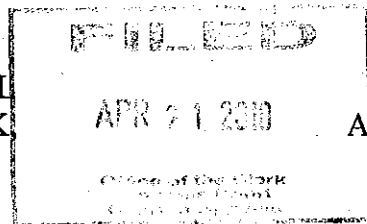


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IN THE SUPREME COURT OF MISSISSIPPI
DOCKET NO. 2007-CA-00465-SCT

THE ESTATE OF EULA MAE FEDRICK,
BY AND THROUGH SUE SYKES,
ADMINISTRATRIX, FOR THE USE AND BENEFIT
OF THE ESTATE OF EULA MADE FEDRICK AND
FOR THE USE AND BENEFIT OF THE WRONGFUL
DEATH BENEFICIARIES OF EULA MAE FEDRICK



APPELLANT

VERSUS

QUORUM HEALTH RESOURCES, INC., NESHOB
A COUNTY, AND MARVIN PAGE,

APPELLEES

**SUPPLEMENTAL BRIEF OF APPELLANT
ON WRIT OF CERTIORARI**

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ARGUMENT

In this supplemental brief, the Estate of Eula Mae Fedrick will confine its argument to matters not addressed in its original briefing, its motion for rehearing, or its petition for certiorari. Citations to those original arguments will be set forth in the appropriate sections.

Two questions were presented in the petition for certiorari:

First, whether the Court of Appeals erred in holding that Quorum Health Resources, Inc., was an “instrumentality” of Neshoba County for purposes of the Mississippi Tort Claims Act; and

Second, whether the Court of Appeals erred in finding that the continuing tort doctrine did not apply to the facts of this case.

**The Court of Appeals erred in holding that
Quorum Health Resources, Inc., was
an “instrumentality” of Neshoba County
for purposes of the Mississippi Tort Claims Act**

The principal arguments supporting this question are found in the Appellant’s initial brief at pages 33-37, in its reply brief at pages 10-13, in its motion for rehearing at pages 5-6, and in its petition for certiorari at pages 3-5. The Circuit Court and the Court of Appeals misapplied this Court’s decision in *Bolivar Leflore Medical Alliance, LLP v. Williams*, 938 So. 2d 1222 (Miss. 2006), in finding Quorum Health Resources to be a public entity covered by the Mississippi Tort Claims Act, when Quorum, in its own pleadings made exactly the opposite assertion. See Motion by Defendants for Summary Judgment, and Alternative Motions for Continuance and to Bifurcate, May 31, 2006, ¶¶8 and 9 (R. 449).

The notice of appeal in this action was filed on March 9, 2007, more than three years ago. The case was argued and submitted in the Court of Appeals on June 5, 2008. On that same day, this Court denied the motion for rehearing in *Estate of Grimes v. Warrington*, 982 So.2d 365 (Miss. 2008), where the Court addressed the application of the Mississippi Tort Claims Act

(MTCA) to a doctor employed by a hospital instrumentality identical to the limited liability company at issue in *Bolivar Leflore Medical Alliance, LLP v. Williams*. The Court in *Grimes* held, consistent with its decision in *Bolivar Leflore* that the limited liability company was an instrumentality of Greenwood Leflore Hospital and therefore covered by the MTCA. As in *Bolivar Leflore*, then, the individual doctors employed by the limited liability company were government employees immune from personal liability by virtue of Miss. Code Ann. §11-46-5.

However, despite so finding, this Court unanimously¹ held in *Grimes* that MTCA immunity was an affirmative defense, citing *City of Ellisville v. Richardson*, 913 So.2d 973, 975 (Miss.2005); *Lumberman's Underwriting Alliance v. City of Rosedale*, 727 So.2d 710, 712 (Miss.1998); and *Dixon v. Singing River Hosp. Sys.*, 632 So.2d 951, 952 (Miss.1994). Rule 8(c) of the Mississippi Rules of Civil Procedure provides:

In pleading to a preceding pleading, a party shall set forth affirmatively ... any ... matter constituting an avoidance or affirmative defense.

Under this Court's holding in *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss.2007), a defendant is required to pursue the defense of MTCA immunity as he would any other affirmative defense or risk losing it. In *Grimes*, the Court held that the defendant doctor, despite raising MTCA immunity as an affirmative defense in his answer, had waived that defense by “substantially ... engag[ing] the litigation process by consenting to a scheduling order, participating in written discovery, and conducting depositions.” 982 So.2d at 370.

