2006 WL 6352195 (Ala.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Alabama.
Jefferson County

Susan Rachel BOHANNON, as Personal Representative of the Estate of Scott Allen Gould, deceased, W. Jay Gould, father, W. Jay Gould, Jr., brother, and Matthew A. Gould, brother, Plaintiffs,

v.

SHANDS TEACHING HOSPITAL and Clinics, Inc., a Florida corporation, Defendant.

No. 01-2005-CA-3664.
November 8, 2006.

Plaintiffs' Memorandum of Law in Opposition to Defendant's Amended Motion to Dismiss Amended Complaint

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Plaintiffs, SUSAN RACHEL BOHANNON, as Personal Representative of the Estate of SCOTT ALLEN GOULD, deceased, W. JAY GOULD, father, W. JAY GOULD, JR., brother, and MATTHEW A. GOULD, brother, by and through their undersigned attorney, supplement their Memorandum of Law in Opposition to Defendant's Motion to Dismiss served November 24, 2005 and incorporate the same by reference as well as the transcript of the hearing on Defendant's Motion to Dismiss November 28, 2005 filed with this Court.

It is respectfully submitted the Plaintiffs have amended their Complaint so as to satisfy the requirements of the Honorable Robert E. Roundtree, Jr.

This Memorandum of Law is solely to supplement Plaintiffs' Initial Memorandum of Law not to supplant that Memorandum of Law. Accordingly, Plaintiffs intend to respond to Defendant's Memorandum of Law only to the extent that Plaintiffs have not previously addressed it; or, for the purpose of providing additional clarification and argument.

Chapter 415 does not conflict with Chapters 766 and 768, Fla. Stat.

First, it is a well-established, foundational principal of statutory construction that unless the statute is either vague or ambiguous, there is no room for construction or interpretation as the court is bound by the plain language and is not to involve itself in semantic niceties or speculations. Similarly, the court is not to add words it deems necessary and is not to rewrite the statute or ignore the words chosen by the Legislature. See generally, *Knowles v. Beverly Enterprises - Florida, Inc.*, 898 So. 2d 1 (Fla. 2004). The undersigned commends the *Knowles* decision for this Court's consideration in that it discusses many of the legislative interpretation principals addressed by both parties in this case.

Defendant's claim of conflict is wholly unavailing. Chapter 415 entitled the “Adult Protective Services Act” is clearly to promote the care and protection of disabled adults or **elderly** persons. Section 415.101(2), Fla. Stat. Section 415.1111 provides a civil cause of action to a “vulnerable adult.” [1] It is only a vulnerable adult who has a potential statutory cause of action for the **abuse** or neglect thus there is no conflict as alleged with Chapter 766, Fla. Stat., as one does not need to be a “vulnerable adult” to bring a medical malpractice wrongful death claim.

Moreover, as noted by United States District Judge Timothy J. Corrigan in his Order denying Vencor Hospital's motion for summary judgment, attached as an exhibit to Plaintiff's initial Memorandum of Law, Chapter 415, like Chapter 400, provides

its own standard of care. Here, Plaintiffs did not rely upon the medical negligence standard of care provided by Florida Statute Section 766.102(1) in Count I of the Complaint. Accepting Judge Corrigan's disposition in the *Benson v. Kindred Hospital's East, LLC, d/b/a Vencor Hospital - North Florida*, Chapter 766 does not apply.

Moreover, Section 415.1111, Fla. Stat., specifically provides "[t]he remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult." Conceivably, the fact that Plaintiffs could have brought an action against Defendant under Chapter 766 as well as Chapter 415 does not place these statutes in conflict. What the Defendant seemingly desires that this Court studiously overlook is that statutes of the same purpose should be construed in harmony. *City of Boca Raton v. Gidman*, 440 So. 2d 1277,1282 (Fla. 1983). Here, in comparing the two statutes, there certainly is not any conflict appearing on the face of either Chapter 766 and Chapter 415 nor Chapter 768. There is no "positive repugnancy" between Chapter 415 and either Chapter 766 or Chapter 768. And, when you have a cumulative remedy/savings clause, as Section 415.1111, Fla. Stat., does incorporate, Defendant's argument is nothing but a veiled attempt to secure this Court's implied repeal of Chapter 415 as it applies to hospitals not excluded from the Act. Implied repeals by the Legislature are disfavored. *Flo-Son, Inc. v. Kirk*, 783 So. 2d 1029,1036 (Fla. 2001) (determining that Chapter 403 does not supercede Chapter 823, recognizing the cumulative remedy/savings clause in so holding); *Smith v. Lusk*, 356 So. 2d 1309, 1311 (Fla. 2d DCA 1978 (concluding that the Legislature did not impliedly abolish the survival statute by enacting the wrongful death statute).

