SUPREME COURT OF MISSISSIPPI

THE ESTATE OF ARDELUA JOHNSON, BY AND THROUGH ALLIE SHAW, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ARDELUA JOHNSON, AND FOR THE USE AND BENEFIT OF THE WRONGFUL DEATH BENEFICIARIES OF ARDELUA JOHNSON

PLAINTIFF/ APPELLANT

vs.

NO. 2008-TS-00688

GRACELAND CARE CENTER OF OXFORD, LLC, GRACELAND MANAGEMENT COMPANY, INC., GRACELAND HOLDINGS, LP, GRACELANDS, INC., LAFAYETTE LTD, INC., KATIE M. OVERSTREET, QTIP TRUST, KATIE M. OVERSTREET TRUST, LARRY OVERSTREET, JOHN B. ("LEY") FALKNER, UNIDENTIFIED ENTITIES 1 THROUGH 10 AND JOHN DOES 1 THROUGH 10 (AS TO GRACELAND CARE CENTER-OXFORD)

DEFENDANTS/ APPELLEES

IN THE LAFAYETTE CIRCUIT COURT OF MISSISSIPPI
THIRD JUDICIAL DISTRICT AT OXFORD, LAFAYETTE COUNTY

THE HONORABLE HENRY L. LACKEY

REPLY BRIEF OF PLAINTIFF/ APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Joining Defendants, Plaintiff requests that oral argument be granted. Plaintiff believes that a thorough discussion with the Court regarding the application and construction of the tolling provisions of §15-1-36 will be beneficial.

ARGUMENT

This case raises two primary issues and another secondary issue. The primary issues are: 1) whether the statute of limitations begins to run on an incompetent nursing home resident's claims upon her discharge from the facility or upon her death, which occurred one month later; and 2) whether Miss. Code Ann. §15-1-36(6) supersedes the provisions of § 15-1-36(5), reducing the applicable statutory period to 1 year after Ms. Johnson's death. The secondary issue is whether the professional negligence statute, Miss. Code Ann. §15-1-36, subsumes all other claims against a nursing home. The Court need only consider whether Plaintiff's alleged non-medical malpractice causes of action are subsumed by the medical malpractice statute if the Court finds that Plaintiff's medical malpractice claims are barred by the applicable statute of limitations.

Defendants open their brief with the argument that Miss. Code Ann. §15-1-59 is irrelevant because Plaintiff's claims sound in medical malpractice and §15-1-36 specifically addresses the limitations period for medical malpractice claims. (Def. Brief at 5-7) Yet, Plaintiff has never maintained that her medical malpractice claims were subject to any statute other than §15-1-36. The general savings statute, §15-1-59, provides a historical background for the tolling of claims against incompetents. Moreover, it applies to the majority of Plaintiffs claims, which do not allege medical malpractice.

I. Plaintiff's Medical Malpractice Claims Were Timely Filed.

Focusing on Plaintiff's medical malpractice claims, the critical questions that must be addressed are the two primary issues stated above: 1) whether the statute of limitations begins to run on an incompetent nursing home resident's claims upon her

discharge from the facility or upon her death one month later; and 2) whether Miss. Code Ann. §15-1-36(6) supersedes the provisions of § 15-1-36(5), reducing the applicable statutory period to 1 year after Ms. Johnson's death.

1. The Statute of Limitations for Plaintiff's Claims Began to Run Upon Ardelua Johnson's Death.

Ardelua Johnson was a resident of Graceland Care Center-Oxford (Graceland) from approximately September 1, 2001 until June 8, 2004. R. at 1. Ms. Johnson died on July 16, 2004. R. at 5. On September 11, 2006, Plaintiff filed the instant action against Defendants, stating claims for the injuries and damages Ms. Johnson sustained while she was a resident of Graceland. R. at 1. On October 26, 2006, Defendants filed a Motion to Dismiss alleging Plaintiff's claims are barred by the applicable statute of limitations. R. at 77. For purposes of their Motion to Dismiss, Defendants stipulated that Ms. Johnson was of "unsound mind" during her residency at Graceland and continuing until her death. R. at 264, 271. On March 31, 2008, the Circuit Court issued an Opinion and Order finding that all of Plaintiff's claims are derivative and "arise from alleged medical malpractice." R. at 441.[1] Moreover, the Circuit Court held that the statute of limitations began to run from the date of Ms. Johnson's discharge from Graceland, June 8, 2004. Accordingly, the Circuit Court found that the statute of limitations expired on all of Plaintiff's claims on June 8, 2006. The Circuit Court dismissed all of Plaintiff's claims as barred by the two-year statute of limitations applicable to medical malpractice cases.

