

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

1. Neshoba County Mississippi, Defendant/Appellee
2. Marvin Page, Defendant/Appellee
3. Quorum Health Resources, Inc., Defendant/Appellee
4. Estate of Eula Mae Fedrick, Deceased, by Sue Sikes, Administratrix, Plaintiff/Appellant
5. Estate of JoAnn Robinson, Deceased, sole heir and wrongful death beneficiary of Eula Mae Fedrick, Deceased, Plaintiff/Appellants
6. Mark P. Caraway, Esquire, Attorney for Defendants/Appellees, Neshoba County and Marvin Page
7. Cory Radicioni, Esquire, Attorney for Defendants/Appellees, Neshoba County and Marvin Page
8. William W. McKinley, Jr., Esquire, Attorney for Defendant/Appellee, Quorum Health Resources, Inc.
9. F. M. Turner, III - Attorney for the Appellant
10. The Honorable Vernon R. Cotten, Neshoba County Circuit Court Judge



WILLIAM W. MCKINLEY, JR.

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- II. *The Mississippi Supreme Court's Decision in Howard v. Estate of Harper* Forecloses a Cause of Action Against Quorum Where the Sole Basis for Imposition of Liability Against Quorum Is the Alleged Negligence of Lawrence Graeber, the Administrator of the Nursing Home
- II. Alternatively, Assuming the *Howard v. Estate of Harper* Does Not Control this Action, Quorum Health Resources, Inc. Has No Liability and Is Entitled to All the Protections of Mississippi Tort Claims Act as an "Instrumentality" of a "Community Hospital," and All Claims Against it Are Barred by the One Year Limitations Period of the Mississippi Tort Claims Act
- III. As a Further Alternative, Where All Claims Against Quorum Are Derivative, the One-Year Limitations Period Prescribed in Section 11-46-11(3) Controls in this Action

Home on or about January 23, 1995 and resided there until her death on August 4, 2000. (R. at 1230). Her death certificate listed "natural causes" as the reason for her demise. (R. at 1230). Subsequently, the Plaintiff issued a Notice of Claim on October 17, 2005, alleging that the Defendants' negligence caused or contributed to Ms. Fedrick's death. (R. at 633 and 1230-1235). The complaint in this matter was filed November 16, 2000 by Wilkes & McHugh, P.A. (R. at 6-33). The Complaint named as defendants Neshoba County Nursing Home, Quorum Health Resources, Inc., and Marvin Page.

Neshoba County General Hospital - Nursing Home is a community hospital created pursuant to §41-13-35(3) of the Mississippi Code, as amended. (R. 1064-1085). Neshoba County General Hospital - Nursing Home, in accordance with statutory authority and its bylaws, entered into a contract with Quorum Health Resources, Inc. Quorum, subject to the hospital's Board of Trustees' continuing control and direction, performed administrative services. Under both Neshoba County General Hospital's bylaws and the management agreement, the Board of Trustees retains full control of the business, policy, operations, and assets of the nursing home. (R. 562-580, 1064-1085).

The Plaintiff has distinct theories of liability against each of these parties. The Plaintiff alleges that Neshoba County General Hospital - Nursing Home was liable for personal injuries and death of Ms. Fedrick due to the negligence of the staff at Neshoba County Nursing Home who rendered care to Ms. Fedrick. The Plaintiff alleged that Marvin Page was liable to Ms. Fedrick in his role as licensee of the nursing home pursuant to

Neshoba County Nursing Home. Plaintiff argued that Graeber, as administrator of the facility, owed a duty of care to Ms. Fedrick through federal and state legislative and regulatory standards. (R. 501-507, 1198-1201). As stated in the Appellant's brief, Quorum is liable for any negligence, "through Lawrence Graeber." (Appellant's br. at p.41).

