
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

BRIEF OF PLAINTIFF/ APPELLANT

ORAL ARGUMENT REQUESTED

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MARY WILSON, UNIDENTIFIED ENTITIES 1
THROUGH 10 AND JOHN DOES 1 THROUGH 10 (AS
TO GRACELAND CARE CENTER-OXFORD)**

DEFENDANTS/ APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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

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Respectfully submitted, this the 15th day of October, 2008.



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STATEMENT OF ISSUES

1. Whether the statute of limitations for an incompetent nursing home resident's personal injury claims, including medical malpractice, is tolled until the incompetent resident's death, notwithstanding her discharge from the nursing home one month prior to her death?
2. Whether the Circuit Court's application of Miss. Code Ann. §15-1-36(2) and (15) conflicts with Mississippi Supreme Court precedent construing those provisions, including *Proli v. Hathorn*, 928 So.2d 169 (Miss. 2006)?
3. Whether the Circuit Court erred in dismissing Plaintiff's non-medical malpractice claims against the nursing home prior to any discovery?

STATEMENT OF THE CASE

A. Nature of the Case

This case is a nursing-home abuse-and-neglect case.

Allie Shaw (Plaintiff) is the daughter and Executrix of the Estate of Ardelua Johnson. Record at p. 1, 253.¹ Plaintiff brought this action against Graceland Care Center of Oxford LLC, Graceland Management Company, Inc., Graceland Holdings, LP, Gracelands Inc., Lafayette LTC, Inc., Katie M. Overstreet Qtip Trust, Katie M. Overstreet Trust, Larry Overstreet, John B. ("Ley") Falkner, Mary Wilson, and Unidentified Entities 1 through 10 and John Does1 through 10 (as to Graceland Care Center-Oxford) for the injuries and damages sustained by Ardelua Johnson while she was a resident of Graceland Care Center-Oxford (Graceland). R. at 1.² Plaintiff's Complaint, as amended, alleges causes of action for negligence, medical malpractice, malice and/or gross negligence, fraud, breach of fiduciary duty, and for the wrongful death of Ms. Johnson. R. at 319.

B. Course of the Proceedings Below

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 from approximately September 1, 2001 until June 8, 2004. R. at 1. Ms. Johnson died on July 16, 2004. R. at 5. An Amended Complaint was filed January 4, 2007. R. at 319. On October 26, 2006, without the benefit of any discovery, Defendants filed a Motion to Dismiss alleging, 1) Plaintiff failed to comply with the certificate requirement of Miss. Code Ann. §11-1-58(1); 2) Plaintiff's claims are barred by the applicable statute of limitations; 3) the Administrator had no

¹ Citations to the Record will be made as "R. at ____".

² Plaintiff voluntarily dismissed Mary Wilson on January 22, 2007. R. at 355.

independent duty to Ms. Johnson; 4) Plaintiff has no cause of action against the Overstreet Defendants because they had no relationship with Graceland after December 31, 2003; 5) Plaintiff did not plead fraud with sufficient particularity; and 6) Mississippi does not recognize a claim against a nursing home for breach of fiduciary duty. R. at 77. Plaintiff responded to Defendants' Motion on November 7, 2006, attaching medical records of Ardelua Johnson demonstrating her mental impairment during the period in question. R. at 171. In their Reply Memorandum, Defendants withdrew their allegation that Plaintiff had not filed a certificate in accordance with Mississippi statutory requirements. R. at 232. Plaintiff then filed a Rebuttal Brief on November 30, 2006, clarifying that Plaintiff had asserted causes of action against Defendants with statutes of limitations longer than the two-year statute for medical malpractice. R. at 256. Defendants stipulated in their Surrebuttal filed December 7, 2006, Ms. Johnson's "unsoundness of mind." R. at 264, 271.

Following a hearing held January 3, 2007, Judge Lackey indicated that, at that point, his decision would require that he "flip a coin." Hearing Transcript, p. 27. On July 30, 2007, the Circuit Court issued a letter opinion dismissing Plaintiff's Complaint. R. at 365.

On August 10, 2007, Plaintiff filed an Objection to Proposed Opinion and Order and Motion for Reconsideration and Clarification. R. at 359. Plaintiff explained to the Court that the Plaintiff's 10-count Complaint could not fall entirely under the professional malpractice statute of limitations. Defendants responded to Plaintiff's Motion for Reconsideration on August 20, 2007. R. at 366. Plaintiff then filed a Supplemental Brief on August 20, 2007, attaching decisions from various Mississippi trial courts for the proposition that a judgment can be rendered against a nursing home on various causes of action. R. at 393. A hearing was held on Plaintiff's Motion on September 17, 2007. Hearing Transcript at 31.

The Circuit Court issued an Opinion and Order on March 31, 2008 finding that all of Plaintiff's claims are derivative and "arise from alleged medical malpractice." R. at 441. Moreover, according to the trial court, the statute of limitations began to run from the last day that Ms. Johnson was in 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.³ Plaintiff timely filed a Notice of Appeal on April 18, 2008. R. at 445.

³ 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.

STATEMENT OF FACTS

On or about September 1, 2001, Ardelua Johnson was admitted to Graceland Care Center-Oxford. It is undisputed that from at least September 1, 2001 and continuing until her death, Ardelua Johnson's cognitive skills were impaired due to mild senile dementia, and she was no longer competent to handle her own affairs. R. at 220-22, 271, 323-24. Ms. Johnson remained a resident of Graceland until June 8, 2004. R. at 5. On July 16, 2004, Ms. Johnson died at Baptist Memorial Hospital-Oxford as a result of the injuries she suffered at Defendants' facility. R. at 5.

On September 11, 2006, Plaintiff filed against Defendants a 10-Count Complaint for the injuries, pain and suffering sustained by Ms. Johnson during her residency at Graceland, including multiple decubitus wounds (pressure sores); weight loss; conjunctivitis with preorbital edema (eye infection); chronic constipation; surgical debridement; gangrene; upper respiratory infections; urinary tract infections; chronic yeast infections; multiple infections with MRSA; malnutrition; dehydration; poorly regulated Coumadin therapy; disfigurement; poor hygiene; and death. Plaintiff further alleged that Defendants' conduct caused Ardelua Johnson to lose her personal dignity and caused her death to be preceded by extreme and unnecessary pain, degradation, anguish, and emotional trauma. Moreover, these wrongs were of a continuing nature, and occurred throughout Ardelua Johnson's stay at Graceland. R. at 1, 6-7, 324-25.

