to all, including First American.[259] If this is true, then Ambulatory Services also had knowledge of this law. Since Ambulatory Services owned numerous other parcels of real property, it must bear some duty to insure that its purchases are valid.[260] These facts combined with Ambulatory Services stewardship of the funds entrusted to it should have excited Ambulatory Services' attention and put it upon inquiry to make an investigation into the true state of title of its properties.[261] This duty to inquire acts as notice of everything to which said inquiry would lead and Ambulatory Services is deemed to have notice of what the inquiry would have found.[262] A cause of action for negligence regarding this transaction was barred three (3) years after the recording of the deed to the Subject Property in December of 2007.

## CONCLUSION

This Court should affirm the decision of the Circuit Court of Harrison County, Mississippi and dismiss all claims asserted by Ambulatory Services against First American in this case.

This the 15th day October, 2021.

[259] *See* Brief of Appellant at pp. 24-30.
[260] R. 398-426;1048-1049; 1106-1138; 1564; 1761-1797.
[261] *See Baldwin v. Anderson,* 60 So. 578, 580, 103 Miss. 462 (1913).
[262] *Id.* citing *Parker v. Foy,* 43 Miss. 260, 5 Am. Rep. 484.

Respectfully submitted,

**FIRST AMERICAN TITLE INSURANCE COMPANY**

*/s/ G. Dewey Hembree, III*
Attorney of Record

OF COUNSEL:

G. Dewey Hembree, III (MSB #2247)
**MCGLINCHEY STAFFORD, PLLC**
1020 Highland Colony Pkwy, Ste 702
Ridgeland, MS 39157
Telephone: (769) 524-2300
Facsimile: (601) 510-5609
Email: ghembree@mcglinchey.com

## CERTIFICATE OF SERVICE

I, G Dewey Hembree, III, do hereby certify that I have this day electronically filed the above and foregoing Appellee's Brief with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record.

Charles J. Swayze, Jr. - cjs@whittingtonlaw.com lisa@whittingtonlaw.com

Charles Jones Swayze, III - cjs@whittingtonlaw.com cjsiii@whittingtonlaw.com meredith@whittingtonlaw.com rachael@whittingtonlaw.com

Michael Bentley - jaltobelli@bradley.com mbentley@bradley.com rpeluso@bradley.com

Michael E. Bruffey - mike.bruffey@islandviewcasino.com mikebruffey@msgaming.org

Patrick R. Buchanan - chl@brownbuchanan.com mailb@brownbuchanan.com skg@brownbuchanan.com ss@brownbuchanan.com

I, G. Dewey Hembree, III, do hereby further certify that I have this day mailed, via First Class U.S. Mail, postage prepaid, a copy of the Appellee's Brief to the following:

The Honorable Lawrence P. Bourgeois, Jr.
Circuit Court Judge
Harrison County Circuit Court
Post Office Box 1461
Gulfport, Mississippi 39502

SO CERTIFIED on this the 15th day of October, 2021.

*/s/ G. Dewey Hembree, III*
G. Dewey Hembree, III
Certifying Attorney