2013 WL 10178494 (Ohio Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Ohio.
Summit County

Robert REYNOLDS, et al.,

v.

HCR MANORCARE, INC., et al.

No. CV2013115276.
December 31, 2013.

Jury Demanded

Plaintiff's Response to Defendants' Motion to Dismiss

Robert Reynolds, Individually and on behalf of the Wrongful Death Beneficiaries of June Reynolds, McHugh Fuller Law Group, Michael J. Fuller, Jr., OH Bar No. 90250, D. Bryant Chaffin, OH Bar No.90249, 97 Elias Whiddon Rd., Hattiesburg, MS 39402, T: 601-261-2220, F: 601-261-2481, for plaintiff.

Judge Jane M. Davis.

Plaintiff, by and through his counsel, offers the following response to Defendants' HCR Manor Care, Inc., HCR ManorCare Services, Inc., Heartland Employment Services, LLC, and Megan Lublin [1] (hereinafter "Defendants") Motion to Dismiss his Complaint. Defendant's arguments are without merit and their motion to dismiss should be denied. As set forth below, Plaintiff's Complaint properly states claims for which relief may be granted pursuant to Ohio law.

INTRODUCTION

June Reynolds suffered numerous injuries during her residency at Manorcare Health Services-Akron, a nursing home facility owned, operated, managed, and controlled by the Defendants in this matter. Indeed, due to Defendants' negligence Ms. Reynolds suffered severe dehydration, pressure sores, malnutrition, weight loss, pneumonia, and death. Plaintiff subsequently filed a Complaint against Defendants and Defendants have now asserted that Plaintiff's claims are "medical claims" thereby subject to the one year statute of limitations pursuant to R.C. 2305.113. This characterization, however, is inaccurate as Plaintiff has stated claims for ordinary negligence wholly separate from any medical treatment, care, or diagnosis. Furthermore, Defendants are not licensed medical providers in Ohio and so cannot claim the protections of R.C. 2305.113 as that statute does not apply to them. Additionally, Defendants have moved to dismiss the complaint because Robert Reynolds is an improper party. However, case law indicates that the wrongful death action may be brought in the name of the personal representative or the correct party may be substituted. Accordingly, Defendants have not identified valid grounds for dismissal.

The Supreme Court of Ohio has explained that Ohio is a notice pleading state. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144 (1991). "A plaintiff is not required to prove his or her case at the pleading stage." *Id.* at 145. Thus, "a complaint need not contain more than 'brief and sketchy allegations of fact to survive a motion to dismiss under the notice pleading rule."' *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 48 (2008) (*citing Vinicky v. Pristas*, 163 Ohio App.3d 508 (2005)). Plaintiff's Complaint clearly places Defendants on notice of the claims Plaintiff has asserted as required by the Ohio Rules of Civil Procedure and Ohio precedent. Accordingly, Defendants' motion should be denied.

STANDARD OF REVIEW

In order to dismiss a complaint for failure to state a claim upon which relief can be granted under Civ. R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 0.0.2d 223, syllabus. A court construing a complaint upon a motion to dismiss "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988).

I. Plaintiff Is A Proper Party

Defendants' assertion that Plaintiff's entire complaint must be dismissed because he is not the administrator of the estate misstates Ohio law. The requirement that the action be brought in the name of the personal representative of the estate was "obviously intended for the benefit and protection of the surviving spouse, children, and next of kin of a decedent, the real parties in interest. *Toledo Bar Assn v. Rust*, 124 Ohio St. 3d 305, 308 (2010)(citing *Wolf, Adm'r, v. Lake Erie & W. Ry. Co.*, 55 Ohio St. 517 (1896). In *Toledo Bar Assn v. Rust*, 124 Ohio St. 3d 305, 308 (2010), the Supreme Court explained that over the years Ohio courts have often "acknowledged that it is not necessarily fatal to the wrongful-death claim for a party other than the fiduciary appointed by the probate court to file the action." In fact, that court explained that "if the action is brought by the beneficiaries it must be dismissed ***or the correct party substituted.***" *Id.* (*citing Sabol v. Pekoc*, 148 Ohio St. 545, 36 0.0.182, 76 N.E.2d 84 (1947))(emphasis added).

