IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN SECTION OF TENNESSEE
WESTERN DIVISION

BRENDA SMITH and JAMES A. SMITH, individually and as Next of Friend of MARY TAYLOR, deceased	)	**Case No. _____**
PLAINTIFFS,	)	
v.	)	
WILKES & McHUGH,.P.A., a Florida professional association	)	**JURY TRIAL DEMANDED**
DEFENDANT.	)	

TO THE HONORABLE DISTRICT COURT JUDGE:

I.

NATURE OF THE ACTION

1. This lawsuit is brought under (i) the Tennessee Consumer Protection Act (hereinafter referred to as the "TCPA") of 1977, as amended, TENN. CODE ANN. §§ 47-18-101 to 47-18-125, (ii) the Tennessee Medical Malpractice Act, TENN. CODE ANN. § 29-26-120, and (iii) Tennessee common law to remedy Defendant's unlawful contracting for and collection of

excessive legal fees in connection with the cap set forth in the Tennessee Medical Malpractice Act, TENN. CODE ANN. § 29-26-120. Among other forms of relief, Plaintiffs seek compensatory damages, and punitive or treble damages (whichever is determined to be higher by the trier of fact) based upon Defendant's intentional, reckless and/or willful misconduct as well as reasonable attorney's fees under the TCPA.

2. Plaintiffs named herein were not included in the recently settled class action known as *Debbie Howard and Lora L. Newson, on behalf of themselves and all similarly situated persons v. Wilkes & McHugh, P.A., James L. Wilkes, II and Timothy C. McHugh*, Case No 2:06-cv-02833. As such, Plaintiffs were not identified as members of the proposed settlement class (*see*, D.E. 328, Exhibit "A" to the Joint Motion for Preliminary Approval of Proposed Class), were not involved in any of the 54 nursing home lawsuits that comprised the settlement class and, thus, were not sent any class notice and had no right to make a claim to any of the class settlement proceeds. As a result, Plaintiffs have brought this individual lawsuit.

II.

JURISDICTION AND VENUE

3. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1). Because Plaintiffs are all citizens of the State of Tennessee and the Defendant is a citizen of the State of Florida, complete diversity exists between the Plaintiffs and Defendant. Further, Plaintiffs allege that each of their claims exceed $75,000.00, exclusive of interests and costs. As a result, this Court has original diversity jurisdiction of this action pursuant to 28 U.S.C. §§ 1332(a)

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a), (b) and (c) on the grounds that all or a substantial portion of the acts giving rise to the violations alleged

herein occurred in this judicial district. Venue is also proper in this judicial district pursuant to TENN. CODE ANN. § 47-18-109(a)(2) on the grounds that the Defendant transacts business within Shelby County, Tennessee. *See*, *Netherland v. Hunter*, 133 S.W.2d 614 (Tenn. Ct. App. 2003)(TCPA special venue provision supersedes Tennessee's general venue statute such that a defendant may be sued in the county where he transacts or has transacted business).

5. Pursuant to the TCPA, TENN. CODE ANN. § 47-18-113, a Tennessee consumer cannot be forced to litigate his or her claims outside the State of Tennessee nor can the law of another State be applied to such claims. As a result, this action cannot be transferred to a forum outside the State of Tennessee.

III.

THE PARTIES

6. Plaintiffs Brenda Smith and James Smith (hereinafter referred to as "Plaintiffs") are all individuals residing in Shelby County, Memphis, Tennessee.

7. Defendant Wilkes & McHugh, P.A (hereinafter referred to as "Defendant" or "Wilkes & McHugh") is a professional association incorporated under the laws of the State of Florida, with its principle place of business located at One North Dale Mabry Highway, Suite 800, Tampa , Florida 33609. Service of process may be accomplished on Wilkes & McHugh via its registered agent Corporation Service Company located at 2908 Poston Avenue, Nashville, Tennessee 37203.

IV.

FACTUAL ALLEGATIONS

A. Summary of Allegations

8. Employing a lawyer staff of over forty -five persons in eight different states, Defendant Wilkes & McHugh touts itself to the public as a law firm recognized across the nation as trial attorney "pioneers" who specialize in prosecuting nursing home neglect cases for the families of elderly patients who have suffered significant personal injury and/or death as the result of the rendition of improper and/or inadequate medical care. Boasting over $200 million in courtroom verdicts, Defendant's website advertises over three dozen "notable" multi-million dollar jury verdicts obtained by them in courts outside of Tennessee against nursing homes for "neglect by nursing home staff resulting in . . . pressure sores, infections, dehydration, malnutrition, and death." *See*, Defendant's Worldwide Website at www.wilkesmchugh.com/florida-nursing-home-neglect/.