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[1] The Circuit Court's Opinion and Order did not address Defendants' arguments that the Administrator had no independent duty to Ms. Johnson; that Plaintiff has no cause of action against the Overstreet Defendants because they had no relationship with Graceland after December 31, 2003; that Plaintiff did not plead fraud with sufficient particularity; or that Mississippi does not recognize a claim against a nursing home for breach of fiduciary duty. R. at 441-44.

Respectfully, the statute of limitations could not have begun to run at the time of Ms. Johnson's discharge from Graceland. It has long been the law in Mississippi that a statute of limitation does not run against a minor or a person of unsound mind. While that rule has long been codified at Miss. Code Ann. § 15-1-59 for most actions, the enactment of §15-1-36 does not change the policy of "protect[ing] the legal rights of those who are unable to assert their own rights due to disability." *Hays v. Lafayette County School Dist.*, 759 So.2d 1144, 1147 (Miss. 1999) (*quoting Rockwell v. Preferred Risk Mut. Ins. Co.*, 710 So.2d 388, 391 (Miss. 1998)). As the Mississippi Supreme Court has determined, to allow the statute of limitations to run during the disability of a person of unsound mind "would defy reason." *Rockwell*, 710 So.2d at 1147. Moreover, the longstanding rule that the disability of unsound mind is removed when the disabled party either regains competency or dies is not altered by the medical malpractice statute. To the contrary, § 15-1-36(5), which specifically tolls medical malpractice claims for persons of unsound mind, provides,

> If at the time at which the cause of action shall or with reasonable diligence might have been known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, **commence action on such claim at any time within two (2) years next the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.**

Miss. Code Ann. § 15-1-36(5)(emphasis added).

By the plain terms of the statute, the statute of limitations was tolled for Ardelua Johnson's claims until her death because she was of unsound mind upon her admission to Defendants' facility and she continued in that condition until her death on July 16 2004.

R. at 220-22, 271, 323-24. Therefore, the limitations period on Plaintiff's claims did not commence until Ms. Johnson's death on July 16, 2004. The Circuit Court erred when it held that the limitations period began to run upon her dismissal from Graceland on June 8, 2004.

2. Miss. Code Ann. §15-1-36(6) does not supersede the provisions of § 15-1-36(5), reducing the applicable statutory period to 1 year after Ms. Johnson's death.

Miss. Code Ann. § 15-1-36(2) limits Plaintiff's medical malpractice claims to those acts occurring within two years before Plaintiff's Complaint was filed. Miss. Code Ann. § 15-1-36(2) provides:

> (2) For any claim accruing **on or after July 1, 1998**, and except as otherwise provided in this section, **no claim in tort may be brought against a** licensed physician, osteopath, dentist, hospital, **institution for the aged or infirm,** nurse, pharmacist, podiatrist, optometrist or chiropractor **for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered,** and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred....

Id. (emphasis added). Miss. Code Ann. §15-1-36(5) tolls the commencement of the two year limitations period until the removal of Ms. Johnson's disability, in this case her death. Had Ms. Johnson not been of unsound mind during her residency, then the last date on which she could file any claim stemming from her residence at Graceland would be two years after her discharge (not counting any extension granted by the §15-1-36(15) sixty day provision), which would be June 8, 2006. Notwithstanding Defendants' concession that Ms. Johnson was of unsound mind for purposes of their Motion to Dismiss, the Circuit Court calculated the limitations period to be the same as if Ms.

Johnson were not of unsound mind. Such calculation is nonsensical in light of the tolling provision of §15-1-36(5).

Defendants first agree with the Circuit Court's interpretation that the date of Ms. Johnson's discharge is the correct commencement of the limitations period. (Def. Brief at 7-10) Defendants then argue, however, that if the Court were to look at the date of Ms. Johnson's death, then §15-1-36(6) makes clear that Ms. Johnson's claims could not be filed later than one year after her death in any event. Defendants allege that §15-1-36(6) does not remove any longer limitations periods but merely imposes a limitation in the event that a person dies while still under a disability. Yet, the reading proposed by Defendants clearly, significantly reduces the limitations period allowed to a disabled resident.