The Supreme Court in Rust went on to acknowledge that the statute requiring that the administrator bring the wrongful death action does not necessarily require that the personal representative be appointed before he or she can enter the courthouse. *Rust, supra* at 311. Rather, "the language in R.C. 2125.02(A)(2) and 2125.02(C) indicates that the personal representative must be court appointed after the complaint has been filed but before any judgment is entered or settlement is reached." *Id.* Additionally, case law indicates that the action need not be brought by the personal representative but only be brought in the name of the personal representative. *Burwell v. Maynard*, 21 Ohio St.2d 108, 50 0.0.2d 268, 255 N.E.2d 628 (*quoting Douglas v. Daniels Bros. Coal Co.*, 135 Ohio St. 641, 15 O.O. 12, 22 N.E.2d 195); see also *Gottke v. Kiebold, Inc.* (Aug. 9, 1990), Licking App. NO. CA-3484, 1990 WL120801, *1; *Kyes v. Pennsylvania RR. Co.*, 158 Ohio St. 362, 363, 490.0. 239, 109 N.E.2d 503 (1952).

In this case, Plaintiff filed his Complaint in an effort to preserve his claims as to the pending statute of limitations. Plaintiff also sought to open the estate of June Reynolds and be appointed the administrator almost contemporaneously with the filing of the Complaint. The case that Defendants rely on as requiring dismissal, *Ramsey v. Neiman*, 69 Ohio St. 3d 508 (1994), is distinguishable from the case at hand because there "the record did not show 'any attempt on [plaintiff's] part to become appointed."' Rust, at 311 (*citing Ramsey v. Neiman*, 69 Ohio St. 3d at 513). The opposite is true in this case. Plaintiff has from the nearly the outset of this litigation pursued being appointed the administrator of the estate.

II. Defendants Cannot Avail Themselves of the Protections of R.C. 2305.113

Defendants attempt to dismiss Plaintiff's complaint using a statute that is wholly inapplicable to them. R.C. 2305.113 is specifically intended to protect only certain defendants from particular types of claims. In this case, Defendants are not entities intended to be protected under the statute and the claims at issue fall outside the statute's scope.

In general, a plaintiff has two years to file a personal injury claim under R.C. 2305.10. The legislature has outlined additional protection from tort liability for those specific individuals and entities which fall under the purview of the medical malpractice statute by shortening the statute of limitations to one year. See R.C. 2305.113. That statute was crafted by the legislature to provide added protections to a defendant if they qualify. If the personal injury action is brought against a "physician, podiatrist, hospital, home or residential facility" and "arises out of the medical diagnosis, care, or treatment of any person" then the defendant may qualify for the added protection of the one year statute. *Id.* Thus, for Defendants to qualify for the protections

of the statute, they must: 1) be an entity licensed as one of the enumerated classes and 2) the claim must arise from medical diagnosis, care, or treatment. Defendants cannot establish either qualification outlined in R.C. 2305.113. Defendants' attempt to dismiss Plaintiff's claims through an inapplicable statute is without merit and their Motion to Dismiss should be denied.

A. Plaintiff's Claims Are Not Subject to the One Year Statute of Limitations Because They Are Not "Medical Claims"

Plaintiff's complaint alleges Defendants failed to "properly manage, operate, and/or control" Manorcare Health Services-Akron in a manner that a reasonably careful corporation or person would have under similar circumstances. See Plaintiff's Complaint attached hereto as Exhibit A, para. 40. Plaintiff specifically asserts that Defendants failed to properly allocate resources, provide appropriate policies and procedures, take appropriate corrective action when operational problems were brought to their attention and intentionally concealed the severity and existence of these operational failures from affected residents. *Id.* Defendants failed to adopt adequate guidelines, policies, and procedures for documenting, maintaining files, and investigating complaints. *Id.* at para. 41(d). Plaintiff has also alleged that Defendants failed to properly staff the facility, thereby resulting in an inability to provide for many, if not all, of Ms. Reynolds activities of daily living. *Id.* at 41(a)(i).