A plain reading of Plaintiff's Complaint reveals that Counts I, II, III, and IV are for ordinary/custodial neglect against the Defendants named in those counts. R. at 7, 11, 15, 22. Count V is for medical malpractice. R. at 25. Count VI is for gross negligence. Count VII is for fraud against all Defendants. R. at 29. Count VIII is for breach of fiduciary duty by all Defendants; and Counts IX and X are for statutory survival and wrongful death, respectively. R. at 32, 33, 34. The four negligence claims and one gross negligence claim (Counts I-IV and

VI) rely upon acts of ordinary/custodial neglect such as the failure to bathe Ms. Johnson, turn and reposition Ms. Johnson, or provide her with enough water to stay hydrated or food to stay nourished. The fraud and fiduciary duty counts clearly do not rely on acts of professional negligence, and Plaintiff submits that the statutory survival and wrongful death claims arise from the failures noted above, failures of ordinary custodial care.

Prior to the commencement of any discovery related to Plaintiff's claims, the Circuit Court dismissed Plaintiff's Complaint based on the erroneous finding that all of Plaintiff's claims "arise from alleged medical malpractice." R. at 441. Plaintiff submits that, to the contrary, she has correctly pled separate and distinct causes of action for negligence, gross negligence, fraud, breach of fiduciary duty, statutory survival claims, and wrongful death. Accordingly, the Circuit Court erred in declaring all of Plaintiff's claims to be derivative of the medical malpractice cause of action. Further, the Circuit Court erred in its application of the medical malpractice statute of limitations to Plaintiff's claims.

SUMMARY OF THE ARGUMENT

Ardelua Johnson was a resident of Graceland Care Center-Oxford from September 1, 2001 until her discharge on June 8, 2004. From September 1, 2001 until her death, Ardelua Johnson's cognitive skills were impaired due to mild senile dementia, and she was not competent to handle her own affairs. R. at 220-22, 271, 323-24. Ms. Johnson died on July 16, 2004, at Baptist Memorial Hospital-Oxford.

On July 7, 2006, Plaintiff gave to Defendants notice of intent to sue pursuant to Miss. Code Ann. §15-1-36(15). R. at 123. On September 11, 2006, Plaintiff filed against Defendants a 10-Count Complaint for the injuries, pain and suffering sustained by Ms. Johnson during her residency at Graceland. On October 26, 2006, without the benefit of any discovery, Defendants filed a Motion to Dismiss alleging that Plaintiff's claims are barred by the statute of limitations applicable to medical malpractice claims.

The statute of limitations for Plaintiff's medical malpractice claim, the shortest possible limitations period, began to run on July 16, 2004, the date of Ardelua Johnson's death. This period was extended by Plaintiff's July 7, 2006, provision of notice under Miss. Code Ann. §15-1-36(15), such that the sixty-day notice period is not calculated in determining the running of the limitations period. Plaintiff's Complaint was timely filed on September 11, 2006, with regard to all claims asserted in Plaintiff's Complaint.

In the alternative, if the Court declines to find that Plaintiff's Complaint was timely with regard to her medical malpractice claim, Plaintiff submits that the Complaint was timely for each of the alternative theories of recovery asserted in her Complaint, which each bear a three year statute of limitations.

ARGUMENT

I. Standard of Review

When reviewing a trial court's grant or denial of a motion to dismiss or a motion for summary judgment, this Court applies a *de novo* standard of review. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss. 2006); *Park on Lakeland Drive, Inc. v. Spence*, 941 So.2d 203, 206 (Miss. 2006); *Monsanto Co. v. Hall*, 912 So.2d 134, 136 (Miss. 2005). "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears **beyond doubt** that the plaintiff will be unable to prove **any** set of facts in support of his claim." *Scaggs*, 931 So.2d at 1275 (citing *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234, 1236 (Miss.1999))(emphasis added). Indeed, judicial practice favors the disposition of cases on the merits.

Taking the allegations in Plaintiff's Complaint as true, it is clear that Defendants' motion should have failed.

'When a complaint is tested via a motion under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, the sufficiency of the complaint is in substantial part determined by reference to Rule 8(a) and (e).' *Stanton & Assocs., Inc. v. Bryant Constr. Co.*, 464 So.2d 499, 505 (Miss.1985). Rule 8(a) requires only that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief ... and ... a demand for judgment for the relief to which he deems himself entitled.' M.R.C.P. 8(a)(1) and (2). Similarly, Rule 8(e) instructs that '[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.' M.R.C.P. 8(e)(1). Significantly, Rule 8 allows a plaintiff to advance alternative and/or inconsistent claims. *See* M.R.C.P. 8(a)(2), 8(e)(2).

Jordan v. Wilson, 2008 WL 2894366, 4 (Miss.App. 2008).

Plaintiff's Complaint states separate claims for relief, each with their own, independent statute of limitations. *See Caves v. Benjamin Yarbrough, M.D.*, 2008 WL 4351357 (Miss. Sept. 25, 2008). Plaintiff submits that the Circuit Court of Lafayette County's decision granting

Defendants' Motion to Dismiss should be reversed and the case should be remanded so that Plaintiff may proceed to trial with her cause of action.

II. Because Ardelua Johnson was Incompetent, All Statutes of Limitations for Her Personal Injury Claims were Tolloed Until Her Death.

A. Mississippi's General Savings Statute, Miss. Code Ann. § 15-1-59.

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. Miss. Code Ann. § 15-1-59. The savings statute, codified at § 15-1-59, provides as follows:

If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or **unsoundness of mind**, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of **unsoundness of mind** shall never extend longer than twenty-one (21) years.

Miss. Code Ann. § 15-1-59 (emphases added). "The term 'unsound mind,' when used in any statute in reference to persons, shall include idiots, lunatics, and persons non compos mentis." Miss. Code Ann. § 1-3-57. The savings statute applies to those who suffer from temporary incapacity, as well as those who suffer from long-term mental incapacity, regardless of whether the person's unsoundness of mind has been adjudicated. *Rockwell v. Preferred Risk Mut. Ins. Co.*, 710 So.2d 388 (Miss. 1998). "It is unnecessary for a party to show formal adjudication of incompetence in order to toll the statute of limitations." *Id.* at 391.

The purpose of the savings statute for minors and incompetents is "to protect 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 1147.⁴

It is undisputed that Ardelua Johnson was “of unsound mind” while she was a resident of Defendants’ facility, when most of her claims accrued. R. at 220-22, 271, 323-24. She remained of unsound mind until her death on July 16, 2004, at which time her disability was removed.⁵ Because Ms. Johnson was of unsound mind until her death, she could not have discovered the injuries she sustained at Defendants’ facility while living.⁶

Moreover, the Mississippi Supreme Court has held that this savings statute applies to actions for wrongful death. *Thiroux ex rel. Cruz v. Austin ex rel. Arceneaux*, 749 So.2d 1040, 1041 (Miss. 1999) (“There is no question now that the savings clause, set out in § 15-1-59 of the Mississippi Code, applies to a wrongful death action”); *see also Anderson v. R & D Foods, Inc.*, 913 So.2d 394 (Miss. Ct. App. 2005). The statute of limitations for wrongful death is determined by the statute of limitations applicable to the underlying tort. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923, 926 (Miss. 2006), overruling, *Gentry v. Wallace*, 606 So.2d

⁴ Defendants have argued that § 15-1-59 of the Mississippi Code does not apply because it is only applicable to minors. R. at 271. However, the clear title of this Section is “Person under disability of infancy or unsoundness of mind.” Plaintiff submits that the plain language of this statute indicates that it is not solely limited to minors.