Finally under this particular point, Defendant's reliance upon Representative Dudley Goodlette's statement during attempts to amend Chapter 415 to exclude medical malpractice cases is distinctly problematical that such attempt has been repeatedly rejected by the *entire* legislature. See Judge Cantero's concurring opinion in *Knowles*, 898 So. 2d at 29-39 questioning a single legislator's comment being sufficient to provide legislative intent. The only reasonable and ultimate conclusion that can be reached is that the legislature desired that a vulnerable adult have a remedy in addition to Chapter 766 for medical **abuse** or neglect. The Legislature has provided Chapter 400 as an exclusive remedy for nursing homes and ALFs. The Legislature has not provided in Chapter 766, or any other statute, an exclusive remedy against hospitals.

Chapter 415, Fla. Stat., Is clearly and expressly applicable to corporate defendants.

The Legislature has made clear that Section 415.1111 is intended to be a remedial civil cause of action when vulnerable adults are subjected to medical **abuse** or neglect. Hospitals are expressly included as a "facility" and so are hospital's employees. Plaintiffs have already submitted extensive argument on this point and other trial courts have held that corporations are, indeed, subject to Chapter 415, orders previously filed with the Court.

Section 415.104 Is not a condition precedent for a vulnerable adult to bring a civil action under Section 415.1111.

As previously explained in Plaintiffs' initial Memorandum of Law, the version of Section 415.1111 which applies to this case eliminated the requirement that the victim and alleged perpetrator be named in a confirmed report. As concluded by Chief Judge Patricia C. Fawsett in *O'Dell v. Doychak*, 2006 U.S. Dist. Lexis 76476, U.S. Dist. Ct., Middle District of Florida, Orlando Division, October 19, 2006, the change in the applicable statute merely eliminates a procedural obstacle to the victim's ability to sue, a copy of this case being attached for convenience of perusal.

Whether Shands, through its employees and health care providers, was a "perpetrator" is a question of fact for the jury to determine. Prior administrative or judicial determination is not a condition precedent or prerequisite for a civil cause of action. If the Legislature intended that a civil action could be brought only by a person named as a "victim" in a report (confirmed or not) of **abuse**, neglect, or exploitation, it could have easily done so by using the term "victim" [2] in Section 415.1111 instead of "vulnerable adult." There is no requirement that a vulnerable adult be named a "victim" or that a "perpetrator" be previously determined before being entitled to bring a civil action.

Chapter 415 is not unconstitutionally vague.

As clearly set forth in *Knowles v. Beverly Enterprises*, supra, this Court is bound by the plain language of the statute. If terms are not statutorily defined, resort to a dictionary is permissible. *Rayburn v. Orange Park Medical Center, Inc.*, 842 So. 2d 985, 988 (Fla. 1st DCA 2003).

Shands argues that Chapter 415 is a penal and regulatory statute and should therefore be strictly construed. Plaintiffs would agree if the penal and regulatory sections of the statute were being prosecuted by the regulatory or criminal authorities. Plaintiffs are bringing a civil action. The nature of the civil action, by the announced statutory intent of the legislature, is for an indisputable remedial purpose. Thus, to the extent it is necessary to interpret this statute, it is a liberal construction that will broadly effectuate the remedy created which is required. *Causeway Lumber Co. v. Lewis*, 410 So. 2d 511 (Fla. 4th DCA 1982).