Defendants attempt to re-characterize Plaintiff's ordinary negligence claims as "medical claims" as defined by R.C. 2305.113(E)(3). Defendants argue that Plaintiff's claims are encompassed by the statutory definition of "medical claim" which includes 1) derivative claims for relief arising from medical diagnosis, care, or treatment; 2) claims that arise out of the diagnosis, care or treatment of any person from acts or omissions in providing medical care; and 3) claims that arise out of the medical diagnosis, care, or treatment of any person and result from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment. Plaintiff's claims, however, fall wholly outside this statutory definition.

1. Plaintiff Has Not Asserted a Derivative Claim for Relief Arising From Medical Diagnosis, Treatment, or Care

Plaintiff does not dispute that derivative claims are subject to protections of R.C. 2305.113. However, Plaintiff has not asserted any derivative claims for relief against the Defendants in this case. Derivative claims in the medical malpractice context include claims like loss of consortium or loss of support and services. *See Flowers v. Walker,* 63 Ohio St. 3d 546 (Ohio 1992) (discussing a derivative claim of loss of consortium); *Sellers v. Wolf,* 1985 WL 8328, Case NO. 85-CA-30, November 13, 1985 (discussing loss of consortium claims as derivative of the primary action of medical malpractice); *Zweigant v. Pasquale,* 1988 WL48575, No. 87-11-015, May 16, 1988 (discussing derivative action as loss of child's services); *Lipovecs v. Eisenstat,* 1987 WL 5304, NO. 51512, January 8, 1987 (derivative claim defined as deprivation of society and companionship, loss of consortium, loss of support and services, and severe emotional distress). Plaintiff has not asserted a claim that would be considered "derivative" under Ohio law and accordingly Defendants attempt to utilize this statutory provision as a means to dismiss Plaintiff's complaint is without merit.

2. Plaintiff's Claims Do Not Arise From Medical Diagnosis, Care, or Treatment

In *Browning v. Burt,* 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993), the Supreme Court of Ohio recognized that not all claims asserted against a medical facility as defined under the statute are "medical claims" subject to the one year statute of limitations. *Summers v. Midwest Allergy Associates, Inc.,* 2002-Ohio-7357 (Ohio Ct. App. Dec. 31, 2002). The Browning court explained that a claim against a medical facility is a medical claim "only if the claim arises out of the medical diagnosis, care, or treatment of an individual. The terms 'medical diagnosis' and 'treatment' are terms of art having a specific and particular meaning relating to the alleviation of a physical or mental illness, disease, or defect." *Id.* (*citing Browning,* 66 Ohio St.3d at 557). That court explained that the term "care" should not be broadly interpreted outside of the context by which it can be properly understood. *Id.* "'Care' as used in R.C. 2305.11(D)(3)...means the prevention or alleviation of a physical or mental defect or illness." *Id.* Specifically, care should only be included as a medical claim under R.C. 2309.11(D)(3) where the services rendered to an individual are "ancillary to and an inherently necessary part" of an individual's diagnosis or treatment. *Rome v. Flower Mem. Hosp.,* 70 Ohio St. 3d 14, 16 (1994).