⁵ The disability of unsound mind is removed when the disabled party either regains competency or dies. *Rockwell v. Preferred Risk Mut. Ins. Co.*, 710 So.2d 388 (Miss. 1998).

⁶ While Mississippi law previously required the Court to look at what the decedent’s survivor knew or should have known in determining the date on which the limitations period begins to run in a wrongful death action, this holding was expressly overruled by the Mississippi Supreme Court in *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923, 925-26 (Miss. 2006), overruling *Gentry v. Wallace*, 606 So.2d 1117 (Miss. 1992). Now, the Court must look at the decedent’s knowledge of the date of injury to determine when the statute of limitations begins to run. *Neglen v. Breazeale*, 945 So.2d 988 (Miss. 2006) (“The focus is on the time that the patient discovers, or should have discovered by the exercise of reasonable diligence, that he or she probably has an actionable injury.”). Ms. Johnson, being of unsound mind, could not have discovered her injuries while living.

1117 (Miss. 1992). Plaintiff has asserted against Defendants multiple causes of action with three-year statutes of limitation. Admittedly, Plaintiff's claims for medical malpractice are subject to a two-year statute of limitations. However, because Mississippi's savings statute applies in the present case, the statute of limitations applicable to Ms. Johnson's claims (whether two or three years) was tolled until her disability was lifted at her death.

B. Tolling Specific to Professional Negligence, Miss. Code Ann. § 15-1-36(5).

Defendants have argued that § 15-1-59 does not apply to toll Plaintiff's medical malpractice claims. R. at 235. Instead, Defendants assert that § 15-1-36(5), which specifically tolls medical malpractice claims for persons of unsound mind, applies to Plaintiff's claims. R. at 235, 270-71.⁷

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).

Whether this Section or the general savings statute applies, the statute of limitations was tolled for Ardelua Johnson's claims because she suffered from severe and debilitating medical conditions with impaired cognitive skills upon her admission to Defendants' facility and

⁷ Although Defendants argue that § 15-1-36(5) applies to toll medical malpractice causes of action, at the same time, Defendants claim that § 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. R. at 234, 270.

continuing until her death on July 16 2004. R. at 220-22, 271, 323-24.⁸ Plaintiff's Complaint was filed within all applicable statutes of limitations calculated from Ms. Johnson's death. Thus, the Circuit Court erred in granting Defendants' Motion to Dismiss.

III. The Statute of Limitations for Plaintiff's Medical Malpractice Claims Was Two Years, Extended by The Sixty Day § 15-1-36(15) Notice Period.

Plaintiff asserted against Defendants several, independent causes of action for the injuries sustained by Ardelua Johnson. See M.R.C.P. Rule 8(e)(2)(litigants in all cases are entitled to assert alternative theories, even inconsistent alternative theories, of recovery). Each of Plaintiff's claims has a separate limitations period. The shortest limitations period, two years, applies to Plaintiff's claims for medical malpractice. 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).

⁸ As the Mississippi Supreme Court concluded in *Rockwell v. Preferred Risk Mut. Ins. Co.*, 710 So.2d 388, 391 (Miss. 1998), "We hereby adopt the view of other jurisdictions that, for purposes of tolling the statute of limitations, a party need not be formally adjudicated as being of unsound mind, but must instead be allowed to present evidence relating to his mental incapacity at trial."

Defendants assert that, not only is the statute of limitations for Plaintiff's medical malpractice claims the shortest possible limitations period, but it is the only relevant limitations period. R. at 268. Accordingly, Defendants' Motion to Dismiss hinged on the application of § 15-1-36(2) to Plaintiff's Complaint. Adopting Defendants' reasoning, the Circuit Court incorrectly held that the medical malpractice statute of limitations is the only limitations period applicable to Plaintiff's Complaint. R. at 441-44.

A. Miss. Code Ann. § 15-1-36(6) Does Not Shorten the Two-Year Statute of Limitations.

Defendants have argued that § 15-1-36(6) shortens the period in which Plaintiff may assert claims from the two year period set forth in §15-1-36(2), as extended by § 15-1-36(5) due to Ms. Johnson's incompetency, to 1 year following the death of Ardelua Johnson. R. at 234, 270. Section 15-1-36(6) states:

When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

Miss. Code Ann. § 15-1-36(6). The referenced statute, § 15-1-55 reads as follows:

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

Miss. Code Ann. § 15-1-55.

Under § 15-1-36(5), suit may be filed "within two (2) years next after the time at which the person to whom the right shall have first accrued... shall have died" if that person was under the disability of unsoundness of mind. *Id.* Section 15-1-36(6) 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. The predecessor to § 15-1-55 was Section 728 Mississippi Code 1942. This statute “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). In *Triplett*, the Court did not apply the statute because the injured party had died well within the applicable statute of limitations.

“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).

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.

B. Miss. Code Ann. § 15-1-36(15) Notice Extends the Two-Year Statute of Limitations.

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)

Construing this statute, the Supreme Court wrote in *Pope v. Brock*, 912 So.2d 935, 938 (Miss. 2005),

Since Pope was prohibited by law from filing suit during the sixty-day notice period, this statute clearly and unambiguously prohibits use of any of the sixty-day notice period in computing the running of the statute of limitations. Since Pope originally had two years to file suit under Section 15-1-36(2), and since Pope was "prohibited by law" from filing suit for the sixty-day period, a literal application of the wording of the statute results in a statute of limitations period of two years and sixty days, which expired on August 1, 2003.

Pope, 912 So.2d at 938. This construction was affirmed in *Scaggs v. GPCH-GP, Inc.*, "where a plaintiff serves notice of intent to file a claim during the final sixty-day period of the two-year period provided for in Section 15-1-36(2), the two-year statute of limitations effectively becomes a two-year and sixty day statute of limitations." *Scaggs*, 931 So.2d 1274, 1276 (Miss. 2006) (citing *Pope v. Brock*, 912 So.2d 935, 938 (Miss. 2005)).