Plaintiffs have previously addressed *ad nauseam*, Shands' claim that "frequent and regular," "perpetrator," and "caregiver," are ambiguous. *Childers v. State of Florida*, 931 So. 2d 86,98-100 (Fla. 1st DCA 2006) (determining that Escambia County is a "person" being a victim entitled to restitution); *State of Florida v. Christie*, 30 Fla. L. Weekly D 2526 (Fla. 3d DCA Nov. 2, 2005), *rev. den.*, 929 So. 2d 1051 (Fla. 2006) (statutory analysis determining that a public school teacher can be deemed a "care giver" for students during school hours). Clearly, these words are either statutorily well defined or words of common understanding. Here, as in the Order rendered by U.S. District Judge Corrigan, at page 12, the 79 days that the deceased, Scott Gould, received care and treatment at Defendant Shands is easily equatable with the nearly 90 days Vencor Hospital provided care and treatment on a long term basis to the plaintiff in that case.

It is a bit disingenuous to argue constitutional vagueness when it is well known, presumably to Shands, that Chapter 415 was not amended to exclude medical malpractice actions or hospitals from its reach on more than one occasion. The accepted test for vagueness is whether the statute is specific and clear enough to put persons of common intelligence and understanding on notice of the proscribed conduct. *State v. Sailer*, 645 So. 2d 1115, 1116 (Fla. 3d DCA 1994) ("... the legislature's failure to define the terms of the statute does not render the terms unconstitutionally vague," citation omitted). As espoused in the sundry Orders provided this Court, this statute is susceptible of interpretation through ordinary logic and common understanding. Accordingly, this Court must reject Shands' statutory vagueness challenge. [3]

Count I of the Amended Complaint has been amended to satisfy the concerns of the Honorable Robert E. Roundtree, Jr. and adequately pleads the elements of a Chapter 415 action as a matter of law.

Shands claims, without any citation of authority, that they must accept the obligation under Chapter 415 before there can be a breach of duty ignores the statutory duty imposed by Chapter 415 for that care or services. Shands accepted Mr. Gould as a patient. There is no requirement that Shands consent, acquiesce or do anything else other than not medically neglect or **abuse** their vulnerable patient. While the initial care may have been anticipated as limited, to or attendant to, the transplant operative procedure, it turns out that the deceased Scott Allen Gould, in fact and as alleged, received "frequent and regular" care for a period of 79 days at Shands. And, Medicare paid Shands $366,302.80; Medicaid paid $1,067.15.

The Complaint was amended to set forth ultimate facts establishing that Defendant Shands and its employees and agents assumed the responsibility as a caregiver for Scott Allen Gould pursuant to Section 415.102(4), Fla. Stat.

With these allegations, including the physicians, healthcare providers and non-healthcare providers identified by name in the Complaint it appears Shands is either overlooking some of the pertinent allegations, e.g. paragraph 6, 7, 9, 14-31 of the Amended Complaint, or takes exception with the sufficiency of the factual allegations establishing an agency or apparent agency relationship coupled with sufficient allegations establishing a non-delegable duty. See *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842 (Fla. 2003) (agency and apparent agency); *Pope v. Winter Park Healthcare Group, Ltd.*, 31 Fla. L. Weekly D2504 (Fla. 5th DCA Oct. 6, 2006) (consent to treatment constituted contract between parties and a non-delegable duty to provide non-negligent neonatal care by Winter Park Hospital).

Count II adequately sets forth a breach of fiduciary duty and the damages caused thereby.

The Honorable Robert E. Roundtree, Jr. during argument presented by the attorneys on November 28, 2005, questioned how the Plaintiffs were damaged if they did not rely upon the accepted allegations of fraud to their detriment. The Amended Complaint, now, specifically and directly addresses those concerns. That the law does not require detrimental reliance on a claim for breach of fiduciary duty does not mean in the context of causation that detrimental reliance or facts akin to that are not sufficient to establish causation through a deceitful breach of trust.

