

2010 WL 2675331 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Seventh Judicial Circuit
Civil Division
Volusia County

The Estate of Margaret S. GAMBLE, by and through Kathleen B. Griggs, Personal Representative, Plaintiff,

v.

HEARTHSTONE SENIOR COMMUNITIES, INC., a/k/a Hearthstone Senior Communities, Inc., d/b/a Age Florida, f/k/a Age Institute of Florida, Inc; Senior Health Management-Gulf Coast, LLC; Senior Health Management, LLC; Dan Davis; Jo Ann Grasso n/k/a Jo-Ann Grasso (as to University Center West), Defendants.

No. 2009-13606 CIDL.
March 9, 2010.

Defendants' Motion to Dismiss Complaint

Fla. Bar No.: 817201, [Jeremy W. Rogers](#), Esq., Fla. Bar No.: 150551, Spector, Gadon; & Rosen, LLP, 360 Central Avenue, Suite 1550, St. Petersburg, Florida 33733, (727) 896-4600; (727) 896-4604 - fax, Attorneys for Defendants.

Division: 02

Defendants, HEARTHSTONE SENIOR COMMUNITIES, INC., SENIOR HEALTH MANAGEMENT-GULF COAST, LLC, SENIOR HEALTH MANAGEMENT, LLC, DAN DAVIS, and JO ANN GRASSO, by and through the undersigned counsel, file this Motion to Dismiss Complaint and as grounds hereof states as follows:

1. Plaintiff filed a Complaint in this matter attempting to allege several causes of action, including the following:

- Count I - Non-Lethal Negligence Damages against HEARTHSTONE SENIOR COMMUNITIES, INC., SENIOR HEALTH MANAGEMENT-GULF COAST, LLC, SENIOR HEALTH MANAGEMENT, LLC, DAN DAVIS, and JO-ANN GRASSO;¹
- Count II - Lethal Negligence Damages² against HEARTHSTONE SENIOR COMMUNITIES, INC., SENIOR HEALTH MANAGEMENT-GULF COAST, LLC, SENIOR HEALTH MANAGEMENT, LLC, DAN DAVIS, and JO ANN GRASSO;
- Count III - Lethal Wrongful Death Damages against HEARTHSTONE SENIOR COMMUNITIES, INC., SENIOR HEALTH MANAGEMENT-GULF COAST, LLC, SENIOR HEALTH MANAGEMENT, LLC, DAN DAVIS, and JO ANN GRASSO;
- Count IV - Breach of Fiduciary Duty against HEARTHSTONE SENIOR COMMUNITIES, INC.;
- Count V - Violations of [Florida Statutes §415.1111](#) against SENIOR HEALTH MANAGEMENT-GULF COAST, LLC, SENIOR HEALTH MANAGEMENT, LLC, and DAN DAVIS; and
- Count VI - Violations of [Florida Statutes §415.1111](#) against JO ANN GRASSO.

2. The gravamen of Plaintiff's Complaint pertains to alleged violations of Margaret Gamble's statutory rights as a nursing home resident at University Center West from March 12, 2008 to March 29, 2008.

***COUNT I, II, OR III SHOULD BE DISMISSED FOR FAILING TO ELECT
A REMEDY AS REQUIRED BY FLORIDA STATUTES. CHAPTER 400.023***

3. Count I, II, or III should be dismissed for failing to elect a remedy as required by Florida Statutes, Chapter 400.023.

4. Count I of the Complaint purports to state a cause of action for Non-Lethal Negligence Damages.

5. Count II of the Complaint purports to state a cause of action for Lethal Negligence Damages.

6. Count III of the Complaint purports to state a cause of action for Lethal Wrongful Death Damages.

7. Florida Statutes, Chapter 400.023 specifically provides as follows:

If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21.

8. As such, by statute, Plaintiff should be forced to elect either death or survival damages and those counts claiming damages that are not elected should be dismissed.

***COUNTS I, II and III OF PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR IMPROPERLY
ALLEGING A CAUSE OF ACTION FOR NEGLIGENT TRAINING, HIRING AND RETENTION***

9. Counts I, II and ID of Plaintiff's Complaint should be dismissed for improperly alleging a cause of action for negligent hiring, training and retention.

10. Paragraph 46 of Plaintiff's Complaint improperly alleges that "Defendant owed a duty to MARGARET S. GAMBLE to properly hire, retain and supervise nurses on Defendants' staff and to ensure that any such licensed nurses exercised care consistent with the prevailing professional standard of care for a nurse".