Determining what care and services are ancillary to and an inherently necessary part of alleviating a person's physical or mental illness, disease, or defect is necessarily a fact based determination, and therefore, an inappropriate basis for a motion to dismiss. Three general rules have arisen from Ohio's complicated appellate case law to define what care and services constitute medical claims as opposed claims for ordinary negligence: 1) a medical claim exists where it is the result of actions ancillary to and inherently necessary to treatment; *See Rome v. Flowers,* 70 Ohio St. 3d 14 (Ohio 1994), *McDill v. Sunbridge Care Ents., Inc.,* 2013-Ohio-1618 (April 11, 2013); 2) a medical claim exists where the actions were ordered by a doctor; *See Rome v. Flowers,* 70 Ohio St. 3d 14 (Ohio 1994); *Byrne v. Lorain Cnty. Cardiology Consultants, Inc.,* 93CA005726, 1994 WL 162351 (Ohio Ct. App. May 4, 1994); *Flynn v. St. Vincent Mercy Med. Center,* 6th Dist., No. L-01-1241, 2001 WL 1155808 (September 28, 2001); and 3) a medical claim exists where the incident occurred during use of an instrument generally used in a health setting by a hospital employee. *See Raggazine v. St. Elizabeth Hosp. Medical Center,* 7th Dist., 1991 WL 184817, No. 90 C.A. 129 September 19, 1991; *McDill v. Sunbridge Care Ents., Inc.,* 2013-Ohio-1618 (April 11, 2013).

While Defendants reference a number of cases where a plaintiff's allegations were deemed to be medical claims against hospital defendants for injuries that occurred *in the course of treatment*, the Defendants failed to bring to this Court's attention Ohio case law holding medical providers liable for ordinary negligence claims. For example, in *Hill v. Wadsworth-Rittman Area Hosp.,* 185 Ohio App.3d 788 (2009), the Ninth District Court of Appeals held that a patient falling out of her wheelchair when the nurse left the patient unattended during her discharge was not a medical claim under the scope of R.C. 2305.11 (D)(3) but rather ordinary negligence.

Recently, in *McDill v. Sunbridge Care Ents.,* Inc., the Fourth District Court of Appeals held that where aides inadvertently let a nursing home resident fall while she was being assisted to the bathroom constituted ordinary negligence, and so, her claims were not barred by the one year statute of limitations applying to medical claims. *McDill v. Sunbridge Care Ents., Inc.,* 2013-Ohio-1618 (Ohio Ct. App. Apr. 11, 2013). That court held that escorting a resident from the bathroom did not involve the prevention or alleviation of a physical or mental defect, illness, or disease. *Id. Similarly, in Conkin v. CHS-Ohio Valley Inc.,* 2012 WL 2367391 (1st Dist. June 22, 2012) the First District Court of Appeals held that where a nursing home resident was dropped in the process of being transferred from her wheelchair to a Hoyer lift in order to shower stated a claim for ordinary, not medical, negligence. Similarly, a patient's claim against her allergy doctor was not subject to the one year statute where the patient was struck on the head by a cabinet falling off the wall while she waited on the exam table. *See Summers v. Midwest Allergy Associates, Inc.,* 2002-Ohio-7357 (Ohio Ct. App. Dec. 31, 2002). Again, the determination between whether a claim is a medical claim or one for ordinary negligence is fact based. Plaintiff is not required to prove her case at the pleading stage, but only give reasonable notice of the claim which she has done.

In addition to the case law finding ordinary negligence in a nursing home setting, the Ohio legislature expressly anticipated ordinary negligence claims against a nursing home. In fact, the legislature specifically outlined that a nursing home provides both medical and ordinary care. *See* R.C. 3721.01 ("a nursing home is licensed to provide personal care services and skilled nursing care"). Skilled nursing care is the provision of services that "require technical skills and knowledge beyond those the untrained person possesses and that are commonly employed in providing for the physical, mental, and emotional needs of the ill or otherwise incapacitated." R.C. 3721.01(A)(4). In contrast, the legislature identifies the services a nursing home provides that are not medical care as "personal care services."
(a) "Personal care services" means services including, but not limited to, the following:

(i) Assisting residents with activities of daily living;

(ii) Assisting residents with self-administration of medication, in accordance with rules adopted under section 3721.04 of the Revised Code;

(iii) Preparing special diets, other than complex therapeutic diets, for residents pursuant to the instructions of a physician or a licensed dietitian, in accordance with rules adopted under section 3721.04 of the Revised Code.