On May 31, 2006, the Defendants moved for summary judgment contending that all alleged negligent acts took place over one (1) year prior to August 17, 2000, the date on which the Plaintiff issued her Notice of Claim. (R. 447 - 497). In response to the Motion for Summary Judgment, the Plaintiff provided voluminous reports by her purported experts. All of the allegedly negligent acts in the Plaintiff's reports took place before August 17, 1999, one year prior to the filing of the Notice of Claim. In these voluminous reports, there is only one reference to any date within the one year limitations. This entry provides the following:

On September 23, 1999, the nurses noted that Ms. Fedrick was preparing to go to restorative feeding. There was no prior discussion in the nurses' notes for the need for restorative care. There is also no order for any such care in the record. According to the treatment records, Ms. Fedrick was in the restorative feeding program for breakfast and lunch only from September 17, 1999 through her death on October 4, 1999. During that 17 day period, her dietary intake increased to an average from around 20 percent to more than 50 percent. Had her need for additional assistance been recognized in a timely manner, months earlier than it was, it is likely her weight loss could have been prevented, thus extending her life.

(R. at 500-560; 736-843; and 1230-35) (emphasis added).

As is facially obvious, this notation does not pertain to any conduct occurring within

no acts of negligence occurred within one year prior to August 17, 2000, the date the Notice of Claim was issued. The trial court accordingly ruled that the Plaintiff's cause of action was time barred. (R. 1230-1236).

The trial court also ruled that summary judgment was appropriate as Quorum Health Resources, Inc., in its role providing management services under the control and direction of Neshoba County General Hospital-Nursing Home's Board of Trustees, was an instrumentality of the hospital and was entitled to the same statute of limitations defense. Alternatively, the trial court also held that even if Quorum were not an instrumentality, all claims against Quorum were derivative of the claim against Neshoba and were thereby barred where the direct claim against Neshoba was barred. (R. 1230-1236)

In accordance with the management agreement and continuing practice, Lawrence Graeber was set forth as the employee of Quorum that acted as administrator for Neshoba County General Hospital - Nursing Home. (R. 570, 590, 593). Apart from Mr. Graeber, all of the other relevant employees at Neshoba County General Hospital - Nursing Home are employees of that facility and are protected under the provisions of the Miss. Tort Claims Act. (R. 687-688).

The parties briefed the issues regarding the statute of limitations, its applicability to all defendants, and whether the Plaintiff's theory of liability as to Quorum and Marvin Page were valid. Following briefing, the trial court rendered a decision that the Plaintiff's cause of action was barred by the applicable statute of limitations, that Quorum Health Resources, Inc. was an instrumentality of Neshoba County General Hospital - Nursing

derivative claims and would likewise be barred if the claims against Neshoba were barred. (R. 1230-1235). The trial court did not address the issue of whether the complaint stated a cause of action against Quorum, since where the Plaintiff conceded that Quorum would be properly dismissed under *Howard v. Estate of Harper* if that decision were affirmed without amendment following the Motion for Re-Hearing that was pending at that time. (R.1274). Following entry of judgment, this appeal ensued. (R. 1236-1237).

The present cause is a medical malpractice action against three defendants. All of the claims are controlled by the one-year statute of limitations applicable to the Mississippi Tort Claims Act. However, the method of determining [by which one determines that] whether the one year limitations period applies to Quorum Health Resources involves a slightly different analysis than that of Neshoba County General Hospital - Nursing Home. In this brief, Quorum adopts and incorporates by reference the entirety of the argument of Neshoba County General Hospital - Nursing Home as to the manner in which the Plaintiff's factual allegations are barred by operation of the one year statute.

In this brief, Quorum sets forth the two bases by which the one year statute is applicable to Quorum. The first is that Quorum operated as instrumentality of the Board of Trustees of Neshoba County General Hospital - Nursing Home, operating under the continuing direction and control of the Board in providing administrative services. Second, Quorum will demonstrate that all of the claims against it, for alleged mismanagement, are derivative of the claims of direct negligence against Neshoba County for alleged negligent medical care of the decedent, Ms. Fedricks.

In addition, Quorum Health Resources, Inc., has the supplemental defense that the Plaintiff fails to state a cause of action against it, where the claims against Quorum are solely for vicarious liability of it's employee, Lawrence Graeber the administrator of the facility. According to case of *Howard v. Estate of Harper*, an administrator owes no duty of care to the residents of a nursing home, but only to their employer. Further, the *Howard*

General Hospital - Nursing Home is the operator of the facility, not Quorum. While the Plaintiff conceded to the trial court that the *Howard* decision required the dismissal of Quorum, the Plaintiff, inexplicably, has appealed against Quorum and failed to inform this Court of the import of the *Howard* decision.