11. Paragraph 53 of Plaintiff's Complaint improperly alleges that "Defendants owed a duty to MARGARET S. GAMBLE to properly hire, retain and supervise nurses on Defendants' staff and to ensure that any such licensed nurses exercised care consistent with the prevailing professional standard of care for a nurse".

12. Paragraph 60 of Plaintiff's Complaint improperly alleges that "Defendants owed a duty to MARGARET S. GAMBLE to properly hire, retain and supervise nurses on Defendants' staff and to ensure that any such licensed nurses exercised care consistent with the prevailing professional standard of care for a nurse".

13. [§ 400.022, Fla. Stat.](#), clearly and unambiguously enumerates those rights that are afforded to residents of nursing homes. Under this statute section, or any other, there is no mention of any duty to retain, hire, and supervise nursing staff.

14. Because [§ 400.022](#) does not enumerate retention, hiring, and supervision of nurses as a statutory right afforded to residents of nursing homes, and because [§ 400.022](#) does enumerate those rights afforded to residents of nursing homes, resident's in nursing homes in the state of Florida do not have any statutory rights with regards to the retention, hiring, and supervision of nurses. See *PW Ventures, Inc. v. Nicholas*, 533 So.2d 281 (Fla. 1988) (holding that the express mention of one thing implies the exclusion of another); *Mingo v. ARA Health Services, INC.*, 638 So.2d 85 (Fla. 2d DCA 1994) (holding "When a statute

enumerates things upon which it is to operate, it should be construed as excluding from its operation things of the same class or category which it does not mention.”).

15. Rather, negligent retention and hiring is a separate cause of action with its own elements. *See Doe v. Evans*, 718 So.2d 286 (Fla. 4th DCA 1998); *Watson v. City of Hialeah*, 552 So.2d 1146 (Fla. 3d DCA 1989); *Bennett v. Godfather's Pizza, Inc.*, 570 So.2d 1351 (Fla. 3d DCA 1990).

16. Plaintiff has failed to state a cause of action for negligent hiring, negligent retention, and/or negligent supervision and simply included bare allegations within Counts I, II, and III. *See also Fla. R. Civ. P. 1.110* (stating that separate claims must be set forth in separate counts and not intermingled).

17. Moreover, § 400.023 specifically provides that it is the exclusive remedy for a violation of resident rights and precludes recovery for damages under theories of negligence.

Sections 400.023 - 400.0238 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022. This section does not preclude theories of recovery not arising out of negligence or s. 400.022, which are available to a resident or to the agency.

18. As such, Counts I, II and III of the Complaint should be dismissed for improperly attempting to state a cause of action for negligent training, hiring and retention within claims for recovery based upon other theories.

19. In the alternative, this Court should strike paragraphs 46, 53, and 60 of the Complaint.

COUNT IV SHOULD BE DISMISSED FOR FOR IMPROPERLY ALLEGING A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY IN VIOLATION OF THE EXCLUSIVE REMEDY PROVISION OF § 400.023, FLA. STAT.

20. Count IV should be dismissed for improperly alleging a cause of Action for Breach of Fiduciary Duty in violation of the exclusive remedy provision of § 400.023, Fla. Stat.

21. A fiduciary relationship is based on trust and confidence between the parties where “confidence is reposed by one party and a trust is accepted by the other.” *Taylor Woodrow Homes Florida, Inc. v. 4/46-a Corporation*, 850 So. 2d 536, 540 (Fla. 5th DCA 2003)(citing *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002)).

22. Florida courts have recognized that the “elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff’s damages.” *Patten v. Winderman*, 964 So.2d 1222 (Fla. 4th DCA 2007).

23. Put another way, breach of fiduciary duty is established by “the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the [claimant]’s damages.” *Gracey v. Eaker*, 837 So.2d 348, 353 (Fla. 2002); *see also Barnett Bank of Marion County, N.A. v. Shirey*, 655 So.2d 1156, 1158-59 (finding no breach of fiduciary duty by a bank’s termination of a loan).

24. Clearly, the elements of Breach of Fiduciary Duty arise out of negligence and mirror the elements of a negligence claim.

25. As noted above, § 400.023 specifically provides that it is the exclusive remedy for a violation of resident rights and precludes recovery for damages under theories of negligence.

Sections 400.023 - 400.0238 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022. This section does not preclude theories of recovery not arising out of negligence or s. 400.022, which are available to a resident or to the agency.