The medical malpractice statute makes clear in § 15-1-36(2) that all plaintiffs are allowed two years in which to assert their medical malpractice claims. Yet, under Defendants' theory, Ardelua Johnson would be allowed not more than 13 months (until July 2005) in which to assert any claims stemming from actions that occurred in June 2004 because Ms. Johnson died in July 2004 while still under the disability of unsound mind. R. at 234, 270. Such a construction of the statute, reducing the universally applied two year limitations period because an incompetent has died, is absurd. Ms. Johnson was entitled to a minimum of two years in which to file her claims. That she was of unsound mind should extend, not shorten, the applicable limitations period.

The more logical reading of Section 15-1-36(6) is that it provides an extension of the time allowed for individuals who were subject to the disability of unsound mind but who died shortly before the statute of limitations has run on a particular claim. This is the

construction that has long been applied to § 15-1-55, which is specifically mentioned and incorporated into §15-1-36(6). Instead of applying §15-1-55 to the construction of §15-1-36(6), as the statute requires, Defendants argue that only the 1 year period prescribed under §15-1-55 was intended to be incorporated. Had the Legislature intended for a straightforward one year period be included in the construction of §15-1-36(6)—independent of the long-established judicial construction of §15-1-55, then the Legislature could have easily inserted the words Defendants propose "and within one year after the death of the person." (Def. Brief at 11-12) Instead, the Legislature chose to specifically incorporate "beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972." There was no need to reference that statute had the Legislature intended that the statutes be construed separately.

Section 15-1-55 "has been repeatedly held not to apply in such cases unless the death of the injured decedent occurs within the last year in which a suit may have been brought for his injury." *See Triplett v. U.S.*, 213 F.Supp. 887, 889 (S.D. Miss. 1963) (citing *Weir v. Monahan,* 67 Miss. 434, 7 So. 291 (Miss. 1890)); *Hambrick v. Jones*, 64 Miss. 240, 8 So. 176 (Miss. 1886); *Hughston v. Nail,* 73 Miss. 284, 18 So. 920 (Miss. 1895).

Ms. Johnson died on July 16, 2004, barely over a month after leaving Defendants' facility on or about June 8, 2004. Plaintiff submits that the one-year time limit provided under § 15-1-36(6) and § 15-1-55 would only apply if Ms. Johnson's death had been nearly two years after the removal of her disability or the termination of her residency at Defendants' facility. For example, if Ms. Johnson had died in May of 2006, still of unsound mind, § 15-1-36(6) and § 15-1-55 would provide for up to one year after her

death to file an action against the Defendants. This one-year time limit should not, however, apply to shorten the specific two-year limitations period set forth in §15-1-36(2) and § 15-1-36(5), when Ms. Johnson died within approximately one month of her residency at Defendants' facility. Any other reading, including that championed by Defendants, simply creates confusion and conflict between the sections.

"It is a general rule in construing statutes this Court will not only interpret the words used, but will consider the purpose and policy which the legislature had in view of enacting the law." *State ex rel. Hood v. Madison County ex rel. Madison County Board of Supervisors,* 873 So.2d 85, 88 (Miss. 2004) (citing *Aikerson v. State,* 274 So.2d 124, 127 (Miss. 1973)). "[The] doctrine of *in pari material* . . . provides that if a statute is ambiguous, then this Court must resolve the ambiguity by applying the statute consistently with other statutes dealing with the same or similar subject matter. *James v. State,* 731 So.2d 1135, 1138 (Miss. 1999). Because the Legislature specifically incorporates the period prescribed under §15-1-55 (Defendants' semantics arguments aside), it necessarily intended that such period be construed under §15-1-36(6) in the same manner. Because Ardelua Johnson died just one month after her discharge from Graceland, §15-1-36(6) has no application on the construction of the applicable limitations period. Instead, §15-1-36(5) controls. Moreover, the period began to commence upon her death, as contemplated in the statute-- "two years next the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred." Miss. Code Ann. §15-1-36(5).

3. Miss. Code Ann. §15-1-36(15) extended the limitations period to two years and 60 days.

It is undisputed that Plaintiff sent notice letters to the Defendants pursuant to Mississippi Code Annotated § 15-1-36(15) on July 7, 2006, less than two years after Ms. Johnson's death. R. at 79. Miss.Code Ann. § 15-1-36(15) provides:

> (15) **No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action.** No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. **If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others.** This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

Id. (emphasis added)

Defendants do not argue with Plaintiff's contention that Plaintiff was entitled to file her suit within two years and sixty days after the date the limitations period commenced. (Def. Brief at 8)[2] The only disagreement between the parties is the determination of when the limitations period began to run—upon Ms. Johnson's discharge or her death. As previously set forth, the correct construction of the applicable