9. In an effort to capitalize on its past success suing nursing homes in other states, Defendant began a television advertising campaign in Tennessee, targeting Tennessee nursing home medical providers and claiming that Defendant had the skill and know how to properly represent nursing home patients and their families in Tennessee for nursing home neglect. From that time until the present, Defendant Wilkes & McHugh has secured hundreds of clients whose loved ones have died or were significantly injured as the alleged result of nursing homes' improper and/or inadequate medical care.

10. As described more fully below, Defendant has filed and prosecuted a lawsuit in Tennessee State court asserting a claim arising under the Tennessee Medical Malpractice Act on behalf of Plaintiff Taylor, as it has done for hundreds of clients in Tennessee. In Plaintiff Taylor's complaint, Defendant asserted factual allegations that his mother suffered from multiple

pressures sores, multiple infections, dehydration, medical error and/or malnutrition proximately caused by certain nursing homes' deviation from the acceptable standards of care. The allegations arose directly under the Tennessee Medical Malpractice Act.

11. Defendant garnered substantial contingency legal fees from Plaintiffs through an unlawful scheme in which it contracted to receive a contingency fee of 40% of the gross settlement paid by medical malpractice defendants. These contingency fees are in direct violation of the contingency fee cap set forth in the Tennessee Medical Malpractice Act, which limits contingency fees to 33 ⅓ % of any recovery.

12. Because Defendant's contingency fees clearly violate the Tennessee Medical Malpractice Act, it may appear that Defendant's imposition and collection of these statutorily prohibited and excessive fees is merely the product of over eager, marketeering out-of-state attorneys who have rushed into Tennessee courts without first apprising themselves of Tennessee law. However, Defendant became aware that its contingency fee charges were unlawful but nevertheless continued to contract for and receive these excessive and/or illegal fees, while simultaneously failing to disclose to its clients that its fees were prohibited by law.

13. Plaintiffs seek to redress Defendant's wrongful and improper charging of legal fees in excess of the Medical Malpractice contingency fee cap. These charges were unlawful, unfair and/or deceptive and in direct violation of Tennessee law.

B. <u>The Tennessee Medical Malpractice Act applies to actions against nursing homes where the plaintiff's complaint asserts a claim arising under the Tennessee Medical Malpractice Act relating to the nursing home's care and treatment of the patient.</u>

14. In 1975, the Tennessee Legislature enacted the Tennessee Medical Malpractice Review Board and Claims Act of 1975 (hereinafter referred to as the "Medical Malpractice Act" or the "Act") in order to contain the cost of medical malpractice litigation and benefit the general welfare of Tennessee citizens. *See*, *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn.1978).

The Medical Malpractice Act established a Medical Review Board to review medical complaints and to render rulings as to whether certain alleged conduct deviated from the acceptable standard of medical care and treatment. *See* TENN. CODE ANN. §§ 29-26-101 – 114 (Repealed 1985).

15. The Act also contained a number of restrictive measures, including a statute of repose, requirements as to expert testimony, and a limitation on attorney's fees. *Id*.

16. The Medical Malpractice Act further provided that its scope included actions asserted against nursing homes. Specifically, the Act stated that the term "health care provider" "includes, but is not limited to, physicians,. . .registered nurses, physicians' assistants, chiropractors, physical therapists, … emergency medical technicians, hospitals, *nursing homes* and extended care facilities. …" *See*, TENN. CODE ANN. §§ 29-26-102(4)(emphasis added).

17. The Act defined a medical malpractice action as follows: "'Medical malpractice action' means an action for damages for personal injury or death as a result of any medical malpractice by a health care provider, whether based upon tort or contract law. The term shall not include any action for damages as a result of negligence of a health care provider when medical care by such provider is not involved in such action. …" *See* TENN. CODE ANN. §§ 29-26-102(6).

18. In 1985 the Tennessee Legislature decided to abolish the Medical Malpractice Review Board by repealing a number of the sections of the Medical Malpractice Act, while leaving in place the statute of limitations and certain other parts of the act not dealing with the Board. *See* Acts of 1985, Chapter 184, Section 4, and TENN. CODE ANN. §§ 29-26-115 -120.

19. In particular, the Legislature retained that portion of the Medical Malpractice Act which requires any claimant's attorney who has entered into a contingency fee contract with his client to obtain a court determination as to the exact amount of said fee based upon her time and

20. Although the definitions of "healthcare provider" and "medical malpractice action" were repealed in 1985, Tennessee Courts have relied upon these former definitions in order to construe the applicability of the Medical Malpractice Act and its remaining portions that were not repealed. *See*, *Estate of Doe v. Vanderbilt*, 824 F.Supp.2d 746, 748 (M.D. Tenn. 1993)("The repealed sections [of the Medical Malpractice Act] must be looked to for definitions and understanding of those unrepealed sections"), *citing*, *Burris v. Hospital Corp. of America,* 773 S.W.2d 932, 934 (Tenn.App.1989).