In *Proli v. Hathorn*, 928 So.2d 169 (Miss. 2006), the Mississippi Supreme Court clarified its decision in *Pope* to hold, “that the time period is *extended*, not tolled, pursuant to the language of Miss.Code Ann. § 15-1-36(15).” *Proli v. Hathorn*, 928 So.2d at 174. The facts in *Proli* were that Bedwell had a stroke on May 1, 2002. On May 2, 2002, the defendant, Dr. Proli, performed a transesophageal electrocardiogram on her. Bedwell was then transferred to Forrest General Hospital for additional surgery. Bedwell died on May 18, 2002. It was conceded by the parties that the statute of limitations began to run on May 18, 2002, the date of Bedwell's death. Notice was mailed to Dr. Proli on April 22, 2004. A complaint was filed on June 24, 2004, alleging that Dr. Proli perforated Bedwell's esophagus during the May 2, 2002 procedure, proximately causing or contributing to her death. Dr. Proli filed an answer asserting the statute of limitations pursuant to Miss.Code Ann. § 15-1-36(15) as a defense. Applying the reasoning of *Pope*, the *Proli* Court wrote,

[W]hen Hathorn mailed her notice to Proli on April 22, 2004, she had 26 days until the 2 year statute of limitation expired on May 18, 2004. However, Hathorn had to send 60 days notice prior to commencing an action against any health care provider. Miss.Code Ann. § 15-1-36(15). On April 22, 2004, Hathorn began the 60 day waiting period as set forth in Miss.Code Ann. § 15-1-36(15).

Pursuant to Miss.Code Ann. § 15-1-57, when a person is prohibited from commencing an action, the time during which a person is prohibited “shall not be computed as any part of the period of time limited by this Chapter for the commencement of the action.” The notice period prohibited Hathorn from commencing her action for a 60 day period. The normal statute of limitations on a case of this nature is two years. Therefore, the 60 day notice period could not be computed as part of the two year statute of limitations. Here, the statute of limitations began to run on May 18, 2002. Normally, the statute of limitations would end on May 18, 2004. However, Miss.Code Ann. § 15-1-36(15) required a 60 day notice period, but this 60 day period could not be computed as part of the two year statute of limitations. *See* Miss.Code Ann. § 15-1-57. When Hathorn mailed her service of notice on April 22, 2004, she had to wait until June 21, 2004, and no later than July 17, 2004, to file her case. Hathorn filed her complaint on June 24, 2004, which was within the statute of limitations.

Id. at 175.

C. Plaintiff's Medical Malpractice Claim Was Filed Timely Under Miss. Code Ann. § 15-1-36(2).

Ms. Johnson died on July 16, 2004, as a result of the injuries she received as a resident of Defendants' skilled nursing facility, Graceland Care Center-Oxford. Plaintiff filed her Complaint on September 11, 2006. Notwithstanding the fact that some of Plaintiff's claims are governed by three-year statutes of limitations, even if the two-year statute of limitations provided by Mississippi Code Annotated § 15-1-36 applies to all of Plaintiff's claims, the statute of limitations had not expired at the time Plaintiff filed her Complaint.

Section 15-1-36(2) of the Mississippi Code provides a two-year limitations period for medical malpractice claims "from the date of the alleged act." Plaintiff was discharged from Graceland on June 8, 2004. Application of the two-year statute of limitations would require that Plaintiff's claims be brought no later than June 8, 2006, two years after her discharge. However, § 15-1-36(5) tolls that limitations period due to Ms. Johnson's unsound mind. Because Ms. Johnson was of unsound mind during and after her residency at Graceland, the statute of limitations for her medical malpractice claims did not commence until her death, July 16, 2004, and would not expire until July 16, 2006. This limitations period was further extended by Plaintiff's provision of notice under § 15-1-36(15).⁹

According to Supreme Court precedent construing § 15-1-36(15), Plaintiff was prohibited from filing any claim against Defendants during the sixty days after she gave notice to them. Accordingly, the statute of limitations was extended during the notice period until September 5, 2006. Adding back in the nine days remaining until the limitations period would have expired on July 16, 2006 had Plaintiff not served Defendants with § 15-1-36(15) notice, the limitations

⁹ Plaintiff served Defendants with Notice on July 7, 2006, nine days before the limitations period would have expired. R. at 79, 123.

period was finally extended until September 14, 2006. Plaintiff filed her Complaint on September 11, 2006, within the prescribed period. See *Proli, supra*.

IV. Even If Plaintiff's Medical Malpractice Claim Is Time-Barred, Plaintiff's Other Claims Should Go Forward.

A. The Three-Year Statute of Limitations Codified at Miss. Code Ann. §15-1-49 Applies to Plaintiff's Ordinary Negligence, Survival and Wrongful Death Claims.

In addition to her claims for medical negligence, Plaintiff asserted against Defendants claims for negligence, gross negligence, fraud, breach of fiduciary duty, survival, and wrongful death. The statute of limitations for Plaintiff's negligence, statutory survival and wrongful death claims is set forth at Miss. Code Ann. §15-1-49. The Circuit Court erred in finding these claims to be derivative of Plaintiff's medical malpractice claims.

Plaintiff submits that, in the event this Court declines to find Plaintiff's medical malpractice claims to be time-barred, Plaintiff did sufficiently plead and timely file her additional claims of relief, which each bear a three-year limitations period.

1. Ordinary Negligence.

With regard to Plaintiff's ordinary negligence claim, Plaintiff alleged that Defendants owed a duty to Ardelua Johnson to provide adequate and appropriate custodial care and supervision, which a reasonably careful person would provide under similar circumstances. Plaintiff 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; 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; failure to provide a safe environment; and failure to protect Ardelua Johnson from harm within the facility. R. at 7-25.

As alleged by Plaintiff, a reasonably careful nursing home operating under similar circumstances would foresee that the failure to provide the ordinary care listed above would result in devastating injuries to Ardelua Johnson.

2. Statutory Survival Claim.

As a direct and proximate result of Defendants' negligence, malice, and/or gross negligence evidencing a willful, wanton or reckless disregard for the safety of others, including Ardelua Johnson, Ms. Johnson suffered the injuries set forth in Plaintiff's Complaint, all of which caused Ms. Johnson physical pain and suffering, mental anguish, humiliation and emotional distress. As a result, Ardelua Johnson incurred significant hospital and medical expenses. R. at 33-34.

In her Complaint, Plaintiff requests judgment for compensatory and punitive damages for Ardelua Johnson's injuries, including, but not limited to medical expenses, physical pain and suffering, mental anguish, disability, humiliation, and disfigurement as a result of the wrongful acts and omissions of all Defendants, plus costs and all other relief to which Plaintiff is entitled by law.

3. Statutory Wrongful Death Claim.

As a direct and proximate result of Defendants' negligence, malice, and/or gross negligence evidencing a willful, wanton or reckless disregard for the safety of others, including Ardelua Johnson, Defendants caused the death of Ardelua Johnson on July 16, 2004, thereby causing her to incur funeral, burial and other related expenses. As a result of the death of Ardelua Johnson, the wrongful death beneficiaries suffered loss of consortium, attention, guidance, care, protection, training, companionship, compassion, affection, and love. R. at 34-35.

In her Complaint, Plaintiff asserts a claim for each of these separate causes of action, stemming from the ordinary and gross negligence of Defendants. Taking the allegations in Plaintiff's Complaint as true, Plaintiff has sufficiently pled these causes of action. Moreover, these claims are not time-barred as "derivative" of Plaintiff's medical malpractice claims.