[2] Oddly enough, Defendants argue that the Court's interpretation of the applicable statutory period should be negatively influenced by what Defendants perceive as Plaintiff's counsel spending too much time reviewing and assessing the case before filing the Complaint. (Def. Brief at 9-10) Perhaps it is the well-founded Complaint that has Defendants so desperately seeking to craft a technical error to avoid litigating the merits of this action. Regardless, Defendants' argument has no merit. As long as the Complaint was filed prior to the expiration of the limitations period, it does not matter if it was filed on the first day or the last. The Complaint is equally timely as long as the period has not expired. In this case, Plaintiff's Complaint was timely.

statutes would be that the statute of limitations began to run upon Ms. Johnson's death. Accordingly, Plaintiff's had two years and sixty days, until September 14, 2006, in which to file Plaintiff's claims. See *Caldwell v. Warren*, 2 So.3d 751, 755 -756 (Miss.App. 2009). Because Plaintiff's Complaint was filed September 11, 2006, Plaintiff's Complaint was timely.

II. Even If Plaintiff's Medical Malpractice Claims Are Time-Barred, Plaintiff's Other Claims Should Go Forward.

Should this Court reverse the Circuit Court regarding the application of the limitations period for Plaintiff's medical malpractice claims, it need not reach the secondary issue raised in this appeal—whether the professional negligence statute, Miss. Code Ann. §15-1-36, subsumes all of Plaintiff's other claims against the nursing home because they would all be timely.[3] Consistent with Mississippi precedent that a plaintiff may plead multiple or alternative theories of liability in one complaint, Plaintiff has asserted against Defendants several, independent causes of action for the injuries

[3] Defendants have additionally alleged that the Administrator had no independent duty to Ms. Johnson; that Plaintiff has no cause of action against the Overstreet Defendants because they had no relationship with Graceland after December 31, 2003; that Plaintiff did not plead fraud with sufficient particularity; or that Mississippi does not recognize a claim against a nursing home for breach of fiduciary duty. However, the Circuit Court's Opinion and Order did not address these separate arguments. R. at 441-44. Where the Circuit Court erred by summarily construing, and then dismissing, separate and distinct claims as medical malpractice claims, the proper remedy on appeal is for this Court to remand for the Circuit Court to make determinations of fact regarding those separate claims. *Caldwell v. Warren*, 2 So.3d 751, 759 (Miss. App. 2009)("the underlying facts of the fraud and negligence per se claims were not addressed by the circuit court. As such, the circuit court's grant of summary judgment did not fully adjudicate Dr. Caldwell's claims. *See* M.R.C.P. 56(d). The claims of fraud and negligence per se are still pending.")

sustained by Ardelua Johnson. See *Jordan v. Wilson*, 2008 WL 2894366, *4 (Miss. Ct. App. 2008); M.R.C.P. Rule 8(e)(2). Specifically, Plaintiff has alleged that Defendants failed to provide Ms. Johnson with adequate nutrition, hydration and other custodial care, causing her harm, and ultimately her death. Plaintiff has sufficiently stated claims, not only for medical malpractice, but for ordinary negligence, gross negligence, fraud, breach of fiduciary duty, survival and wrongful death. Defendants contend that the other causes of action pled by Plaintiff, although clearly permitted under the Rules, are merely an attempt by Plaintiff to plead around the two year statute of limitations for medical malpractice claims. (Def. Brief at 21-22)[4] According to Defendants, any failure of any duty by Defendants is medical malpractice. Defendants are wrong.

Miss. Code Ann. §15-1-36(2) is only applicable where an allegation directly involves, first, an act or omission "arising out of the course of medical, surgical or other professional services," and, second, the act or omission is performed by a designated health-care provider. If one of these requirements is not met, then the wrongful conduct

[4] Defendants further accuse Plaintiff of pleading NO cases in support of her claims of ordinary negligence. According to Defendants, such failure precludes this Court from considering that cause of action on appeal. (Def. brief at 29-31) Maybe Defendants did not read pages 20-28 of Plaintiff's brief, which cite no fewer than 15 cases and 3 statutes in support of Plaintiff's assertion of contemporaneous claims of negligence and medical malpractice. Defendants' attempt to dispose of Plaintiffs' wrongful death and survival claims on the same basis is likewise without merit. Plaintiff's brief fully addresses Mississippi precedent for the proposition that the applicable statute of limitations for statutory wrongful death and survival claims, the only issue addressed by the Circuit Court, is based on the underlying tort. (See Plaintiff's Brief at p. 10) Because Plaintiff has alleged torts resulting in Ardelua Johnson's death that have limitations periods longer than two years, the wrongful death and survival claims were necessarily dismissed in error. See also, *Price v. Clark*, 2009 WL 2183271, *7 -8 (Miss. 2009)("The statute of limitations for a wrongful-death claim is subject to, and limited by, the statute of limitations associated with the underlying tort that resulted in the wrongful death.")

falls outside the scope of the medical malpractice statute and within the scope of ordinary negligence or some other cause of action. Thus, Defendants' basic premise is flawed.