21. Under Tennessee law, when the gravamen of a plaintiff's complaint sounds in medical malpractice, the provisions of the Medical Malpractice Act apply to that lawsuit, regardless of the label a plaintiff uses to characterize her cause of action. Whether the gravamen of the complaint sounds in medical malpractice is a legal question for the court. However, as alleged below, because Defendant's assert formal medical malpractice claims in Plaintiff Taylor's Complaint lawsuits against nursing homes, such an analysis of the gravamen of complaint is unnecessary in this case.

22. Both before and after the 1985 revisions to the Medical Malpractice Act, Tennessee courts have consistently ruled that a plaintiff who has sustained an injury that relates to or bears upon the rendition of medical treatment (or lack thereof) must comply with the requirements of the Medical Malpractice Act. This is true even in those cases where the plaintiff's injury is incidental to the "medical treatment." *See*, *Tucker v. Metro. Gov. of Nashville and Davidson County*, 687 S.W.2d 87 (Tenn. Ct. App. 1984)(where catatonic patient was placed on cot in emergency room for observation, awoke from cot, fled emergency room and was hit by

car an hour and a half later, plaintiff's action sounded in medical malpractice, requiring plaintiff to provide expert proof that hospital deviated from standard of care by failing to restrain patient on cot); *Murphy v. Schwartz*, 739 S.W.2d 777 (Tenn. Ct. App. 1985)(allegation that physician and hospital failed to properly prevent patient from falling from cot sounded in medical malpractice and required expert medical proof since standard of care did not come within the "common knowledge exception"); *Lewis v. Hill*, 770 S.W.2d 751 (Tenn. Ct. App. 1989)(where x-ray technician failed to use restraints available on x-ray table and patient was injured when she fell from table, plaintiff's allegations sounded in medical malpractice, requiring expert proof); *Wilson v. H.C.A Southern Hills Medical Center*, No. 01A01-9211-CV-00460, 1993 WL 177155 (Tenn. Ct. App. May 26, 1993)(in action where patient claimed emotional injury as the result of hospital providing her with birth card entitled "It's a Boy!" following her still birth delivery, action sounded in medical malpractice); *Grainger v. Methodist Hosp. Healthcare Systems, Inc.*, No. 02A01-9309-CV-00201,1994 WL 496781 (Tenn. Ct. App. Sept. 9, 1994)(where patient alleged that hospital was negligent in failing to assist her from alighting from examination table, allowing her to fall and break wrist, action sounded in medical malpractice, thus requiring her to obtain expert proof); *Seavers v. Methodist Medical Center of Oak Ridge*, 9 S.W.3d 86 (TENN. 1999)(applying Medical Malpractice Act to patient's allegations that nurses caused nerve damage to her right arm by failing to properly pad her elbow or to prevent it from prolonged contact with hard surface); *McBee v. H.C.A. Health Services of Tennessee, Inc.*, No. M2000-00271-COA-R3-CV, 2000 WL 1533000 at *3 (TENN. CT. APP. Oct. 18, 2000)(plaintiff's allegations that nurse failed to properly assist her when ambulating her after surgery sounded in medical malpractice, and, therefore, required expert proof, noting "[m]ost actions against health care providers, whether they sound in tort or contract, fall within the coverage of the medical