ARGUMENT

I. Standard of Review

An appeal from a grant of summary judgment by the trial court is reviewed *de novo*. *Oaks v. Sellers*, 953 So.2d 1077, 1080 (Miss. 2007); *Russell v. Orr*, 700 So.2d 619, 622 (Miss.1997); *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss.1997); *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss.1995). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c) (emphasis added).

The moving party has the burden of demonstrating that there is no genuine issue of material fact, while the non-moving party should be given the benefit of every reasonable doubt. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Id.* Of

one, one that matters in an outcome determinative sense ... the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So.2d 798, 801 (Miss.1994).

The evidence must be viewed in the light most favorable to the non-moving party. See *Northern Electric Co.*, 660 So.2d at 1281; *Russell*, 700 So.2d at 622; *Richmond*, 692 So.2d at 61; *Simmons*, 631 So.2d at 802; *Tucker*, 558 So.2d at 872. To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. *Richmond*, 692 So.2d at 61 (citing *Lyle v. Mladinich*, 584 So.2d 397, 398 (Miss.1991)). "If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise the decision is affirmed." *Richmond*, 692 So.2d at 61; *Oaks v. Sellers*, 953 So.2d 1077, 1080 (Miss. 2007).

II. **The Mississippi Supreme Court's Recent Decision in *Howard v. Estate of Harper* Forecloses a Cause of Action Against Quorum Where the Sole Basis for Imposition of Liability Against Quorum Is the Alleged Negligence of Lawrence Graeber, the Administrator of the Nursing Home**

In this appeal, Plaintiff fails to completely inform the court of the entire argument for which the Plaintiff has sought to hold Quorum liable in the court below. At the Plaintiff's request, the trial court declined to rely upon the *Howard* decision, however, this Court is not so bound. An appellate court is most "interested in the result of the decision, and if it is correct we are not concerned with the route-straight path or detour-which the trial court took to get there." *Kirksey v. Dye*, 564 So.2d 1333, 1336-37 (Miss.1990). In the trial court

In the body of the Plaintiff's Response to Defendants' Motion for Summary Judgment, Plaintiff devoted six (6) pages of her response for their sole argument that Quorum was liable for Mr. Graeber's acts as Mr. Graeber's employer. The Plaintiff alleged below that Mr. Graeber, as administrator, had a duty to the decedent arising under both statutory and federal legislative mandates and regulations. (R. 503-507). It is undisputed that Lawrence Graeber was the administrator of Neshoba County Nursing Home and was an employee of Quorum fulfilling that role pursuant to a Management Agreement entered between Quorum and Neshoba. (R. 566, 570, 590). Plaintiff contended that she had a viable cause of action against Quorum for vicarious liability for any breach of any of these statutes or regulations by Mr. Graeber. On appeal, the Plaintiff again makes the same argument, that Quorum's liability is due solely to Mr. Graeber's role as administrator

The staff at the nursing home were employees of Neshoba but under the direction and control of Quorum through Lawrence Graeber in the conduct of their daily duties and responsibilities. Any negligent acts or omissions by the staff would impose liability upon both Neshoba County and Quorum.

Appellant's br. at p.41.

¹ It is worthwhile to note that the original Complaint in this matter was filed by the law firm of Wilkes and McHugh. (R. 30). As the Court is well-aware, every Complaint filed a Plaintiff represented by this law firm named the administrator and licensee of the facility as defendants, contending that these individuals owed common law, statutory and regulatory duties to the residents of the nursing home. In the present case, the Plaintiff named Marvin Page, licensee, as a Defendant. Also, as argued by the Plaintiff in her Response to the Motion for Summary Judgment,, Quorum Health Resources, Inc., was named, a Defendant because it was the employer of the administrator of Neshoba County Nursing Home.