Whether due to lack of diligence or lack of candor, Defendants cite only one of the three Mississippi appellate decisions rendered since the filing of Plaintiff's principal brief which specifically recognize that claims of ordinary negligence may co-exist with claims of medical malpractice.[5] Even then, Defendants' citation to *Estate of Guillotte v. Delta Health Group,* 5 So.3d 393, 399-402 (Miss. 2009) mischaracterizes the holding in that case.

In *Chitty v. Terracina,* 2009 WL 2595697, *2 (Miss. App. 2009), the Mississippi Court of Appeals plainly recognized, as asserted by Plaintiff herein, that the medical malpractice statute "does not apply to 'all tort claims' but only those tort claims which 'aris[e] out of the course of medical, surgical or other professional services.' Therefore, section 15-1-36(2) would not apply to a tort claim that did not arise out of the performance of professional services by a medical provider listed under the statute." In determining whether claims "arise out of the course of medical, surgical or other professional services" under Mississippi Code Annotated section 15-1-36(2), the *Terracina* Court, citing the appellate decision in *Howell v. Garden Park,* 1 So. 3d 900, 903-04 (Miss. Ct. App. 2008), directed that the following factors identified in *Coleman v. Deno,* 813 So.2d 303, 315-16 (La.2002) be considered:

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[5] *Chitty v. Terracina,* 2009 WL 2595697, *2 (Miss. App. 2009); *Estate of Guillotte ex rel. Jordan v. Delta Health Group, Inc.,* 5 So.3d 393, 395 (Miss. 2009); *Caldwell v. Warren,* 2 So.3d 751, 758 -759 (Miss. App. 2009).

> [1] whether the particular wrong is "treatment related" or caused by a dereliction of professional skill,
>
> [2] whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached,....
>
> [3] whether the pertinent act or omission involved assessment of the patient's condition,
>
> ....
>
> [4] whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform,
>
> [5] whether the injury would have occurred if the patient had not sought treatment, and
>
> [6] whether the tort alleged was intentional.

Focusing on the main issue of whether the tort "arise[s] out of the course of medical, surgical or other professional services," the *Terracina* Court construed the above factors with Chitty's claim that her cause of action was a business dispute. The Court of Appeals determined that it was "clear that Chitty's claims fall under section 15-1-36(2). The biopsy procedure and pathology report were part of her treatment and diagnosis by Dr. Terracina... The pertinent acts involved his assessment and treatment of Chitty's condition...." *Chitty v. Terracina,* 2009 WL 2595697, *4 (Miss. App. 2009). While the *Terracina* Court did determine that Chitty's alleged non-medical malpractice claims in fact sounded in medical malpractice, it did so only after a detailed factual analysis. Certainly, the Court did not foreclose the possibility of non-medical malpractice tort claims co-existing with medical malpractice claims.

In *Guillotte,* citied by Defendants, Edith Jordan, individually and as the administratrix of Guillotte's estate, initiated a lawsuit against the defendant nursing home companies asserting claims of negligence, medical malpractice, malice and/or gross

negligence, fraud, breach of fiduciary duty, a statutory survival claim, and a statutory wrongful-death claim. *Estate of Guillotte ex rel. Jordan v. Delta Health Group, Inc.*, 5 So.3d 393, 395 (Miss. 2009). After the initial pleadings were filed, the parties undertook discovery for more than three years. Ultimately, the nursing home defendants filed a motion for summary judgment arguing that Jordan's failure to identify by name the caregivers at Dixie White House who allegedly breached the standard of care was fatal to her negligence claims. After hearing arguments from both parties, the trial court granted the Defendants' summary judgment motion on September 18, 2007. *Estate of Guillotte ex rel. Jordan v. Delta Health Group, Inc.*, 5 So.3d 393, 396 (Miss. 2009)

On appeal, the Supreme Court wrote, "it does not make sense that a plaintiff's claim can be defeated on summary judgment just because individual names are not given when there is a significant amount of expert testimony, summarized above, regarding individual staff members' negligence. Clearly, the Defendants are in a better position to review and interpret the medical records, which are generated and maintained by the Defendants, in order to identify the employees who cared for Guillotte." *Estate of Guillotte ex rel. Jordan v. Delta Health Group, Inc.*, 5 So.3d 393, 408 -409 (Miss. 2009).