malpractice statutes"); *Cooksey v. HCA Healthcare Services of Tennessee, Inc*, No. M2001-00303-COA-R3-CV., 2001 WL 1328539 (Tenn. Ct. App. Oct. 30, 2001)(allegation that two nurses attempted to move patient in her bed with excessive force, injuring her shoulder, sounded in medical malpractice and, thus, required expert proof as to deviation from the standard of care); *Campbell v. Blount Memorial Hosp*. No. E2001-00717-COA-R3-CV., 2000 WL 1381259 (Tenn. Ct. App. Nov. 8, 2001)(allegations that nurse failed to place bed rails up thus allowing disoriented patient to fall sounded in medical malpractice, thus requiring expert proof); *Age v. HCA Health Services, of Tennessee, Inc.*, No. M2001-01286-COA-R3-CV, 2002 WL 1255531 (Tenn. Ct. App. June 7, 2002)(in action for (1) battery, (2) breach of contract for services, (3) negligence *per se* and (4) corporate negligence, plaintiff's allegations that nurses fractured her arm when moving her onto CT table sounded in medical malpractice; failure to refute defendant's affidavits with expert proof that defendant breached the standard of medical care warranted summary judgment as to all of plaintiff's claims); *Howard v. Kindred Nursing Centers Limited Partnership*, No. W2005-02360-COA-R3-CV, 2006 WL 2316466 (Tenn. Ct. App. Aug. 2, 2006)(in action against nursing home where plaintiff's complaint alleged "failure to properly provide accurate and complete nursing assessments for the Decedent; failure to properly develop and implement an individual nursing plan for the Decedent; failure to prevent the Decedent from becoming dehydrated; failure to prevent the Decedent from developing pressure ulcers; failure to treat those ulcers; failure to supervise the nursing staff assigned to care for the Decedent; failure to evaluate the Decedent's response to nursing care; and failure to record and report to physicians the signs and symptoms of changes in the Decedent's physical condition" all sounded in medical malpractice and, thus, plaintiff's claims were not filed timely under the Medical Malpractice Act).

23. Thus, under Tennessee jurisprudence, where the plaintiff's complaint asserts a Medical Malpractice Act claim against a nursing home for its alleged neglectful care proximately causing pressure sores, infections, malnutrition, dehydration, and/or contractures leading to death or injury, the Medical Malpractice Act clearly applies. Indeed, recent Tennessee authority has ruled that the Tennessee Medical Malpractice Act is the only claim that may be brought against a nursing home when the care or treatment of the nursing home patient is at issue. *See, e.g. Conley v. Lifecare Centers of America, Inc.,* No. M2004-00270-COA-R3-CV, 2007 WL 34828 (Tenn. Ct. App. Jan. 4, 2007)(dismissing non-medical malpractice claims asserted under the Tennessee Adult Protection Act and negligence *per se* for violations of federal nursing home regulations and holding that deceased nursing home patient's allegations that nursing home failed to properly protect her from violent attack by fellow nursing home patient were exclusively controlled by Tennessee's Medical Malpractice Act).

24. (In fact, even if a Medical Malpractice Act cause of action is not asserted in the plaintiff's complaint, allegations that a nursing home's neglectful care proximately caused its patient to suffer pressure sores, infections, malnutrition, dehydration, and/or contractures leading to death or injury are nevertheless governed by the Medical Malpractice Act because these allegations "sound" in medical malpractice).

25. However, regardless of whether a plaintiff may maintain allegedly "separate" non-medical malpractice claims against a nursing home in an action which also asserts claims for violation of the Medical Malpractice Act, it is clear that when a Medical Malpractice Act "claim" is settled (or a monetary award is granted by judgment), a plaintiff's attorney must comply with the fee cap provision if the Medical Malpractice Act. In *Newton v. Cox*, 878 S.W.2d 105, 108-110 (Tenn. 1994) the Tennessee Supreme Court specifically addressed the scope of TENN. CODE

ANN. § 29-26-120 and held that the statute applies to all medical malpractice claims regardless of whether settlement occurs in the absence of a lawsuit and, thus, regardless of the existence of other potential legal claims: "[The term] 'claim,' however it is clearly a broader term encompassing a cause before litigation is filed as well as after. The guiding principle of statutory construction is to give affect to the legislative intent. Considering the plain language of the statute without any forced or subtle construction which would extend or limit its meaning, and the amendment the to statute inserting a more comprehensive term, we conclude that the Legislature intended for the statue to apply to ***all malpractice claims***, including settlements before and after litigation as filed" (emphasis added).

D. Defendant intentionally and/or recklessly impose contingency fees in excess of the Medical Malpractice Act fee cap upon Plaintiffs.

26. In or about 1998, Plaintiffs contacted Wilkes & McHugh, seeking possible legal representation in connection with the injuries that Plaintiff James Smith's mother, Mary Taylor, had sustained from the improper care provided by a nursing home.

27. In December 1998, Plaintiff James Smith signed Defendant's contingency fee Contract. The Contract provided that Plaintiffs agreed to retain and employ Wilkes & McHugh to represent it "in my claim for damages … resulting from care or treatment to Mary Taylor" and to pay to Wilkes & McHugh 40% of any gross recovery (before expenses) and 45% of any gross recovery obtained after a notice of appeal is filed or "post-judgment relief or action is required for recovery on the judgment."