4. Not All Wrongful Conduct By a Nursing Home is Professional Negligence.

The basic premise of Defendants' motion is that, because this case arose from care in a nursing home, only the Mississippi medical malpractice statute applies. This premise is incorrect. 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 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 motion is flawed. See *Alcoy v. Valley Nursing Homes, Inc.*, 630 S.E.2d 301 (Va. 2006)(rejecting the notion that all claims against a nursing home are subject to the provisions of the Medical Malpractice Act).

Even though nursing homes fall within the medical malpractice statute as an institutional health-care provider, it does not necessarily follow that every act of negligence performed within a nursing home is medical malpractice. The majority of the employees of Defendants' facility who provide the majority of the care are not licensed or professional medical-care providers and, thus, cannot perform "professional services." Most of the staff are low-wage and fairly unskilled and untrained laborers, laundry staff, kitchen staff, janitorial staff, CNAs, and, perhaps, "feeders" or "turners."

Non-professional services such as dressing, grooming, toileting, feeding, budgeting, staffing, and hydration fall outside of the scope of professional negligence. When confronted with the issue of defining "professional services" in the content of an exclusionary clause involving an insurance dispute for a claim against a governmentally owned and operated nursing home, the Mississippi Supreme Court wrote:

In determining whether or not a particular act or failure to act is of a professional nature we should look not to the title or character of the party performing the act but to the act itself." *Marx*, 157 N.W.2d at 872. Inevitably, every service performed, or activity engaged in, by a physician, dentist, nurse or lawyer is not a "professional" service. Here we are presented not with a nurse but with a nurse's aide, which the State of Mississippi does not require to be licensed. The State Board of Nursing only provides a certification process for nurse's aides.

Simply because a nurse's aide may usually be associated with nurses, and because the aide may be exposed to certain activities performed by nurses while trained, does not necessarily mean that bathing is a "nursing treatment" which constitutes "professional service".

Burton v. Choctaw County, 730 So.2d 1, 7-8 (Miss.1999).

Various state guidelines treat bathing as a personal care skill, not as a basic nursing skill. It is unrealistic to say that the average lay person could not be expected to know personal skills such as bathing, grooming, dressing and toileting.

Id. at 8.

The Medicare regulations applicable to nursing homes also distinguish between assistance with or provision of activities of daily living to residents and more advanced care requiring the application of professional medical judgment or skills. Under Medicare regulations, “personal care services” are those which do not require “skills of qualified technical or professional personnel” such as bathing, dressing, eating, periodic turning and positioning in bed, getting in and out of bed or a chair, moving around, using the bathroom, and routine care for incontinence, among others. 42 C.F.R. § 409.33(d). Moreover, the Social Security Act, codified at 42 U.S.C. §§ 1395 *et seq.*, omits CNAs from the definition of a “licensed health professional,” which is limited by federal law to “a physician, physician assistant, nurse practitioner, physical, speech, or occupational therapist, physical or occupational therapy assistant, registered professional nurse, licensed practical nurse, licensed or certified social worker, registered respiratory therapist, or certified respiratory therapy technician.” 42 U.S.C. §§ 1395i-3(b)(5)(A), (F)-(G). Therefore, the failures occasioned by CNAs’ inability to perform their tasks are not professional negligence.

Similarly, the officers or other administrative or decision-making personnel of the corporate defendants are not all medical-care professionals. 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.

Decisions from other states are instructive. Many courts in other states have recognized that not all wrongful conduct that occurs in a nursing home is medical malpractice. *See Bailey v. Rose Care Center*, 307 Ark. 14, 817 S.W. 2d 412 (1991). (Arkansas Medical Malpractice Act did not apply when the patient left the nursing home unnoticed and was substantially struck and killed by a vehicle. Although, the patient was under a doctor’s care, the patient’s death was not

the result of a doctor's treatment or order, but the allegedly improper supervision of the nurse's aide on duty that night); see also, *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).

In the case of *McQuay v. Guntharp*, 336 Ark. 534, 986 S.W. 2d 850 (1999), the Arkansas Supreme Court wrote:

The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involving matters of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common every day experience of the trier or of facts. *Where the matter requires the consideration of the professional skill and knowledge of the practitioner of the medical facility, the more specialized theory of medical malpractice applies.*

Id. at 540, 986 S.W.2d at 852-53 (citing *Borrillo v. Deekman Downtown Hosp.*, 146 A.D.2d 734 (N.Y. App. Div. 1989)). See also, *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003) (holding that separate jury instructions, verdict forms and damage awards against a nursing home for ordinary negligence and medical negligence stemming from the care a nursing home resident received is appropriate).

In *Alcoy v. Valley Nursing Homes, Inc.*, 630 S.E.2d 301 (Va. 2006), the Virginia Supreme Court considered whether causes of action for "negligence and sexual assault and battery, based on the failure of nursing home personnel to ensure the safety of one of their residents, are subject to the provisions of the Medical Malpractice Act, Code §§ 8.01-581.1 through --581.20:1." *Id.* at 302. It was alleged "that Alcoy was sexually assaulted because of Valley's failure to ensure her safety by providing adequate and proper personnel, visitor screening, and security systems for the Woodbine facility." *Id.* at 304.

Considering the unique factual context of a tort occurring in a nursing home, the Virginia Supreme Court held "that these alleged omissions do not involve the provision of health care or professional services as contemplated by the Act. Instead, the alleged omissions involve administrative, personnel, and security decisions related to the operation of the Woodbine facility, rather than to the care of any particular patient." *Id.*

Similarly, in *Owens v. Manor Healthcare Corp.*, 512 N.E.2d 820 (Ill. Ct. App. 4th Dist. 1987), a nursing home resident fell from a wheelchair because he was not properly supervised by nurses and nurse's aides. The Illinois Court of Appeals noted, "Custodial shelter care must be distinguished from medical treatment. The specific act alleged does not arise from medical diagnosis or treatment." *Id.* at 823. The court went on, "Expert testimony from a health-care professional is not required to assess the acts of the defendant. The determination to be made is not inherently one of medical judgment." *Id.*

Many of the acts and omissions Plaintiff has alleged in this case are outside the scope of the Mississippi medical malpractice statute, and, thus, do not trigger the two-year statute of limitations of Miss. Code Ann. § 15-1-36. Simply put, nothing in providing food and water, cleaning people up when they are incontinent, providing good hygiene and grooming, providing sufficient budget, staff, supplies and supervision involves the exercise of professional medical care and judgment. R. at 7-25. Yet, these are the matters Plaintiff has alleged. Taking Plaintiff's allegations as true, the Circuit Court erred in holding that all of Plaintiff's claims fall under the two year statute of limitations for medical malpractice. For many of Plaintiff's claims, the general statute of three-year limitations set forth in §15-1-49 applies.