(b) “Personal care services” does not include “skilled nursing care” as defined in division (A)(4) of this section. A facility need not provide more than one of the services listed in division (A)(5)(a) of this section to be considered to be providing personal care services.

R.C. 3721.01(A)(5).

Defendants' argument then is in direct contradiction with the legislature's explanation of the two types of services nursing homes are to provide. By the clear language of the statute, nursing homes are intended to provide both “medical” and “personal” care and services to their residents. The recent decision of the Fourth District Appellate Court in *McDill v. Sunbridge* highlights this distinction between care related to activities of daily living and care related to the alleviation of a physical condition.
We believe that the instant case is similar to *Conkin* and prior cases in which a patient suffered an injury due to a force separate from the patient's medical care, diagnosis, or treatment. The transportation of both appellant and the *Conkin* patient to the bathroom was not an inherent part of a medical procedure, and it did not arise from a physician-ordered treatment. Neither appellant's nor the *Conkin* patient's injury occurred during the course of receiving medical diagnosis, care, or treatment. Instead, appellant, like the *Conkin* patient, was in the process of being transported to the bathroom to engage in an everyday, routine function (showering, using the bathroom) when the injury occurred.

Moreover, the process of helping appellant to the bathroom and to the sink to wash her hands was not “ancillary to and an inherently necessary part of” the alleviation of her physical condition. Appellant's injury arose because she had to use the bathroom, not because she was in the process of receiving medical diagnosis, care, or treatment. At the time of appellant's injury, she was not undergoing a treatment or procedure to alleviate her physical condition.

McDill v. Sunbridge Care Ents., Inc., 2013-Ohio-1618 (Ohio Ct. App. Apr. 11, 2013).

Plaintiff has specifically alleged that Defendants' negligence was in regards to the ordinary care Defendants were supposed to have provided June Reynolds. Exhibit A, at para. 41, 49, 59, 68, 77. Plaintiff's complaint asserts inadequacies regarding the provision of activities of daily living for June Reynolds, which is exactly the type of care the legislature labeled “personal care services.” The failure of Defendants to properly allocate resources, provide appropriate policies and procedures, and take appropriate corrective action when June Reynolds most basic needs were not being met due to systemic failure is ordinary negligence that resulted in devastating injuries to June Reynolds. Plaintiff has adequately pled claims for ordinary negligence and Defendants' motion should be denied.

3. Plaintiff's Claims Do Not Arise From the Hiring, Training, Supervision, Retention, or Termination of Caregivers Providing Medical Diagnosis, Care or Treatment

Plaintiff's claims arise from the Defendants failure to provide sufficient resources to hire and maintain sufficient staff to meet the total needs of the residents including their activities of daily living. The allegations at issue in this case are not encompassed by R.C. 2305.113 as the caregivers were not providing medical diagnosis, care, or treatment as explained above. Additionally, while Plaintiff brings alternative theories, Defendants failure to adequately staff the facility did not result from the negligent hiring, training, supervision, retention, or termination of caregivers. Plaintiff's claims are not medical claims as defined by R.C. 2305.113.

Plaintiff has alleged that this was an intentional decision to cut the staffing at Manorcare Health Services-Akron in order to increase profits. While at the same time knowing that staffing levels were so low that residents, including June Reynolds, would not receive adequate provision. This issue has been addressed in several other states, and probably most recently in Tennessee in *Wilson v. Americare Systems, Inc.*, 397 S.W.3d 552 (2013). There, the Supreme Court of Tennessee held that