28. Thereafter, Defendant caused the action known *Brenda Smith as Next of friend of Mary Taylor and William Taylor v. Sunbridge Healthcare Corporation; Sunbridge Healthcare Group, Inc.; Retirement Care Associates, Inc.; Capitol Care Management Co., In.c; and West Tennessee, Inc., d/b/a Launderdal Healthcare Center* to be filed in Lauderdale Circuit County

Court at Ripley, Tennessee (hereinafter the "Taylor Lawsuit")

29. The Taylor Lawsuit asserted a claim against the nursing home defendants that arose under the Tennessee Medical Malpractice Act. Specifically, the Taylor Lawsuit alleged the following acts of medical malpractice, among others:

> Defendants breached the duty owed to their residents, including Mrs. Taylor, and were negligent in their care and treatment of Mrs. Taylor, through their acts or omissions, which include the following:
>
> a) Failure to provide Mrs. Taylor with basic and necessary care and supervision;
>
> b) Failure to provide timely medical intervention for Mrs. Taylor;
>
> c) Failure to timely notify the physician of significant changes in Mrs. Taylor's condition;
>
> d) Failure to properly and timely follow physicians' order;
>
> e) Failure to timely and adequately assess and monitor the blisters on the left foot area of Mrs. Taylor;
>
> f) Failure to timely and adequately assess and monitor the development and/or progression of pressure sores on Mrs. Taylor;
>
> g) Failure to take appropriate intervention to prevent the development and/or progression of pressure sores on Mrs. Taylor;
>
> h) Failure to timely and adequately turn and reposition Mrs. Taylor, or to provide devices to prevent development and/or progression of pressure sores on Mrs. Taylor;
>
> i) Failure to develop and implement an adequate plan of care to meet Mrs. Taylor's individualized needs, and to timely and appropriately update Mrs. Taylor's plan of care upon changes in her condition;

30. Because the Taylor Lawsuit asserted a claim under the Medical Malpractice Act, Defendant was required to comply with all provisions of the Medical Malpractice Act.

31. Nowhere in its Contract with Plaintiffs did Defendant disclose that its contingency fees must be limited to no more than 33 ⅓ % of any recovery in actions involving the Medical Malpractice Act. Nor did the Contract disclose that, under the Medical Malpractice Act, Wilkes & McHugh would be required to seek the trial court's determination of the actual percentage amount of its contingency fee before said fee would be charged against any gross recovery.

32. To the contrary, in a bold effort to circumvent the Medical Malpractice Act fee cap, Wilkes & McHugh's Contracts provided that if the trial court awarded an attorney's fee, it would contractually be entitled to the awarded fee or the contingency fee, whichever is greater. As a result, Defendant took affirmative steps to ensure that they would be contractually entitled to fees in excess of the fee cap even if the trial court were somehow informed of the applicability of the Medical Malpractice Act and consequently held the required hearing and awarded Defendant a contingency fee for less than the amount called for in its fee Contract.

33. Defendant never filed a fee Petition to have any court determine the percentage or amount of fees that they intended to charge and did charge to Plaintiffs as required by TENN. CODE ANN. § 29-26-120.

34. Defendant intentionally and/or recklessly chose not to seek a judicial determination of its contingency fee charged to Plaintiffs pursuant to TENN. CODE ANN. § 29-26-120 in order reap fees in excess of the Medical Malpractice fee cap.

35. TENN. CODE ANN. § 29-26-120 is constitutional in nature, applies to pre-litigation claims and post-litigation claims that are settled (and not merely lawsuits which result in a jury

or bench award), and provides a private right of action to any party who as been damaged by a fee in violation of its provisions. *See*, *Newton v. Cox*, 878 S.W.2d 105, 108-110 (Tenn. 1994)

36. TENN. CODE ANN. § 29-26-120 further requires the plaintiff's attorney under a contingency fee arrangement to obtain a judicial determination of his or contingency fee, which cannot under any circumstances exceed 33 ⅓ %. *See*, *Lee v. State Volunteer Mut. Ins. Co., Inc*., No. E2002-03127-COA-R3-CV, 2005 WL 123492 at *3 (Jan. 21, 2005)(" TENN. CODE ANN. § 29-26-120 [ ] requires the trial court to determine the amount of attorneys' fees to be awarded in contingency fee medical malpractice cases, irrespective of the provisions of an attorney-client contract, and sets the maximum possible attorneys' fees award at one-third of the total damages awarded to the client"); *see also*, *Shogrue v. St. Mary's Medical Center, Inc*., 152 S.W.2d 577 (Tenn. Ct. App. 2004)(same).

37. In 2002, Defendant negotiated a settlement with the nursing homes sued in the Taylor Lawsuit. In connection with the settlement, Plaintiff Taylor signed release agreements and signed Defendant's "Settlement Statement" which set forth the attorney's fees and alleged expenses to be deducted from the gross settlement amount. Wilkes & McHugh deducted and received 40% of the gross settlement to be paid to Plaintiffs.