So.2d 854 (Miss. 2006) (rehearing denied without amendment Feb. 1, 2007, mandate issued Feb. 8, 2007), which held that the Plaintiff failed to state a cause of action upon which relief could be granted under this same theory attempting to hold an administrator liable for a resident's injuries. When Quorum requested that it be dismissed on the basis of *Howard* decision. Plaintiff's only response was that *Howard* was not yet a final decision. However, Plaintiff agreed that the decision, if affirmed without amendment after rehearing would require the dismissal of Quorum stating:

Until the motion for rehearing is decided, the opinion is subject to withdrawal or amendment, including a reversal of position by the Supreme Court. In the event that the Supreme Court denies the motion for rehearing without change to the original decision and such decision becomes final by issuance of the Supreme Court's mandate, the Plaintiff will not oppose the dismissal of Marvin Page and Lawrence Graeber.

Plaintiff's letter brief of January 25, 2007 at pg. 10.

As this Court is well aware, the *Howard* decision rejected the very heart of the Plaintiff's contention that an administrator may be held liable for injuries to a resident of a nursing home. Mr. Graeber, the administrator and employee of Quorum, does not owe a duty of care to the Plaintiff. Quite the opposite of Plaintiff's contention, the *Howard* decision held that an administrator "owe duties to their employers, but that they owe no common-law or statutory duty to the residents of the home." *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So.2d 1138, 1156 (Miss. 2007); *Howard v. Estate of Harper ex rel. Harper*, 947 So.2d 854 (Miss. 2006). As to the statutory argument made by the Plaintiff in this case, the *Howard* Court held that

Moreover, the Mississippi Supreme Court expressly disapproved of expanding the boundaries of tort liability, stating that "it is well settled that a nursing home or its proprietor or owner can be held liable under general principles of tort law for negligent acts or omissions regarding the care of its residents." *Id.* at 857. Even more importantly, the Court held that it would not expand the boundaries of tort liability in the absence of a statutory mandate where the duty would be "duplicative of the duty already owed by the nursing home business owner or proprietor." " *Id.* at 858. The expansion of liability the Plaintiff seeks in this case against Quorum is not mandated by the Mississippi Legislature, is certainly duplicative of that sought against Neshoba County General Hospital - Nursing Home, and has been expressly rejected by the Mississippi Supreme Court.

In the present case, it is undisputed that Quorum Health Resources, Inc. neither owns, operates, nor controls Neshoba County General Hospital - Nursing Home. As discussed more fully below, Neshoba County owns the facility, and the Board of Trustees of Neshoba County General Hospital - Nursing Home is the operator and proprietor of the facility.

On appeal in this case, Plaintiff fails to inform the court that the entire argument for which the Plaintiff seeks to hold Quorum liable is based on a theory of liability for which the Plaintiff has conceded there is no defense. While the trial court did not rely upon the *Howard* decision, at the Plaintiff's request, this Court is not so bound. This Court should

for an administrator who owes no duty to the Plaintiff. This Court should therefore affirm the trial court's ruling dismissing Quorum under the controlling authority of the *Howard* decision. The Plaintiff's argument wholly ignores the undisputed fact that the owner/operator of Neshoba County General Hospital- Nursing Home is the nursing home's Board of Trustees - not Quorum. The remaining issues listed by the Plaintiff are wholly moot should the Court follow *Howard*.

III. **Alternatively, Assuming that *Howard v. Estate of Harper* Does Not Control this Action, Quorum Health Resources, Inc. Has No Liability and Is Entitled to All the Protections of Mississippi Tort Claims Act as an "Instrumentality" of a "Community Hospital" and All Claims Against It Are Barred by the One Year Limitations Period of the Mississippi Tort Claims Act**

As best undersigned counsel can understand, Plaintiff's position that Quorum is not an instrumentality of Neshoba County Nursing Home, is based on the argument that where a private entity such as Quorum contracts with a public hospital to provide management services for Neshoba, "any negligent acts or omissions of the staff would impose liability upon . . . Quorum" because even though "[t]he staff at Neshoba were employees of Neshoba County, they were under the direction and control of Quorum through Lawrence Graeber in the conduct of their daily duties and responsibilities" Appellee's br. at p.41. In essence, the Plaintiff requests this Court to find, through some form of metaphysical transmogrification, that Quorum actually operates and controls the hospital itself. Having performed this legerdemain, the Plaintiff then asserts that Quorum is liable for the hospital's employees.