It is a matter of reason and common sense within the jury's fact-finding province to infer that, in an employment setting, if there is too much work required of too few employees, either the work will not get done or the quality of the work will be diminished. *See Estate of French v. Stratford House*, 333 S.W.3d 546, 558 (Tenn.2011) (claims that the failure of nursing home staff "to provide basic services resulted, at least in part, from chronic understaffing of which senior management at [the defendant nursing home] was aware" present a case where "the trier of fact could assess the merits of the claim based upon everyday experiences"); *see also Anderson v. City of Atlanta*, 778 F.2d 678, 685- 86 (11th Cir.1985) (holding that "[t]he jury could reasonably find that a policy of understaffing resulted in the unavailability of medical personnel and prevented individual officers from being able to do their tasks properly," and that the defendant city "knew or should have known that the natural consequence of this failure to adequately staff the jail would impair proper medical care and attention necessary to protect the health of pre-trial detainees"); *Bremenkamp v. Beverly Enters.-Kan., Inc.*, 762 F.Supp. 884, 892-93 (D.Kan.1991) (evidence of understaffing presented question of fact for jury on plaintiff's claim that nursing home resident's injury was proximately caused by failure to adequately staff nursing home); *HCA Health Servs. of Midwest, Inc. v. Nat'l Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120, 125 (1988) (proof of understaffing in hospital nursery room supported inference and jury verdict that inadequate staffing caused newborn's injury).

B. Defendants Are Not Protected Under the Medical Malpractice Statute

R.C. 2305.113 shortens the statute of limitations for claims asserted against "a physician, podiatrist, hospital, home, or residential facility..." Defendants do not qualify as a "home" under the statute, and as such, are precluded from claiming its protection. R.C. 2305.113(E)(14) provides that "'Home' has the same meaning as in section 3721.10 of the Revised Code." Section 3721.10(A)(1)(a) explains that a "home" can be a variety of entities under Ohio law "including a nursing home." A nursing home is an entity that "is licensed to provide personal care services and skilled nursing care." R.C. 3721.01(A)(6)

Based on information and belief, none of the moving Defendants are licensed as a nursing home. They are not licensed as nursing homes and, as such, do not meet the definition of "home" in R.C. 2305.113. Defendants HCR Manor Care, Inc., HCR Manor Care Services, Inc., and Heartland Employment Services, LLC are not licensed as a nursing home by the state of Ohio, and accordingly, fall outside the purview of R.C. 2305.113. These Defendants cannot attempt to hide behind a statute wholly inapplicable to them.

III. Plaintiff Has Adequately Pled Her Fraud Claim

Defendants misstate Plaintiff's claim for fraud. The fraud that Plaintiff has alleged is not in relation to the failure to provide adequate health care services as Defendants argue. Rather, Plaintiff claims that he was defrauded by the Defendants' intentional concealment of pertinent information regarding their services. It is well established Ohio law that "an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to speak." *Starinki v. Pace*, 41 Ohio App. 3d 200, 535 N.E.2d 328, 331 (9th Dist. 1987). The duty to speak "may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Id.* (citing *Central States Stamping Co. v. Terminal Equipment Co.* 727 F.2d 1405, 1409 (6th Dist. 1987)).

Plaintiff's complaint alleges that "Defendants, while claiming and/or implying special knowledge and holding themselves out as being a properly operated nursing home, concealed and misrepresented material facts from/to June Reynolds and her family. Nursing Home Defendants specifically misrepresented that they could and would provide twenty four hour a day nursing care and supervision to June Reynolds, when, in fact, Defendants knew that they would not do so and they were not sufficiently staffed or supplied to do so." Exhibit A, para. 108. In determining whether Defendants' acted fraudulently, the subject matter of the concealment is irrelevant so long as it is material. The fact that Defendants intentionally concealed facts they had special knowledge of and that were critical to Ms. Reynolds' family's decision in entrusting her to Defendants' care establishes a valid

allegation of fraud. Accordingly, Plaintiff has adequately pled a claim for fraud and Defendants' motion as to this count should be denied.