38. The monetary damages to the Plaintiffs are not simply the amount of fees that were charged in excess of the Medical Malpractice Act fee cap. To the contrary, under Tennessee jurisprudence, when – as in this case – a legal fee is illegal or excessive, the attorneys who have charged the illegal or excessive fee are not entitled to *quantum meriut* but, instead, must disgorge the entire legal fee. *See*, *White v. McBride*, 937 S.W.2d 796, 803 (Tenn. 1996)(holding that where fee is illegal or clearly excessive, attorney was not entitled to any fee, stating "[t]o permit an attorney to fall back on the theory of *quantum meruit* when he

unsuccessfully fails to collect a clearly excessive fee does absolutely nothing to promote ethical behavior. On the contrary, this interpretation would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of *quantum meruit* is there in case of a subsequent fall"). As a result, Defendant must disgorge the entire fee charged in the Taylor Lawsuit.

E. Defendant ignores warnings from local Tennessee attorneys that its contingency fees violate the Medical Malpractice Act.

39. Well prior to the time Defendant represented the Plaintiffs named herein, Defendant was directly informed that it could not charge contingency fees in excess of fee cap set forth under the Medical Malpractice Act. Memphis attorneys have specifically informed Wilkes & McHugh that (i) a claim for personal injuries against a nursing home that arises out of the care and treatment provided by the nursing home is governed by the Medical Malpractice Act and its fee cap, (ii) that efforts to charge a fee in excess of one-third are unlawful and excessive and (iii) that a fee charged in violation of the Medical Malpractice Act will require disgorgement of the entire contingency fee charged, pursuant to *White v. McBride*, 937 S.W.2d 796 (Tenn. 1996).

40. Nevertheless, Wilkes & McHugh has ignored these warnings and, instead, continued to contract for and impose these excessive and unlawful contingency fees.

V.

CAUSES OF ACTION.

COUNT 1 –VIOLATION OF THE TENNESSEE MEDICAL MALPRACTICE ACT, PURSUANT TO TENN. CODE ANN. § 29-26-120

43. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

44. Pursuant *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994), TENN. CODE ANN. § 29-26-120 applies to any matter or case in which a medical malpractice claim is settled, regardless of whether the settlement occurs before or after litigation is commenced, and regardless of whether a case involves more than a claim for medical malpractice. In connection with the settlement of a case involving a medical malpractice claim, TENN. CODE ANN. § 29-26-120 also prohibits the plaintiff attorney from charging and collecting in excess of 33⅓% of all damages or the gross settlement dollars paid to the plaintiff. Lastly, TENN. CODE ANN. § 29-26-120 provides a private right of action to any person who has been harmed by an attorney's failure to comply with the fee cap.

45. Defendant drafted and entered into a contingency fee agreement with Plaintiffs was subject to the Medical Malpractice Act fee cap.

46. With respect to Plaintiffs, Defendant Wilkes & McHugh violated TENN. CODE ANN. § 29-26-120 by: (i) proposing to enter into and entering into contingency fee agreements with Plaintiffs which called for a contingency fee of 40% of the gross recovery received by the Plaintiffs, (ii) charging and collecting a contingency fee in excess of 33⅓ % of the gross recovery received by Plaintiffs, and (iii) failing to request that the trial court determine and limit the amount of its contingency fees to one-third as required by TENN. CODE ANN. § 29-26-120.

47. As a result of the above described violations of TENN. CODE ANN. § 29-26-120,

Defendant has proximately caused injury and damage to Plaintiffs.

COUNT 2 – VIOLATIONS OF TCPA, TENN. CODE ANN § 47-18-104(a) and (b)

48. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

49. Plaintiffs are "consumers" as defined by the TCPA, TENN. CODE ANN. § 47-18-103(2).

50. Defendant Wilkes & McHugh constitutes a "person" as defined by the TCPA, TENN. CODE ANN. § 47-18-103(9).

51. Pursuant to the TCPA, TENN. CODE ANN. § 47-18-109(a)(1), Plaintiffs are entitled to bring a private action for Defendant's violation of the TCPA because, among other things, they have suffered an ascertainable loss of money, namely the payment of unlawful and excessive contingency legal fees in violation of the Medical Malpractice Act.

52. Defendant's charging and collection of the above described unlawful and excessive contingency fees (and the entry into unlawful contingency fee contracts as described above) constitutes an unfair or deceptive practice which affects trade or commerce within Tennessee in violation of the TCPA, TENN. CODE ANN. § 47-18-104(a) and/or (b).