between Quorum and the Board of Trustees of Neshoba County General Hospital, the By-laws of Neshoba County General Hospital, and the Mississippi Tort Claims Act. It is undisputed that the Board of Trustees of Neshoba County General Hospital - Nursing Home retains ultimate control of the hospital and that Quorum must manage "consistent with the policies and directives of the Hospital. . . ." (R. 564). The Management Agreement further states that "Throughout the Term of this Agreement, the Hospital, through its Board of Trustees (the "Board"), shall retain all authority and shall exercise control over the business, policies, operation, and assets of the Hospital, in accordance with the Hospital's Charter and Bylaws." Mgt. Agr. § 2(a). (R. 564). In Section 3 of the agreement, Quorum's duties are "subject to the Board's continuing control and direction. . . ." (R. 566). Further, "[n]othing in this Agreement is intended to alter, weaken, displace or modify the responsibility of the Board for the Hospital's direction and control as set forth in the Hospital's Charter and Bylaws." (R. 566).

The Restated Bylaws of Neshoba County General Hospital - Nursing Home expressly provide that the Board of Trustees "shall exercise such power and authority and assume such responsibility as may be provided for by Chapter 13 of Title 41 of the Mississippi Code of 1972. . . ." Restated By-laws, Art. III, § 2. (R. 1066). Moreover, the Bylaws state that

[n]o assignment, referral, or delegation of authority by the Board of Trustees to the Administrator, the Medical Staff, or anyone else shall preclude the Board of Trustees from exercising the authority to meet its responsibilities for the conduct of the Hospital. The Board of Trustees shall retain the right to rescind any delegation.

statutory authority, which states in relevant part:

(5) The power of the board of trustees shall specifically include, but not be limited to, the following authority: (g) **To contract by way of lease, lease-purchase or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the construction, management, funding or operation of the community hospital or any division or department thereof, or any related activity, including, without limitation, shared management expertise or employee insurance and retirement programs, and to terminate said contracts when deemed in the best interests of the community hospital;**

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

Legally, Plaintiff fails to show present any case law whatsoever that supports its contention that where a private entity contracts with a MTCA-covered public entity to provide management services, under the supervision and control of the public entity, that private entity somehow assumes vicarious liability for the operation of the staff of the public entity. Failure to support their legal contentions acts as a waiver of the issue on appeal. *Varvaris v. Perreault*, 813 So.2d 750 (Miss. Ct. App. 2001).

Procedural bar aside, Quorum Health Resources, LLC., is protected by the Mississippi Tort Claims Act as an instrumentality of the Neshoba County General Hospital - Nursing Home. Because ultimate control of Neshoba County General Hospital - Nursing Home lies with the Board of Trustees, Quorum has no liability. *Allstadt v. Baptist Memorial Hospital*, 893 So. 2d at 1087. In addition, Quorum is entitled to the same "protections, limitations and immunities of the M.T.C.A." as Neshoba County General Hospital - Nursing

MTCA." *Bolivar Leflore Medical Alliance, LLP v. Williams*, 938 So. 2d 1222 (Miss. 2006). The Plaintiff does not contest the fact the Neshoba County General Hospital - Nursing Home is a "community hospital"; a "hospital, nursing home and/or related health facilities or programs established and acquired by *boards of trustees* or by one or more owners which is *governed, operated and maintained by a board of trustees*." Miss. Code Ann. § 41-13-10(c).