5. Plaintiff May Maintain Claims for Both Professional Negligence and Ordinary Negligence.

It is commonly recognized that plaintiffs may maintain actions for both ordinary negligence and medical malpractice within the same action. See *Turner v. Steriltek, Inc.*, __ S.W.2d __, Slip Copy, 2007 WL 4523157 (Tenn. Ct. App.). Indeed, a plaintiff can plead and go forward on as many distinct claims as she has, even if the remedies for such overlap. See, e.g., *Foster v. Evergreen Healthcare, Inc.*, 716 N.E.2d 19 (Ind. Ct. App. 1999). In the *Foster* case, the Indiana court ruled that Rule 8 expressly permitted an estate of a nursing home resident, who suffered severe burns upon being lowered into scalding water, to plead and to seek relief under more than one theory and upon as many separate causes of action as desired or pleaded in the alternative. *Id.* “[I]t was entirely proper . . . to seek recovery in both tort and contract.” *Id.* (citing *Strong v. Commercial Carpet Co., Inc.*, 322 N.E.2d 387 (Ind. Ct. App. 1975)).

This reasoning is consistent with the Mississippi Supreme Court’s statement that not every activity engaged by a physician, dentist, nurse or lawyer is a professional service. See *Burton, supra*. Moreover, it is consistent with Mississippi precedent that a plaintiff may plead multiple or alternative theories of liability in one complaint. See *Jordan v. Wilson*, 2008 WL 2894366, *4 (Miss. Ct. App. 2008). Plaintiff has alleged in her Complaint 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 for ordinary negligence, survival and wrongful death. Accordingly, the three year limitations period for these claims should apply.

Indeed, in the principal case relied upon by Defendants, *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006), the Mississippi Supreme Court applied the three-year statute of limitations for ordinary negligence to the plaintiff’s nursing home negligence case. See

also *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732, ¶ 20 (Miss. 2007) (applying three-year statute of limitations to wrongful death claim against nursing home).

Similar to the case at bar, the plaintiff in *Jenkins* brought a wrongful death suit against a nursing home and its owner for personal injuries sustained by the decedent at the defendants' facility. *Id.* at 924. The defendants moved for partial summary judgment claiming that any of the plaintiff's claims based on tortious conduct occurring more than three years prior to the filing of the lawsuit were barred by the statute of limitations. *Id.* The Supreme Court determined that the plaintiff's complaint against the nursing home defendants sounded in ordinary negligence and, accordingly, the court applied the three-year statute of limitations for ordinary negligence, codified at Miss. Code Ann. § 15-1-49, to the plaintiff's wrongful death claim. *Id.* at 925-26. As a result, the court precluded the plaintiff from recovering on any claims based on tortious conduct occurring more than three years from the date of the filing of the complaint.

As in *Jenkins*, the three-year statute of limitations is applicable to Plaintiff's ordinary negligence claims against the nursing home Defendants. Identical to the facts in *Jenkins*, Plaintiff in the present suit brought a wrongful death claim against Defendants due to the negligent care Ms. Johnson received at Defendants' facility, which led to her death. As the Supreme Court determined the three-year statute of limitations for ordinary negligence applied to the plaintiff's claims against the nursing home defendants in *Jenkins*, the same three-year statute of limitations applies to Plaintiff's claims in the present matter. The bulk of Ms. Johnson's injuries for which Plaintiff seeks recovery were the result of ordinary, not professional, negligence. For example, Ms. Johnson's adult diapers were not timely changed and she was left to lie in her own waste for extended periods of time. This led to the development of bedsores and numerous infections. *R.* at 12. She also lost weight and became malnourished and dehydrated while in the care of Defendants because they did not give her food or water. *Id.* This

is basic care that is regularly provided by any parent to a child. There is nothing medical about Defendants' failure to provide this type of custodial care. As Plaintiff's claims sound in ordinary negligence, the three-year statute of limitations found in Miss. Code Ann. § 15-1-49 applies to the majority of Plaintiff's claims.¹⁰

Just last week, the Mississippi Supreme Court addressed the issue of the application of multiple statutes of limitation in a medical-negligence lawsuit.¹¹ Like here, the question presented was whether the plaintiff's claims were time-barred. The Supreme Court explained,

cases filed pursuant to our wrongful-death statute may involve more than one kind of claim. For instance, in addition to claims the decedent could have brought "if death had not ensued," there may be individual claims of loss of consortium, society and companionship, estate claims, and insurance subrogation claims. While it is true that the wrongful-death statute requires that all such claims be brought in one suit, each claim is subject to its own statute of limitations. The statute of limitations on estate claims does not begin to run until all of the elements of an estate claim are present. The same is true for claims of loss of society and companionship, which may very well not arise until death.

Caves v. Benjamin Yarbrough, M.D., 2008 WL 4351357 (Miss. Sept. 25, 2008). The *Caves* Court further recognized that, "where death is not an immediate result of the tort, the limitation periods for the various kinds of claims may not begin to run at the same time." *Id.*

Ms. 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 has asserted claims for medical malpractice, as well as ordinary negligence.

¹⁰ Only one of the ten counts in Plaintiff's Complaint includes a cause of action for medical malpractice. A cursory review of Plaintiff's Complaint reveals that it sounds in ordinary negligence, as the majority of Ms. Johnson's injuries for which Plaintiff seeks recovery were the result of ordinary, not professional, negligence.

¹¹ *Caves* was filed pursuant to the Mississippi Tort Claims Act ("MTCA"), not the Mississippi medical malpractice statute.

Even if this Court finds Plaintiff's medical malpractice claims to have been time-barred, there is no question that Plaintiff's ordinary negligence 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 three-year statute of limitations, the Circuit Court erred in dismissing Plaintiff's 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*, 931 So.2d at 1275.

B. Plaintiff's Complaint Pleads Fraud with Sufficient Particularity.

Plaintiff's Complaint specifically pleads that Defendants intentionally engaged in common law fraud, which was a proximate cause of Ardelua Johnson's injuries. R. at 29-32. According to Plaintiff, Defendants, while claiming or implying special knowledge, concealed and/or misrepresented material facts to Ardelua Johnson and her family beginning with her admission on September 1, 2001, and continuing throughout Ms. Johnson's residency at Graceland Care Center-Oxford. *Id.* Defendants either personally, or through their agents or employees, specifically misrepresented that they could and would provide twenty-four hour a day nursing care and supervision to Ardelua Johnson during her residency at Graceland Care Center-Oxford. Plaintiff claims that Defendants made these misrepresentations with the knowledge that they would not and/or could not provide twenty-four hour a day nursing care and supervision to Ardelua Johnson during her residency at Graceland Care Center-Oxford because they were not sufficiently staffed or supplied. *Id.*

Defendants' material misrepresentations, which began in 2001 and continued through her death on July 16, 2004, were made with knowledge of their falsity and with the intention that such misrepresentations should be relied upon by Ardelua Johnson and her family to Ms.