53. In addition to the unfair or deceptive act of contracting for, charging and collecting unlawful contingency fees, Defendant also violated the TCPA by failing to disclose to Plaintiffs that (1) Wilkes & McHugh was required to obtain the trial court's determination of the exact amount of the contingency fee to which Wilkes & McHugh should be granted based upon Defendant's time and effort and the complexity of the case, (2) that they had a statutory right to limit Wilkes & McHugh's contingency fee to 33 ⅓ % and to request the trial court to award Wilkes & McHugh even less than 33 ⅓ % pursuant to TENN. CODE ANN. § 29-26-120, and (3)

that its contingency fees were unlawful.

54. Defendant's conduct described in the preceding paragraphs was not isolated or unique to Plaintiffs, but was widespread, affecting hundreds of Tennessee consumers, and was a regular and intended business practice of Defendant, instituted and implemented with a view towards unfairly or deceptively profiting at the expense of their clients. Because Defendant failed to disclose its unfair or deceptive acts and practices when they had a duty to do so, Defendant have fraudulently concealed Plaintiffs' causes of action, including their claims arising under the TCPA. As a result, the TCPA's five (5) year statute of reposed and the common law claims asserted below were all tolled. *See*, *French v. First Union Securities, Inc*., 209 F.Supp.2d 818, 825-26 (M.D.Tenn. 2002)(noting that stockbroker's failure to disclose material facts as required by fiduciary relationship could act as fraudulent concealment, and, thus, the TCPA's statute of repose is tolled by fraudulent concealment)

55. As a result of the above described unfair or deceptive acts or practices, all of which affect the conduct of trade and commerce in Tennessee, Defendant has violated the TCPA, TENN. CODE ANN § 47-18-104(a) and/or (b), and the Plaintiff have thereby suffered ascertainable losses, the exact amount of which is presently unknown, but which is capable of being liquidated.

56. As a result of Defendant's violations of the TCPA, Defendant is liable to Plaintiff for all actual damages, including but not limited to, the full return of all contingency fees charged and collected, and pre-judgment and post- judgment interest.

57. Plaintiffs further request their reasonable attorneys' fees and costs, pursuant to the TCPA, TENN. CODE ANN. § 47-18-109(e)(1). In addition, to the extent that Defendant's violations were intentional (as opposed to merely negligent), the actual damages to Plaintiffs

should be trebled pursuant to the TCPA, TENN. CODE ANN. § 47-18-109(a)(3), or alternatively, under Tennessee common law, Defendant should be assessed punitive damages, whichever is determined to be greater by the trier or fact

COUNT 3 - PUNITIVE DAMAGES

58. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

59. Defendant acted intentionally and/o recklessly with respect to their wrongful conduct because it was aware, but consciously disregarded, the substantial and unjustifiable harm that it would cause to Plaintiffs for contracting for, charging and collecting unlawful contingency fees. As a result, Defendant's actions and omissions constituted a reckless and/or gross deviation from the standard of care that an ordinary person would exercise under the circumstances.

60. Because of Defendant's wrongful conduct, punitive damages are warranted in order to punish Defendant and to deter them from future misconduct.

61. With respect to the applicable factors that may be addressed by the fact finder when determining punitive damages, Plaintiffs would allege as follows:

(i) Defendant's financial affairs, financial condition and net worth range in the multimillions of dollars;

(ii) The nature and reprehensibility of Defendant's wrongdoing is substantial because Defendant has intentionally abused its fiduciary relationship with Plaintiffs, who are primarily low income consumers, by contracting for and charging unlawful contingency fees;

(iii) Defendant was aware of the harm that could and would be caused

to Plaintiffs with respect to it wrongful conduct;

(iv) Defendant's misconduct spanned several years and included efforts to conceal its misconduct by failing to disclose that its fees were unlawful and not determined by a trial court as required under the Medical Malpractice Act;

(v) In order to recover their losses, Plaintiffs will incur substantial costs;

(vi) Defendant profited significantly from the unlawful contingency fees, and a significant punitive award is the only method to deter future similar misconduct.

62. Based upon the above allegations and factors, Plaintiffs would respectfully request entry of a punitive award in an amount to be determined by the trier of fact.

COUNT 4 – DECLARATORY, TEMPORARY AND PERMANENT INJUNCTIVE RELIEF PURSUANT TO TCPA, TENN. CODE ANN. § 47-18-109(b)

63. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

64. Pursuant to TENN. CODE ANN. § 47-18-109(b) of the TCPA, Plaintiffs a request a declaration that the unfair or deceptive acts and practices with respect to the contacting for, charging and collection of unlawful contingency fees by Defendant are in violation of the TCPA. Specifically, Plaintiffs request a Temporary Injunction and a Permanent Injunction to enjoin Defendant from (1) charging contingency fees in excess of the Medical Malpractice fee cap when prosecuting lawsuits for violations of the Medical Malpractice Act, (2) failing to seek

the trial court's determination as to the exact amount of its contingency fee as required the Medical Malpractice Act, and (3) further violating the TCPA as described herein.