Mississippi law holds that "a state entity does not lose its status under the Tort Claims Act by merely contracting with a private entity." *Allstadt v. Baptist Memorial Hospital*, 893 So. 2d 1083 (Miss. Ct. App. 2005). A "private corporate entity," if it is "responsible for governmental activities" may properly be regarded as a "political subdivision" under Miss. Code Ann. § 11-46-1(i). *Bolivar Leflore Medical Alliance, LLP v. Williams, et al*, 2006 WL 2829854 at ¶ 14 (Oct. 10, 2006); *Watts v. Tsang*, 828 So.2d 785, 791 (Miss.2002); *Mozingo v. Scharf*, 828 So.2d 1246, 1254-55 (Miss. 2002). In *Bolivar Leflore*, the Mississippi Supreme Court reasoned that so long as the ultimate control and management of the community hospital rested in the hands of a public entity, then the entity had all the "protections, limitations and immunities of the M.T.C.A."

The Mississippi Supreme Court expressly adopted the reasoning from a Court of Appeals decision in *Allstadt v. Baptist Memorial Hospital*, 893 So. 2d 1083 (Miss. App. 2005). In *Allstadt*, the plaintiff sued Baptist Memorial, a private entity with whom the board of trustees had contracted for management of the facility, for failing to properly exercise

entity which managed the facility was not the facility's operator, and 2) the claim was barred against the Tippah County Hospital, the county owned operated of the hospital.

On appeal, the Court of Appeals noted that while a contractual relationship existed between Tippah County Hospital and Baptist Memorial Hospital (Baptist was hired for management services to be provided for Tippah County Hospital), the court held that pursuant to statutory law, found in §41-13-1(c), Tippah County Hospital had not abandoned control over the property and the hospital operations or control over the employees. The court reasoned that even though Baptist was involved in the management of the hospital's business, pursuant to a management contract, that the Plaintiff could not recover action against the management company because the Tippah County Hospital was the only entity liable for any injuries to residents or invitees of the hospital. *Allstadt*, 893 So. 2d at 1087. *Bolivar-Leflore* speaks with considerable persuasive effect and *Allstadt* is directly on point.

Plaintiff wholly misinterprets *Allstadt*, arguing that the decision does not compel the dismissal because the ruling addressed a "state entity," as opposed to a "private entity. Appellant's br. at p.36. The style of the case alone, *Allstadt v. Baptist Memorial Hospital*, 893 So. 2d 1083 (Miss. Ct. App. 2005), demonstrates that this purported distinction is factually incorrect. The exact text of the opinion states that "Allstadt filed suit for damages against Baptist Memorial Hospital doing business as Tippah County Hospital." The fact that Baptist Memorial Hospital, a private management company, and the only named defendant, was dismissed demonstrates that plaintiff's distinction is incorrect. Where the only party sued in *Allstadt* was a private management company, the Court dismissed the

Put another way, under the Plaintiff's reasoning that a different statute of limitations applies to a private management company, the Plaintiff cannot explain why the claim against Baptist, a private management group, was not remanded following the dismissal of the owner/operator on statute of limitation grounds.

No liability is created for Quorum for "merely contracting" with Neshoba County General Hospital - Nursing Home. Further, even if Quorum could be held liable, it is entitled to the same "protections, limitations and immunities of the M.T.C.A." as Neshoba County General Hospital - Nursing Home. As Quorum has adopted all arguments of Neshoba County General Hospital with regards to Plaintiff's factual allegations for medical malpractice, and all of those claims being barred by the same applicable one year statute of limitations as to Neshoba, then all claims against Quorum are barred as well.

IV. As a Further Alternative, Where All Claims Against Quorum Are Derivative, the One-Year Limitations Period Prescribed in §11-46-11(3) Controls in this Action

As a further alternative argument, Quorum would show that even if Quorum were not entitled to all protections of the Mississippi Tort Claims Act by being an instrumentality of Neshoba County, the one year statute of limitations in 11-46-11(3) would still apply since the claims against Quorum are derivative.