III. Plaintiff Has Adequately Pled Her Claim for Breach of Fiduciary Duty

"A 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis*, 20 0.0.3d 64, 419 N.E.2d 1094, 1097-98 (1981) (citing *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115, 321 N.E.2d 603). In order to determine whether a fiduciary duty exists, the relationship is the determinative factor. Plaintiff has alleged that Defendants "by virtue of the nature of the services rendered to June Reynolds by Defendants, and the special relationship which developed between Defendants and June Reynolds, as well as the huge disparity of power and unequal bargaining position existing between Defendants and June Reynolds, Defendants occupied a position of confidence toward June Reynolds which required fidelity, loyalty, good faith, and fair dealing by Defendants." Exhibit A, para. 121. Plaintiff alleges that Defendants breached this duty not only by failing to provide the appropriate level of care and services to which June Reynolds was entitled, but "by accepting payment for services and care not provided to June Reynolds, and by their concealment of and failure to disclose Defendants' **abuse** and neglect of June Reynolds." *Id.* at para. 129.

Ohio courts have not prohibited fiduciary duty claims in nursing home settings. *See* ***Elder*** *v. Fischer*, 129 Ohio App. 3d 209 (1998) (finding plaintiff should have been allowed to amend complaint to include breach of fiduciary duty, fraud, conversion, resident's rights, and breach of contract claims against nursing home). Other jurisdictions have considered this particular question and found a fiduciary duty on the part of the nursing home in regards to its residents. In *Petre v. Living Centers - East, Inc.*, 935 F.Supp. 808 (E.D. La. 1996), the Federal District Court for the Eastern District of Louisiana squarely addressed whether a nursing home has such a relationship with a nursing home resident such that fiduciary duties arise:
A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

While this Court concedes that fiduciary relationships are most often found in **financial** dealings, the **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 (emphasis added). In *Schenck v. Living Centers - East, supra*, the Court described the relationship between a nursing home and its residents thusly:

> Many if not most nursing home residents are in a vulnerable physical and/or mental state. Placing a loved one in such a facility necessarily entails trust on the part of the family as well as the resident. Since the residents reside in the home, the family has comparatively limited access and opportunity to learn if the resident is neglected or otherwise mistreated.

Schenck, 917 F. Supp. 438. *See also*, *Zaborowski v. Hospitality* Care Center of Hermitage, Inc. (60 Pa. D. & C.4th 474).

Additionally, courts in neighboring states have examined similar issues. In *John G. v. Northeastern Educational Intermediate Unit* 19, 490 F.Supp.2d 565 (M.D.Pa. 2007), a Federal District Court in Pennsylvania examined a case in which the parents of an autistic student brought various claims against the student's teacher and others, alleging that the teacher physically and mentally **abused** the student. The court reasoned that the teacher, as a special education instructor in charge of the student, a child with autism, was in "an overmastering position in the relationship" and that the student trusted and depended on the

teacher to exercise sound judgment in handling his care and instruction. *Id.* at 443. *See also* *Greenfield v. Manor Care, Inc.*, 705 So.2d 926 (Fla. App. 4 Dist. 1997)(overruled on other grounds).

The facts of this case indicate the type of trust relationship that would warrant the finding of a fiduciary duty. Plaintiff has adequately pled his claim for breach of fiduciary, putting Defendants on sufficient notice of her claims, and accordingly, Defendants' motion to dismiss should be denied.

CONCLUSION

Wherefore, for the reasons set forth above and pursuant to the well-settled standard of review in this State, Defendants' motion should be denied. Defendants have not met their burden. Plaintiff's claims are not subject to the one year statute of limitations. Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss and for all other relief, both general and specific, to which Plaintiff is entitled.

Respectfully submitted, this the 31st day of December, 2013

Robert Reynolds, Individually and on behalf of the Wrongful Death Beneficiaries of June Reynolds,

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Footnotes

1 Plaintiff has no objection to substituting as a defendant the administrator of Manorcare Health Services-Akron during the residency of June Reynolds for Defendant Lublin in this matter.

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