Although the Supreme Court cited the extensive expert testimony in support of Guillotte's claims, it did not find Guillotte's negligence claims to be subsumed by the medical malpractice statute. Moreover, the Court expressly recognized that a separate claim for corporate negligence, including failing to hire an adequate number of staff members for Dixie White House, failing to properly supervise nursing home staff, failing to properly train nursing home staff, and failing to adopt adequate guidelines, policies, and procedures for documenting resident care could co-exist with the other allegations

against the facility. Only because, after extensive discovery, the Court could not identify sufficient evidence in the record regarding the Defendants' duty and the standard of care as to hiring, supervision of staff, training of staff, and documentation procedures did the Court dismiss the separate claim of corporate negligence. *Estate of Guillotte ex rel. Jordan v. Delta Health Group, Inc.*, 5 So.3d 393, 410 (Miss. 2009).

In *Caldwell v. Warren*, 2 So.3d 751, 752 -753 (Miss.App. 2009), Dr. David J. Caldwell, brought suit against a physician and a hospital alleging medical negligence, fraud, and negligence per se due to a failure to maintain true and accurate hospital records. Dr. Caldwell claimed that he underwent a surgery other than that to which he had previously consented. Construing the sixty day notice provision of §15-1-36(15), the circuit court granted summary judgment in favor of Dr. Warren and the Mississippi Neurosurgery and Spine Center.

As recognized by the appellate court,

> Dr. Caldwell's complaint set forth claims of fraud and negligence per se in addition to the medical negligence claim. In his opinion and order that granted summary judgment as to the medical negligence claim, the circuit judge stated: "[Dr. Caldwell] complained of a variety of claims and causes of action, but all are considered as a medical malpractice claim."
>
> However, the fraud claim is based on Dr. Caldwell's allegation that his medical records were altered, including a forged signature on an informed consent document. The complaint also alleges that hospital records and other documents were deliberately misplaced. The negligence per se claim regards a statutory duty to maintain true and accurate hospital records. Neither of these claims are related to the medical negligence claim. They center on issues of record keeping and forgery-issues that were never addressed in any manner by the circuit judge in his dismissal of the claims.
>
> We find that it was error for the circuit judge to summarily consider all the claims as a medical negligence claim. The issues of fraud and negligence per se were separate and distinct from the claim of medical negligence. Further, the underlying facts of the fraud and negligence per se claims were not addressed by the circuit court. As such, the circuit court's grant of

> summary judgment did not fully adjudicate Dr. Caldwell's claims. *See* M.R.C.P. 56(d). The claims of fraud and negligence per se are still pending. Accordingly, the circuit court's judgment dismissing these claims on summary judgment is reversed, and the case is remanded to the circuit court for the adjudication of the claims of fraud and negligence per se.

Caldwell v. Warren, 2 So.3d 751, 759 (Miss. App. 2009).

In addition to plaintiff's medical malpractice claims, Plaintiff has asserted claims for negligence, gross negligence, fraud, breach of fiduciary duty, survival, and wrongful death. These claims are separate and distinct from Plaintiff's medical malpractice claims. For example, Plaintiff has specifically alleged that Defendants failed to provide the following basic, custodial care to Ms. Johnson: failure to provide Ardelua Johnson with adequate and appropriate hygiene care, including the failure to bathe her daily after each incontinent episode so as to prevent urine and fecal contact with her skin for an extended period of time; failure to feed Ardelua Johnson to prevent malnutrition and weight loss; failure to provide sufficient amounts of water to Ardelua Johnson to prevent recurrent and continual dehydration throughout her residency; failure to provide adequate supervision for Ardelua Johnson to protect her from unexplained injury within the facility; and failure to protect Ardelua Johnson from harm within the facility. R. at 7-25.