Johnson's detriment. As a result of Defendants' misrepresentation, Defendants obtained an agreement with Ardelua Johnson, or on behalf of, Ardelua Johnson and/or her family, in 2002, wherein Defendants promised to provide basic care for Ms. Johnson. As partial consideration for their promise, Ardelua Johnson and/or her family agreed to turn over virtually all of her income to these Defendants on a monthly basis. By direct statements beginning on April 30, 2004, and continuing until her death, Defendants either personally or through their agents or employees represented to Ardelua Johnson and her family that the care Defendants would provide for Ms. Johnson would fully comply with the licensing requirements and standards of care specified by the laws and regulations of the State of Mississippi and other relevant licensing and regulatory authorities. R. at 29-32.

Plaintiff has further alleged that Defendants concealed from or failed to disclose to Ms. Johnson the fact that there was an epidemic of resident harm and injury at Graceland, as well as a practice of utilizing insufficient numbers of nursing aides who were not qualified to render care or services in accordance with the law during Ms. Johnson's residency from 2002 until the date of Ms. Johnson's death. R. at 30. Defendants' silence or their failure to disclose what they should have disclosed is as much a *fraud* at law as an actual affirmative false representation or act. See *Van Zandt v. Van Zandt*, 86 So.2d 466, 470 (Miss. 1956) (determining that where there is a fiduciary or trust or other confidential relationship, the prevailing rule is that a fiduciary is "under a duty to reveal the facts to the plaintiff (the other party), and that his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud at law as an actual affirmative false representation or act). Concealment of material facts is the legal equivalent of a misrepresentation. *United States Fidelity & Guar. Co. v. Rice*, 130 So.2d 924 (Miss. 1961). Plaintiff submits that Defendants misrepresented material information and failed to disclose, or concealed, material information with the intent to induce Ardelua Johnson and her

family to take some action: specifically, to admit and not remove Ms. Johnson from Graceland. Ardelua Johnson and her family detrimentally relied on Defendants' misrepresentations.

The elements of common law fraud in Mississippi are: a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated; the hearer's ignorance of its falsity; the hearer's reliance on the truth of the representation; the hearer's right to rely thereon; and the hearer's consequent and proximate injury. *Boling v. A-1 Detective & Patrol Service, Inc.*, 659 So.2d 586 (Miss. 1995).

Plaintiff has sufficiently pled Defendants' alleged representations, its falsity, materiality, Defendants' knowledge, Defendants' intent that Ms. Johnson act upon the information, Ms. Johnson's ignorance of the falsity of the representations, Ms. Johnson and Plaintiff's reliance on the misrepresentations and the proximate consequences to Ms. Johnson. Defendants' contended below that the Mississippi Supreme Court's decision in *Howard v. Harper*, 947 So.2d 854 (Miss. 2006) *rehearing denied*, precludes any finding that Plaintiff's allegations of fraud were made with sufficient particularity. However, without the benefit of the record in *Howard* to demonstrate, Plaintiff submits that the details, dates and reliance by Ardelua Johnson are set out more specifically here than they were in *Howard*. Indeed, *Howard* does not compel a finding that Plaintiff has failed to sufficiently allege fraud. To the contrary, the allegations are sufficient to put Defendants on notice of Plaintiff's claims. Plaintiff should be allowed to conduct discovery so that more details substantiating these claims can be fleshed out.

Here, Defendants not only concealed the facts specified in Plaintiff's Complaint, they intentionally mislead Ms. Johnson and her family into believing that they facility could adequately care for her. Plaintiff's fraud claim is not insufficiently pled, as Defendants claim. To the contrary, Plaintiff sufficiently pled these allegations. The statute of limitations for fraud

claims is 3 years. Miss. Code Ann. §15-1-49. The Circuit Court erred in dismissing this claim as time-barred under the two-year statute of limitations for medical malpractice.

C. Plaintiff's Complaint States a Cause of Action for Breach of Fiduciary Duty.

Plaintiff's Complaint alleges that a fiduciary relationship existed between Ms. Johnson and Defendants. Because of her mental and physical infirmities, Ardelua Johnson was particularly dependent upon Defendants, their employees and agents for her daily care and well-being. Ardelua Johnson and her family relied upon Defendants' superior knowledge, skill, and abilities, which they held themselves out to possess. Ardelua Johnson and her family also relied on the Defendants to provide care for Ardelua Johnson who, because of her age and infirmities, was not able to care for herself. R. at 32-33.

By virtue of the nature of the services Defendants provided to Ardelua Johnson, the huge disparity of power and unequal bargaining position between Defendants and Ms. Johnson, as well as all of the other surrounding circumstances including but not limited to Ardelua Johnson's mental and physical infirmities, Defendants occupied a position of trust and confidence toward Ms. Johnson that required among other things fidelity, loyalty, good faith, and fair dealing by the Defendants. The relationship between them was fiduciary in character. Defendants accepted their special confidence and trust by admitting Ardelua Johnson to their facility and by determining the level of care to be provided to Ms. Johnson.

"Fiduciary relationship is a very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enterprises, Inc. v. Trustmark National Bank*, 680 So.2d 812 (Miss. 1996), citing *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79 (Miss. 1991). Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence

upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, *or through trust*, the law does not hesitate to characterize such relationship as fiduciary in character. *Madden v. Rhodes*, 626 So.2d 608 (Miss. 1993), citing *Hendricks v. James*, 421 So.2d 1031 (Miss. 1982) (*emphasis added*). In determining whether or not a fiduciary or confidential relationship existed between two persons, we have looked to see if one person depends upon another. *Id.* A confidential relationship exists when one has a dominant, overmastering influence over a person dependant upon him. *Hendricks, supra*.

So far as Plaintiff's counsel can discern, only one court has squarely addressed whether those providing long-term care stand in a confidential relationship to residents such that fiduciary duties arise. In *Petre v. Living Centers-East, Inc.*, 935 F.Supp. 808 (E.D. La. 1996), Judge Fallon wrote:

A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

One is said to act in a "fiduciary capacity" when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. *Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.*, 623 So.2d 37, 40 (La.App. 1st Cir. 1993).

[T]he Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenck* court, "one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities" as those created by a business relationship. *Schenck v. Living Centers-East Inc., et al*, 917 F. Supp. 432, 437-38 (E.D.La. 1996).

Id. at 812.

This holding is consistent with cases uniformly affirming the notion that those who provide medical care stand in a confidential relationship with and fiduciaries to those to whom

the care is provided. *e.g.*, *Benton v. Snyder*, 825 S.W.2d 409, 414 (Tenn. 1992); *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn. 1998); *Ison v. McFall*, 400 S.W.2d 243 (Tenn. Ct. App. 1964); *Grubbs v. Barbourville Family Health*, 120 S.W.3d 682 (Ky. 2003). Mississippi courts have found fiduciary relationships to exist in situations that are much less compelling than the relationship at issue here. For example, in *Risk v. Risher*, 19 So.2d 484 (Miss. 1944), the Mississippi Supreme Court held that a fiduciary relationship is not restricted to situations involving a trustee and beneficiary, principal and agent, or guardian and ward, but instead “applies to all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise.” *Id.* at 486.