COUNT 5 – BREACH OF FIDUCIARY DUTY

65. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

66. As attorneys specializing in nursing home medical malpractice actions, Defendant held themselves out to the named Plaintiffs as legal professionals with the requisite expertise, superior skills and know-how with respect to the prosecution of these cases. As such, Defendant owed Plaintiffs a fiduciary duty to act at all times in their best interests and to exercise that degree of care, prudence, circumspection and foresight in connection with the prosecution and settlement of these medical malpractice nursing home cases for the benefit of Plaintiffs.

67. This duty included Defendant's obligation to contract for, charge and collect only those contingency fees which are lawful and reasonable under the Medical Malpractice Act when suing a nursing home for medical malpractice. This duty also included the duty to obtain a trial court's determination of the exact amount of its attorney's fees, which, in any event, could not to exceed 33⅓% of the total settlement amount. Defendant, however, breached these duties.

68. Additionally, Defendant owed the duty of disclosure to Plaintiffs. Defendant breached this duty by failing to disclose to Plaintiffs that (1) Defendant was required to obtain the trial court's determination of the exact amount of the contingency fee to which Wilkes & McHugh should be granted based upon Defendant's time and effort and the complexity of the case, (2) that they had a statutory right to limit Wilkes & McHugh's contingency fee to 33 ⅓ % and to request the trial court to award Wilkes & McHugh even less than 33 ⅓ % pursuant to TENN. CODE ANN. § 29-26-120, and (3) that its contingency fee was unlawful. Moreover, because Defendant owed a fiduciary duty to Plaintiffs to disclose the fact that its fee was

unlawful but failed to do so, such failure constitutes fraudulent concealment pursuant to Tennessee jurisprudence. *See*, *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn. 1998)("when there is a confidential or fiduciary relationship between the parties, the 'failure to speak where there is a duty to speak is the equivalent of some positive act or artifice planned to prevent inquiry or escape investigation.'")(citation omitted).

69. As a direct and proximate result of Defendant's breaches of fiduciary duty, Plaintiffs have suffered damages.

COUNT 6 – UNJUST ENRICHMENT

70. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

71. A benefit conferred upon Defendant by Plaintiffs by the payment of unlawful contingency fees. Defendant appreciated from such a monetary benefit. However, Defendant's acceptance and retention of such benefit under such circumstances is inequitable for them to retain the benefit without payment of the value thereof.

72. As a result of the unlawful acts and practices described above, Defendant was unjustly enriched by unlawful contingency fees it collected from Plaintiffs. Defendant has been unjustly enriched at the expense of Plaintiffs. Plaintiffs are entitled to damages as a result of Defendant's unjust enrichment, including the disgorgement of all monies taken by Defendant from Plaintiffs.

COUNT 7 – CONSTRUCTIVE TRUST

73. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

74. A constructive trust arises contrary to intention and *in invitum* [against an

unwilling party], against one who, by commission of a wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. As a result of the above described wrongful conduct, Defendant has obtained unlawful contingency fees from Plaintiffs which, in equity and good conscience, they should not hold and enjoy. Therefore, this Court should establish a constructive trust from which Plaintiffs may claim funds rightfully belonging to them.

VII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Brenda Smith and James A. Smith demand judgment against Defendant Wilkes & McHugh, P.A., on each Count of the Complaint and pray for the following relief:

1. Issue service of process and serve the Defendant;
2. Empanel a jury to try this matter;
3. Grant any reasonable request to Amend Plaintiffs' Complaint to conform to the discovery and evidence obtained in this action;
4. Award each Plaintiff compensatory damages for $476,000.00;
5. Award appropriate punitive damages in the amount of $2,000,000.00 ;
6. Award costs and expenses incurred in this action pursuant to Rule 54 of the Federal Rules of Civil Procedure;
7. Grant the Plaintiffs' their reasonable attorney's fees and costs incurred in this litigation pursuant to TCPA, TENN. CODE ANN. § 47-18-109(e)(1);
8. Award pre-and post-judgment interest in the amount of 10% per annum pursuant to TENN. CODE ANN. § 47-14-123 in amount according to proof at trial; and

9. Grant the Plaintiffs such further relief as the Court may deem just and proper.

Respectfully submitted,

s/ Frank L. Watson, III
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