"[A] 'professional service' involves the application of special skill, knowledge and education arising out of a vocation, calling, occupation or employment." *Howell v. Garden Park Community Hosp.*, 1 So.3d 900, 903 (Miss. App. 2008)(quoting *Burton v. Choctaw County,* 730 So.2d 1, 5-6) (Miss. 1997))(holding that allegations regarding the injuries sustained when undergoing an x-ray to be within the statute of limitations for medical malpractice). Nothing in providing food and water, cleaning people up when they are incontinent, providing good hygiene and grooming involves the exercise of

special skills, knowledge or education. R. at 7-25. Moreover, because the majority of the employees of Defendants' facility are not licensed or professional medical-care providers and, thus, cannot perform "professional services," these personnel are incapable of committing medical malpractice because they are not the sort of licensed professionals who can be sued for medical malpractice. Because none of these persons may be sued for medical malpractice, the nursing home's liability for their actions must lie in ordinary negligence.

In addition to the allegations of custodial care, Plaintiff has alleged systemic failures at Graceland that include: the failure to provide even the minimum number of staff necessary to assist the residents, including Ardelua Johnson, with their needs; the failure to adopt adequate guidelines, policies and procedures for documenting, maintaining files, investigating and responding to any complaint regarding the quality of resident care or misconduct by employees - irrespective of whether such complaint derived from a state survey agency, a resident of the facility, an employee of the facility or any interested person; the failure to provide adequate supervision to the staff; the failure to timely and adequately review records related to the operation of Graceland; the failure to maintain appropriate records, including the failure to monitor and document significant changes in Ardelua Johnson's condition; the failure to manage facility employees and departments in a way that they could fluidly and seamlessly work together; the failure to investigate the relevant facts of, or to correct underlying deficiencies, or licensure violations or penalties found to exist at Graceland Care Center-Oxford by the Mississippi Department of Health or any state or federal survey agency; the failure to set a workable budget in accordance with the needs of the facility; the

failure to properly allocate the funds budgeted to the facility for the proper care of its residents; the inappropriate allocation of funds to management companies that did not assist or even participate in managing the care provided to the residents; the submission of false reimbursement claims; the failure to properly recognize and report instances of non-compliance with state and federal standards, and, further, the failure to correct those instances. R. 1-38. These allegations go beyond the direct care provided to Ardelua Johnson. Indeed, these allegations exceed the provision of professional services. See *Turner v. Steriltek, Inc.*, __ S.W.2d __, Slip Copy, 2007 WL 4523157, at *5 (Tenn. Ct. App.)(recognizing a viable claim for ordinary negligence against Vanderbilt University Hospital when the claim was based upon policy or institution-wide decisions affecting every patient at the defendant hospital).

Applying the *Coleman* factors most recently adopted in *Chitty v. Terracina,* 2009 WL 2595697 (Miss. Ct. App. 2009), to the facts of this case, it is clear that the underlying negligence, fraud and breach of fiduciary duty claims are not "treatment related" or the result of a dereliction of professional skill. The failures alleged do not involve the assessment of Ms. Johnson's medical condition. No physician-patient relationship is alleged in the context of these claims. Moreover, the claims do not involve professional activities that require a license to perform. Many of the corporate claims involve systemic conduct that is independent of the treatment or care provided to Ms. Johnson. While some expert evidence may be required regarding corporate matters, expert medical evidence regarding medical treatment and medical assessment are not required for Plaintiff to prevail on these issues. Finally, some of the conduct asserted by Plaintiff was, as Plaintiff has pled, intentional—for example, the allegations of material

misrepresentations necessarily involve intentional conduct, as do allegations regarding the submission of false reimbursement claims; the inappropriate allocation of funds; the failure to properly report instances of non-compliance with state and federal standards, and, further, the failure to correct those instances. Applying the *Coleman* factors to the claims alleged *sub judice,* it is clear that Plaintiff's allegations of negligence, fraud, and breach of fiduciary duty do not sound in medical malpractice.

Rule 8(a) requires only a "short and plain statement of the claim showing the pleader is entitled to relief." Defendants argue that the facts supporting Plaintiff's non-medical malpractice claims are identical to those facts which are alleged in support of Plaintiff's medical malpractice claims. As can be seen above, Plaintiff has clearly alleged conduct outside of the context of professional services. However, the procedural posture of Defendants' motion hampers Plaintiff's ability to point to specific facts in the record which support her separately pleaded claims. Because Defendants' motion was filed prior to the completion of any discovery, Plaintiff was deprived of the opportunity to develop in the record specific instances that support her corporate claims. It was error for the Circuit Court to determine that Plaintiff's non-medical malpractice claims, in essence, sounded in medical malpractice and, at the same time, deny Plaintiff access to information through discovery that would support the allegations in Plaintiff's complaint. Just as Plaintiff needs access to discovery to support the distinctness of her corporate claims, Plaintiff needs to conduct discovery regarding the alleged direct statements of material misrepresentations made to Ardelua Johnson. R. at 29-32. Because Ms. Johnson is deceased, Plaintiff will only be able to develop her claims of fraud by conducting written discovery and taking depositions and sworn statements of those employees or