That the parameters of a fiduciary relationship are not restricted under Mississippi law is consistent with logic and the whole notion of confidential relationships creating fiduciary duties. Those who provide long-term care do not just provide casual care. Residents depend on them for life’s basic necessities such as food, water, cleanliness and even going to the bathroom, often at the end of life, when they are the most frail and vulnerable. There could hardly be a greater relationship of trust. Thus, the idea that duties fiduciary in nature are not owed is incredulous.

As if the case law were not enough, statutes and regulations governing the care to be provided residents further establish this confidential relationship. In order to prevent the type of abuse and neglect suffered by residents like Ardelua Johnson, federal authorities have enacted various regulations governing care to be given nursing home residents in homes that receive government funds. See 42 C.F.R. § 483 *et. seq.* These regulations are meant to provide nursing home residents “a dignified existence, self determination, and communication with and access to persons and services inside and outside the facility.” 42 C.F.R. § 483.10. They govern staffing levels, nutrition and hydration, turning and repositioning of residents to prevent pressure sores,

and a plethora of other issues in order to guarantee that nursing home residents are provided with quality care.

As the United States District Court for the District of Columbia has acknowledged, “Congress has maintained a longstanding, continuing concern with the well being of America’s elderly population. . . .” *Beverly Health and Rehabilitation Services v. Thompson*, 223 F.Supp.2d 73, 76 (D.D.C. 2002) (hereinafter *BHRS*). This concern led to oversight of nursing homes beginning with the 1935 Social Security Act and was expanded in 1965 with the creation of Medicare and Medicaid. *Ibid.* Criticism of the efficacy of government efforts resulted in a major overhaul of the system by the Omnibus Budget Reconciliation Act of 1987 (OBRA). *Id.* at 76-77; H.R.Rep. No. 100-391(I), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-272. OBRA and the regulations promulgated under it have as their very purpose the creation of standards of care for nursing homes in this nation. They also define a relationship of trust between providers of care like Defendants and recipients of care like Ardelua Johnson. Those rules and regulations are found at 42 C.F.R. §§ 483.1-483.75.

Similarly, the Mississippi state regulations governing long-term care define a fiduciary and confidential relationship between residents and nursing homes. For example, upon admission, the facility must see to it that the resident is fully informed of his resident’s rights. Miss. Min. Std. 408.2(a). The facility must subsequently assist the resident in exercising his rights. Miss. Min. Std. 408.2(e). Finally, the regulations require facilities to see to it that the resident:

Is assured of exercising her civil and religious liberties including the right to independent personal decisions and knowledge of available choice. The facility shall encourage and assist in the fullest exercise of these rights.

Miss. Min. Std. 408.2(p).

That the Mississippi Supreme Court declined to find a fiduciary duty between the Administrator of a nursing home and a resident in *Howard v. Harper*, 947 So.2d 854 (Miss. 2006) *rehearing denied*, does not compel a finding that the facility itself has no duty to its residents. To the contrary, it is the facility with which Ardelua Johnson contracted and placed her confidence and well-being. The relationship between Defendants and Ms. Johnson was one of trust and confidence, and Defendants had a higher duty to speak the truth affirmatively to Ms. Johnson because of her age and infirmities and their confidential relationship to her. This relationship is key to the matters alleged in Plaintiff's Complaint. By accepting payment for services and care that were not provided to Ardelua Johnson and by concealing and failing to disclose their abuse and neglect of Ms. Johnson, Defendants breached their confidential and fiduciary duties, namely, the duties of good faith and fair dealing, to Ms. Johnson.

Plaintiff has sufficiently alleged a claim for breach of fiduciary duty. The statute of limitations applicable to a breach of fiduciary duty claim is three years. Miss. Code Ann. §15-1-49. Taking the allegations in Plaintiff's Complaint as true, the Circuit Court erred in dismissing Plaintiff's Complaint as time-barred under the two-year statute of limitations for medical malpractice.

CONCLUSION

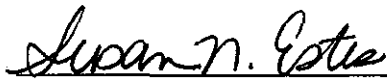
Plaintiff filed this action within each of the applicable statutes of limitations under Mississippi law. The statute of limitations for Plaintiff's medical malpractice claim, the shortest possible limitations period, was extended by Plaintiff's July 7, 2006, provision of notice under Miss. Code Ann. §15-1-36(15), such that the sixty-day notice period is not calculated in determining the running of the limitations period. Plaintiff's Complaint was timely filed on September 11, 2006, with regard to all claims asserted in Plaintiff's Complaint.

In the alternative, if the Court declines to find that Plaintiff's Complaint was timely with regard to her medical malpractice claim, Plaintiff submits that the Complaint was timely for each of the alternative theories of recovery asserted in her Complaint.

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, 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 2nd day of October, 2008, to:

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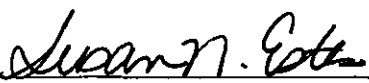
CERTIFICATE OF FILING

I hereby certify that I, Susan Nichols Estes, counsel for the Plaintiff/ Appellant, on this 2nd day of October, 2008, deposited with Federal Express for overnight delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and 5 copies of the above Plaintiff/ Appellant's Brief.

The original and 5 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.



Attorney for Plaintiff/ Appellant

REPRODUCTION OF STATUTES, RULES, AND REGULATIONS

Miss. Code Ann. § 15-1-36 Actions for medical malpractice.

(1) For any claim accruing on or before June 30, 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.

(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:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

(4) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a

parent or legal guardian or shall have died, whichever shall have first occurred; provided, however, that in no event shall the period of limitation begin to run prior to such minor's sixth birthday unless such minor shall have died.

(5) If at the time at which the cause of action shall or with reasonable diligence might have been first 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 after 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.

(6) When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

(7) For the purposes of subsection (3) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

(8) For the purposes of subsection (4) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday or from and after such person shall have a parent or legal guardian, whichever occurs later, unless such disability is otherwise removed by law.

(9) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(10) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(11) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

(12) The limitation established by this section as to optometrists and chiropractors shall apply only to actions the cause of which accrued on or after July 1, 1983.

(13) The limitation established by this section as to actions commenced on behalf of minors shall apply only to actions the cause of which accrued on or after July 1, 1989.

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

(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.

Miss. Code Ann. § 15-1-49. Actions without prescribed period of limitation; actions involving latent injury or disease.

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

Miss. Code Ann. § 15-1-55 Death of person before expiration of period of limitation.

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

Miss. Code Ann. § 15-1-59 Person under disability of infancy or unsoundness of mind.

If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

M.R.C.P. Rule 8(a) and (e) General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,

(2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e) Pleading to Be Concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.

Miss. R. Civ. Proc. Rule 9(b). Pleading Special Matters

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

CERTIFICATE OF VIRUS-FREE COMPUTER DISK

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



Attorney for Plaintiff/ Appellant