Where a claim against the underlying caregiver is barred by the statute of limitations, derivative claims are barred as well. *Lowery v. Statewide Healthcare Service, Inc.*, 585 So.2d 778 (Miss.1991). In *Lowery*, the Plaintiff sued a nurse and Statewide Healthcare Service, Inc., a corporation that had contracted with a medical center. Under

competent nurses and other medical personnel to assist in the treatment of the hospital's patients." *Id.* at 779. Plaintiff's argument that *Lowery* is distinguished because the sole claim was that of vicarious liability is incorrect. As noted in the majority opinion, as well as the dissent, there was a derivative claim of liability for Statewide having failed to provide "reasonably competent nurses and other medical personnel to assist in the treatment of the hospital's patients." *Id.* at 779, 781-82. The Court thus held that when an action against a nurse was barred by the statute of limitations, then the derivative action against the principal was also barred, despite the fact that a longer statute of limitations applied to Statewide. The Court supported its decision by reasoning that "a statute that bars a claim against an agent equally protects those in whose behalf he acted as agent. . . ." *Lowery v. Statewide Healthcare Service, Inc.*, 585 So.2d 778 (Miss. 1991) (additional citations omitted). The present action's similarity to *Lowery* is obvious.

Plaintiff has argued that Quorum is liable for the alleged negligent management and supervision of healthcare services at Neshoba County Nursing Home. As stated in the Appellant's brief, staff at the nursing home were . . . under the direction and control of Quorum through Lawrence Graeber in the conduct of their daily duties and responsibilities. Any negligent acts or omissions by the staff would impose liability upon . . . Quorum." Appellant's br. at p.41. Plaintiff futilely argues that a claim of negligent management is primary and independent, but cites no authority in support of her position. Appellant's br. at 40-41.

the day-to-day operations of the Neshoba is conducted, is nevertheless a direct principal actor in a tort liability lawsuit brought by a resident for personal injuries and death of a resident. Certainly, all claims of mismanagement are dependent on proof of a breach of a duty to in the direct care of a resident. Where there is no genuine issue of material fact that any alleged negligent act or omission occurred within the statutory limitations period against Neshoba, no derivative claim against Quorum for negligent management exists. Put another way, for the claim of negligent management against Quorum to be timely, the Plaintiff must timely file claim that employees of Neshoba County Nursing Home negligently caused injury to the Plaintiff. *Finley v. Beverly Health & Rehabilitation Services, Inc.*, 93 So. 2d 1026 Miss. Ct. App. 2006).

Plaintiff misreads the *Finley* decision in its entirety, arguing that *Finley* does not hold that the claims of negligent management are derivative of underlying liability of the caregiver's employees. In *Finley*, the allegation was short-staffing. Contrary to Plaintiff's position, The Court held that proximate cause required proof that an individual employee **"must have violated the standard of care, even if the fault was corporate policy and not the employee's personal negligence."** *Id.* at ¶14 (emphasis added). Thus, the decision holds that the claims of negligent management are derivative, and not independent.

Where the claims against Neshoba are governed by the one year statute of limitations contained in §11-46-11(3), the claims against Quorum, being derivative in

those claims are likewise barred against Quorum.

CONCLUSION

Quorum Health Resources, Inc., neither owns nor operates the Neshoba County General Hospital-Nursing Home. Further, as any alleged liability of Quorum arises through Lawrence Graeber, the Plaintiff fails to state a claim of relief upon which relief may be granted against Quorum. Alternatively, Quorum is entitled to all of the privileges, immunities and benefits of the Mississippi Tort Claims Act as Quorum is an instrumentality of Neshoba's Board of Trustees which operates and controls the facility. For all of the reasons stated in Neshoba County's Brief, which is adopted and reincorporated by reference here, there is no genuine issue of material fact that the Plaintiff has no expert testimony to demonstrate that any alleged negligence occurred within the one year period of time prior to the filing of the Plaintiffs' Notice of Claim. Finally, all of the claims against Quorum are derivative. Thus, where all of the claims against Neshoba are barred by the Statute of Limitations, then all derivative claims are also barred. This Court should affirm the trial court's grant of summary judgment in favor of Quorum Health Resources, Inc.

Respectfully submitted,

QUORUM HEALTH RESOURCES, INC.

BY:


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CERTIFICATE OF SERVICE

I, William W. McKinley, Jr., do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing instrument to:

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Honorable Vernon Cotten
Neshoba County Circuit Judge
205 Main Street
Carthage, MS 39051

This the 31st day of December, 2007.



WILLIAM W. MCKINLEY, JR.