former employees of Defendants who engaged in such conversations with and submitted such false information to Ms. Johnson. Taking Plaintiff's allegations as true, it is not "**beyond doubt** that the plaintiff will be unable to prove **any** set of facts in support of his claim." *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006) (citing *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1236 (Miss.1999))(emphasis added). The Circuit Court's findings in that regard were premature. This Court should reverse the Circuit Court's dismissal and remand Plaintiff's claims for further development below.

III. Appellees' Brief Should Be Stricken for Failure to Comply with Court Orders.

After granting three extension requests, this Court extended the deadline to file Defendants/ Appellees' brief to July 15, 2009. Yet, Defendants did not file their brief by the court-imposed July 15 deadline, nor did they request an additional extension of time to file their brief. On July 23, 2009, the Court sent toDefendants' counsel a Show Cause notice giving Defendants fourteen days (until August 6) in which to show cause why sanctions should not be imposed for failure to file the Appellees' brief. Defendants' counsel did not respond to the Show Cause notice except to file the Appellees' brief on July 31, 2009. Defendants did not comply with the Court's mandate to explain the reason for the submission of the Appellees' brief sixteen days after the stated deadline—nor did Defendants plea for leniency in the imposition of sanctions for its delinquency. Plaintiff submits that Appellees' brief should be stricken. *Brown v. State*, 986 So.2d 270, 278 - 279 (Miss. 2008)(recognizing that "Rule 2(b) allows the Court of Appeals to issue sanctions for failure "to comply with these rules or any order issued pursuant to these rules."); see also, *Wade v. Wade,* 967 So.2d 682, 683 (Miss.App. 2007)("Ordinarily the

appellee's failure to file a brief with this Court "is tantamount to confession" of the assignments of error asserted in the appellant's brief.").

Certainly, court-imposed deadlines are not just suggestions. A party should not be entitled to disregard the Court's deadline knowing that they will be given another fourteen day "free pass." The Court's imposition of a Show Cause notice should be just that—failure to comply with the directives of the notice should result in the imposition of sanctions. Here, because Defendants failed to comply with the Court's order requesting reasons as to why sanctions should not be imposed and because no excuse was submitted to justify the late filing of their brief, Defendants' brief should be stricken.

CONCLUSION

Ardelue Johnson was a resident at Defendants' facility from September 1, 2001, through June 8, 2004. Ms. Johnson died a little over a month later, on July 16, 2004, as a result of the negligent care she received at Defendants' nursing home. For the injuries sustained by Ms. Johnson, Plaintiff asserted claims for medical malpractice, as well as negligence, gross negligence, fraud, breach of fiduciary duty, survival, and wrongful death. Even if this Court finds Plaintiff's medical malpractice claims to have been time-barred, there is no question that Plaintiff's other claims were filed within the applicable limitations period because Plaintiff filed her Complaint on September 11, 2006, considerably less than three years after Ms. Johnson left Defendants' facility. Because Plaintiff's claims were clearly filed within the applicable limitations periods for Plaintiff's non-medical malpractice claims, the Circuit Court erred in dismissing those claims, essentially finding that it was "beyond doubt" that Plaintiff could not prevail

under "any set of facts in support of" her claims. See generally, *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006).

Because the conclusions drawn by the Circuit Court were manifestly wrong, Plaintiff respectfully requests that this Court reverse the decision of the Circuit Court granting Defendants' Motion to Dismiss, remand the case for further proceedings consistent therewith, dismiss Defendants' brief for failure to comply with the Court's orders, and for all other relief to which Plaintiff may be entitled, including her costs incurred in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, via Federal Express, postage prepaid, this 14th day of September, 2009, to:

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CERTIFICATE OF FILING

I hereby certify that I, Susan Nichols Estes, counsel for the Plaintiff/ Appellant, on this 14th day of September, 2009, deposited with Federal Express for overnight delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and 4 copies of the above Plaintiff/ Appellant's Reply Brief.

~~The original and ____ copies of Plaintiff/ Appellant's record excerpts.~~

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.

Susan N Estes

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CERTIFICATE OF VIRUS-FREE COMPUTER DISK

I certify that the computer disk accompanying this brief has been scanned and is virus free.

Susan N Estes

Attorney for Plaintiff/ Appellant