Defendant claims that the causation allegations are nonsensical and contradictory. Rather, the allegations logically frame up what prove to be a Hobsons' choice the Gould family was presented with. They wanted Mr. Gould to get better and survive. They wanted Mr. Gould to be transferred to Wuesthoff. Shands gave them reason to believe that Mr. Gould would show improvement. Then Shands in a turnabout, claimed Wuesthoff would not accept Mr. Gould and that no further improvement could be expected. These facts are certainly sufficient for the jury to determine whether Shands breached its duty of utmost honesty to the Plaintiffs. Shands recognized that if Scott Gould was transferred to Wuesthoff and did show some improvement, Shands would be, then, facing a substantial catastrophic injury case as opposed to a limited wrongful death claim. Accepting the Plaintiffs' allegations as true, Shands knew that Mr. Gould had a living will and so to limit their exposure for medically neglecting him, they convinced the family to allow him to expire representing that Shands would settle their claims.

It is elemental that alternative claims can be made such as have been made here. See Fla.R.Civ.P. 1.110(b).

To the extent that Shands contends that Mr. Gould's death was consistent with the terms of his living will and that, as a matter of law, the alleged breaches of the fiduciary relationship could not have been the cause of Mr. Gould's death, the Plaintiffs collectively exclaim “outrageous.” Is it for Shands to properly claim that his death which they set in motion coupled with his living will “... dictated and legally required that sad result?” (Pg 25 of Defendant's Memorandum). Shands is alleged to have had the duty to protect and care for Mr. Gould, a vulnerable adult. Stated another way, Shands had a duty to prevent their employees and agents from medically neglecting or **abusing** Scott Gould. It is a guiding principal of law that a duty to prevent someone from acting in a particular way logically (and, legally) can not be defeated by the action sought to be avoided. Restatement (Second) of Torts, § 314A comment d. Florida law has recognized this Restatement. See, e.g., *Hernandez v. Tallahassee Medical Center, Inc.,* 896 So. 2d 839 (Fla. 1st DCA 2005). But, this is exactly what Shands illogically advances having, through their neglect, placed Mr. Gould at death's door.

Moreover, to claim immunity under Section 765.109, Fla. Stat., is also a distorted argument inapplicable to the claims alleged. No cause of action is alleged for a violation of Section 765.109, Fla. Stat. This statutory immunity clearly does not apply but even if it did, it would be in the nature of an affirmative defense not a basis for dismissal.

Additionally misplaced is the argument that the offer to settle caused by Shands' acknowledged lack of care is void as against public policy. It is fundamental that settlements are favored as a matter of law. The agreement simply was that a settlement would be made with the Gould family and these overtures alleged to have been made by Shands while Mr. Gould was in a comatose state as a result of Defendant's medical neglect. Shands attempts to cast this inducement into a contract for Mr. Gould's death thus setting up an illusory agreement as the strawman which it easily knocks down as void. The agreement, as alleged, is simply that Shands was going to settle the claims of the Gould family and then reneged. The implication is not a contract for death; rather, the reasonable implication to derive from these allegations is that Shands used the artifice of settlement overtures designing that would induce the Gould family to allow Mr. Gould to pass, Shands knowing that as soon as that event occurred, Mr. Gould's death, they had just eliminated their exposure for a catastrophic damages claim. Shands can deny the allegations, they can deny the inference and implications, but it is a question of fact for the jury to determine why Shands allegedly made those settlement overtures and for what purpose. Shands is estopped by their conduct to claim no foul under these circumstances. See *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1079 (Fla. 2001); *May v. Muroffi,* 483 So. 2d 772 (Fla. 4th DCA 1986); and *Ashwood v. Patterson,* 49 So. 848, 850 (Fla. 1951) (all of these cases noting the fundamental equitable principal that “no man will be permitted to profit from his own wrong).

Counts III-V do properly state the elements for the reckless infliction of emotional distress

Having previously addressed this in Plaintiffs' initial Memorandum of Law, suffice it to state that if this Court concludes Plaintiffs' Amended Complaint does not set forth egregious facts which exceeds all bounds of decency then this Court can, indeed, rule as a matter of law that Defendant's conduct is not so atrocious or utterly intolerable and would not arouse resentment against Shands as a matter of law. For Plaintiffs to state a cause of action, Shands repetitively claims that there must be an allegation that their conduct had to form the basis for an agreement of the Gould family to allow Scott Allen Gould to expire. There is utterly no support in the law for this contention and no authorities cited by Shands for this proposition because Plaintiffs venture to say that the facts of this case are so novel, egregious and indifferent, that there is no reported decision that even comes close.