In *Grimes*, the complaint had been filed on June 5, 2001, and the defendant did not move for summary judgment on his MTCA defense until August 3, 2006. In the instant case, the complaint was filed on November 16, 2000. (R. 6) Quorum answered on January 31, 2001. (R. 85) Unlike the defendant doctor in *Grimes*, however, Quorum **did not raise** MTCA immunity as

¹ Two Justices concurred in the result only.

a defense (affirmative or otherwise) in its answer or file a separate motion to dismiss based on that defense. On June 1, 2006, the defendants filed a joint motion for summary judgment. (R. 447) In that motion, Quorum **did not assert** immunity under the MTCA as a ground for relief; in fact, Quorum denied that it was a public entity covered by the MTCA. (R. 449 ¶9) What was sought was a bifurcation of the trial, in the event summary judgment was denied, with the claims against Neshoba County and Neshoba County Hospital being tried to the court and the claims against Quorum being tried to a jury. (R. 449-50) In fact, Quorum did not raise the MTCA issue at all until it filed its “Combined Memorandum Brief and Rebuttal ... in Support of Motion for Summary Judgment” (R. 1031) on September 28, 2006. Even then, the issue was raised only tangentially:

Quorum cannot be held liable for the treatment of the hospital patients or nursing home residents as Quorum did nothing more than management services for the Board of Trustees which operates the hospital. Where NCNH [Neshoba County Nursing Home] did not abandon its role as operator and where Quorum operates under the board of trustees control, Quorum has no liability, or alternatively, enjoys the same immunity the NCNH does.

(R. 1039 ¶15) During the five years and eight months that this civil action was pending prior to September 28, 2006, Quorum propounded discovery, filed motions, agreed to scheduling orders and otherwise “substantially ... engaged the litigation process.” Any defense of MTCA immunity was waived by Quorum long before the time it was finally asserted.

**The Court of Appeals erred
in finding that the continuing tort doctrine
did not apply to the facts of this case**

The principal arguments supporting this question are found in the Appellant’s initial brief at pages 11-32, in its reply brief at pages 3-7, in its motion for rehearing at pages 6-7, and in its petition for certiorari at pages 5-10. Since the substantive briefing of this issue, this Court and

the Court of Appeals have addressed the application of the continuing tort doctrine in two additional cases.

In *Pierce v. Cook*, 992 So.2d 612 (Miss. 2008), this Court upheld the tolling of the statute of limitations for intentional infliction of emotional distress by the application of the continuing tort doctrine. In that case, Pierce represented Cook and Cook's wife in a medical malpractice action. After the Cooks ceased marital cohabitation, Pierce and Cook's wife began an affair, ultimately leading to the Cooks' divorce and Pierce and Cook's wife being married. The Court found:

Cook testified to several wrongful acts by Pierce that occurred until the divorce which constituted repeated wrongful conduct, causing Cook emotional distress. Not only did Pierce take Kathleen on a trip to New Orleans during which they had sexual relations, but Pierce flaunted his involvement with Kathleen in front of Cook at a local restaurant in Jackson. Furthermore, there is tape-recorded evidence in which Pierce's voice is in the background clearly "coaching" Kathleen concerning what to say to Cook. Pierce himself called Cook on his birthday, allegedly apologizing for the situation with Kathleen. Based on this evidence, the Court finds there was repeated wrongful contact by Pierce. We thus find that the trial court did not err in tolling the statute of limitations until the date of the divorce decree.

992 So.2d 619-20. Comparing this statement about repeated conduct with the hundreds of events cited in the affidavits of Plaintiff's experts in the instant case clearly shows that, in this case, there is a much clearer pattern of repeated wrongful conduct that led to injury to Eula Fedrick.

Contrasted with *Pierce v. Cook* and the instant case is the decision in *Peavey Electronics Corp. v. Baan U.S.A.*, 10 So.3d 945 (Miss. App. 2009). That suit involved the sale to and implementation of Baan's computer software by Peavey. The software was purchased in 1997; implementation was first attempted in 1999 and suit was filed in 2004. The Court of Appeals observed:

¶ 21. Peavey argues that its tort claims arise out of Baan's "continuing misrepresentations that the software package Baan

sold Peavey could be fully implemented to perform as promised. Those misrepresentations began in 1997, when Baan induced Peavey to purchase the software package, and continued at least through 2003, with Baan's repeated affirmations that Baan could achieve full implementation."

¶ 22. Peavey does not allege any specific act of fraud falling within the statute of limitations; in fact, it has admitted that the actionable torts it has alleged are barred by the statute absent tolling.⁶ Peavey instead asserts that it has produced evidence of "continuing unlawful acts" in Baan's subsequent assertions that its software was not defective.

¶ 23. As the supreme court stated: "Where the tortious act has been completed ... the period of limitations will not be extended on the ground of a continuing wrong." ... If Baan fraudulently induced Peavey to purchase defective software, the tort was completed with the purchase. Baan's subsequent denials that the software it tendered was defective, even if false, do not transform this into a "continuing" tort. The trial court did not err in finding this argument meritless.