As is beyond question, the legal determination of “outrageousness” is to be made on a case-by-case basis. Having yet to engage in significant discovery, is it necessary as a threshold matter to determine this on a motion to dismiss vis-a-vis a motion for summary judgment?

Count VI unjust enrichment, disgorgement.

Plaintiffs have alleged each and every element for unjust enrichment as described in *Shands Teaching Hospital and Clinics, Inc. v. Beech Street,* 899 So. 2d 1222 (Fla. 1st DCA 2005). It is noteworthy that in that case, the First District Court of Appeal determined that the trial court erred in dismissing Shands' claim against Unisys for unjust enrichment by the value of services Shands provided in excess of the discounted rate at which Shands was paid under a preferred provider network ERISA contract Unisys had with Beech Street.

The elements of a cause of action for unjust enrichment and corresponding disgorgement have been more than adequately met by the Plaintiffs' pleadings:
(1) Scott Gould, having been admitted as a patient, conferred a benefit on Shands, Shands knowing that for his transplant operation and hospital care they were being paid by Medicare and Medicaid. Without Medicare, Medicaid or other health care or hospital insurance, would Shands have undertaken the transplant operation? This question answers itself or should;

(2) Shands certainly accepted and retained the $366,302.80 that Medicare paid them and the $1,067.15 Medicaid paid; and

(3) It would be inequitable for Shands to retain the Medicare and Medicaid payments as Plaintiffs are undisputably obligated to reimburse Medicare and Medicaid under 42 U.S.C. § 1395, et seq. and Sections 409.910 and 409.9101, Fla. Stat. Reimbursing Medicare and Medicaid to the extent of any recovery in this case will obviously be at the expense of the Plaintiffs' Estate. The Personal Representative will be absolutely obligated to reimburse Medicaid and Medicare and the Personal Representative not only has standing but the affirmative obligation, subject to criminal prosecution, to protect Medicare and Medicaid reimbursement rights.

It is hardly an adequate remedy at law to receive compensatory damages out of which Medicare and Medicaid are being reimbursed while Shands remains unjustly enriched by Medicare's and Medicaid's payment in excess of that reasonably expected for a successful organ transplant procedure and allegedly caused by Shands' medical neglect. This disgorgement, to the extent of the extensive hospitalization caused by Shands' medical neglect is fair and equitable because it does not dilute or diminish the compensatory damages to the innocent Plaintiffs but visits the loss upon the one responsible for those additional payments. In short, this parasitic claim is rightly to be satisfied by the animal infected with the fleas. See generally *Challenge Air Transport, Inc. v. Transportes Aereos Nacionales, S.A.,* 520 So. 2d 323 (Fla. 3d DCA 1988) (setting forth the essential elements of an action for unjust enrichment).

CONCLUSION

Shands' renewed Motion to Dismiss, and to strike, should be denied. Much of Shands' argument is in the nature of questioning and disputing factual allegations. “A motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact.” *Bolz v. State Farm Mutual Automobile Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996). This matter has languished on now for ten (10) months without the pleadings being closed. Shands should be ordered to answer the Amended Complaint without further delay. To the extent that this Honorable Court is disposed to dismiss any of the Counts of the Amended Complaint, Plaintiffs respectfully request leave of Court to serve yet another mended Complaint.

I CERTIFY that a true copy of the foregoing has been furnished by U.S Mail to Eric P. Gibbs, Esquire, PO Box 4974, Orlando, FL 32802-4974, this 3rd day of November, 2006.

LAW OFFICES OF ROY L. GLASS, P.A.

<<signature>>

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Footnotes

1 Vulnerable adult is defined as a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or disfunctioning, or brain damage, or the infirmities of aging. Section 415.102(26), Fla. Stat.

2 The term “victim” is defined in Section 415.102(25) as “any vulnerable adult named in a report of **abuse**, neglect, or exploitation.”

3 Of course, this Court should resolve all doubts as to the validity of the statute in favor of its constitutionality. E.g. *Vildibill v. Johnson*, 492 So. 2d 1047 (Fla. 1986).