10 So. 3d at 955, *citing Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 148-49(¶ 17) (Miss.1998), *quoting Stevens v. Lake*, 615 So. 2d 1177, 1183 (Miss. 1993). The Peavey factual situation is completely different from the evidence of repeated wrongful conduct cited in the affidavits of Plaintiff's experts here. Their testimony established repeated conduct and negated any conclusion that the injuries complained of were the continued effects of a completed act.

Our neighboring state, Louisiana, has specifically applied the continuing tort doctrine in the context of nursing home care. In *Randall v. Concordia Nursing Home*, 965 So.2d 559 (La. App. 2007), the Third Circuit Court of Appeal applied the continuing tort doctrine to claims that the nursing home's "damaging conduct, chronic and continuous understaffing, led to day to day violations of the resident's 'right to be treated courteously, fairly and with the fullest measure of dignity,'" as guaranteed to her in the Louisiana Nursing Home Residents' Bill of Rights. *Id.* at 569. The Court of Appeal stated, "If a defendant's conduct is continuous and it gives rise to damages successively occurring from day to day, then a continuing tort exists. When such a

situation arises, prescription does not begin to run until the continuous, damage causing conduct ceases.” *Id.* The evidence in that case was that the nursing home was understaffed two to three days per week, resulting in the resident being left in urine and feces for extended periods. In the instant case, we have evidence through the affidavits of the Plaintiff’s experts that the Circuit Court found was sufficient to make out create a *prima facie* case of negligence on the part of the nursing home:

9. The allegations of negligence made by Plaintiff’s experts that *are sufficient to make out the elements of a cause of action*

10. The affidavits submitted by Plaintiff in opposition to summary judgment contain *allegations of negligence resulting in actual injury* from the following:

Falls by Ms. Fedrick;

Alleged failure to address Ms. Fedrick’s incontinence;

Pressure sores, or decubiti;

Alleged failure to address Ms. Fedrick’s psychiatric situation, which included her threatening or striking at fellow residents;

Alleged failure to notify Ms. Fedrick’s physicians of changes in her condition; and

Alleged failure to adequately address Ms. Fedrick’s loss of weight and appetite.

* * * (emphasis added)

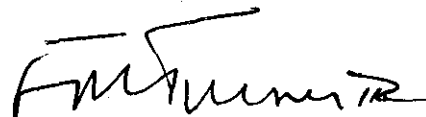
Findings of Fact and Conclusions of Law Regarding Motions for Summary Judgment and Final Judgment (R.Ex. 2, pp. 2-3, R. 1231-1232). These negligent acts formed a pattern of continuing neglect that is set out in detail in the experts’ affidavits. *See* Affidavit of Michael Baldinger, M.D. (R. 736-786); Affidavit of Gloria Blackmon, R.N. (R. 788-843) The Plaintiff in its briefs has offered an extended example of one such pattern of repeated conduct, regarding Mrs. Fedrick’s loss of weight and nutrition, but the patterns of repeated conduct occur in the other areas identified by the Circuit Court.

"A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993); *McFadden v. State*, 580 So. 2d 1210 (Miss.1991). As noted in the Petition for Certiorari, the application of the continuing tort doctrine is fact specific and fact intensive; answering the question of whether a course of acts involves separate wrongs with distinct injuries or a continuous course of conduct with cumulative injury requires the determination of disputed issues of fact. It is a question that can best – perhaps only – be determined following a full hearing of the evidence. This question is clearly material, since it ultimately determines whether and to what extent the statute of limitations may bar all or part of the Plaintiff's claim. In the context of a motion for summary judgment, the existence of such issues of fact requires denial of the motion and consideration of the matter at trial on the merits. The Circuit Court and Court of Appeals erred by undertaking to dispose of this contested issue on a motion for summary judgment.

CONCLUSION

Appellant respectfully asserts that the Court of Appeals erred when it affirmed the grant of summary judgment by the Circuit Court. The decisions of the Circuit Court and the Court of Appeals should be reversed and this civil action remanded for a trial on the merits as to all issues.

Respectfully submitted,
Estate of Eula Mae Fedrick, by and through
Sue Sykes, Administratrix



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CERTIFICATE OF SERVICE

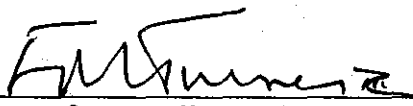
I hereby certify that a true and correct copy of the foregoing has been furnished via United States Mail, postage prepaid and properly addressed, to the following:

Honorable Vernon R. Cotten
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This the 21st day of April, 2010.



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