26. As a claim for breach of a fiduciary duty arises out of negligence, the exclusive remedy provision of § 400.023 precludes this cause of action and it should be dismissed.

***COUNTS V AND VI SHOULD BE DISMISSED FOR IMPROPERLY
ALLEGING A CAUSE OF ACTION PURSUANT TO § 415.1111, FLA. STAT.***

27. Counts V and VI should be dismissed for improperly alleging a cause of action pursuant to § 415.1111, Fla. Stat.

28. Section 415.1111 provides, in pertinent part:

[A] vulnerable adult who has been **abused**, neglected, or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such **abuse**, neglect, or exploitation The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult. Notwithstanding the foregoing, any civil action for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part II of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.023, or against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part I of chapter 429 relating to its operation of the licensed facility shall be brought pursuant to s. 429.29. Such licensee or entity shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party in an action brought under this section.

29. Plaintiff has alleged, in Paragraph 12 that Senior Health Management-Gulf Coast operated the nursing home.

30. Plaintiff has alleged, in Paragraph 17 that Senior Health Management operated the nursing home.

31. Plaintiff has alleged, in Paragraph 22 that Dan Davis operated the nursing home.

32. Plaintiff has alleged, in Paragraph 33 that Jo Ann Grasso operated the nursing home.

33. As Plaintiff has alleged that each of these Defendants operated or managed a facility licensed under part II of chapter 400 relating to its operation of the licensed facility, the Chapter 415.1111 claim is improper because such a claim SHALL be brought pursuant to Chapter 400, as mandated in § 400.023.

34. Alternatively, § 415.1111, Fla. Stat, the “Adult Protective Services Act,” does not apply to these named companies as it is specifically designed to address **elder abuse** by caregivers of vulnerable adults.

35. Section 415.1111 creates a private cause of action by victims against “perpetrators” of **abuse**, neglect, or exploitation.³

36. Section 415.1111 does not apply to Senior Health Management-Gulf Coast or Senior Health Management because they are not “perpetrators” as defined by Chapter 415. Section 415.102(2) defines an “alleged perpetrator” as “a **person** who has been named by a reporter as the person responsible for **abusing**, neglecting, or exploiting a vulnerable adult.” (emphasis added).

37. Certainly, corporate defendants cannot be “perpetrators” of **abuse**, neglect, or exploitation under Chapter 415 because they are not natural persons.

38. Further, the corporate defendants are not “caregivers” as defined by § 415.102(4), Fla. Stat., which defines “caregiver” as “a **person** who has been entrusted with or has assumed the responsibility for frequent and regular care of or services to a vulnerable adult” (emphasis added).

39. Clearly, the corporate entities cannot be “caregivers” under the statute because they are not natural persons.

40. Furthermore, Plaintiff fails to allege a cause of action in either Counts V or VI as the named defendants are not plead to be “caregivers.”

41. Finally, Plaintiff has failed to state a cause of action because he fails to include ultimate facts about how any of these Defendants “**abused**,” “neglected,” or exploited” Margaret Gamble within the statutory definitions of those terms.⁴ Plaintiff cannot simply track the language of the statute without ultimate facts that would support the cause of action. *See Gilbert v. Merritt*, 901 So.2d 334, (Fla. 4th DCA 1983) (quoting *Brown v. Gardens by the Sea South Condominiums Ass'n*, 424 So.2d 181, 183 (Fla. 4th DCA 1983)). In Counts V and VI, Plaintiff simply copied the statutory language of § 415.1111 and used it as ultimate facts. Thus, Counts V and VI should be dismissed and Plaintiff should be required to plead actual ultimate facts to support the cause of action.

WHEREFORE, Defendants request that this Court enter an Order Dismissing Plaintiff’s Complaint and for such other relief as this Court deems appropriate.

Footnotes

- 1 Defendants Vince Giewont and Virginia Getchell have been voluntarily dismissed from this action.
- 2 Plaintiff’s Complaint titles Count II both as “Lethal Negligence Damages” and “Non-Lethal Negligence Damages.” Defendants presume this to be a scrivener’s error and that this claim is intended to be for “Lethal Negligence Damages” as “Non-Lethal Negligence Damages” are plead in Count I.
- 3 “A vulnerable adult who has been **abused**, neglected or exploited as specified in this chapter has a cause of action against any *perpetrator* and may recover actual and punitive damages for such **abuse**, neglect, or exploitation.” (emphasis added). §415.1111, Fla. Stat.
- 4 “**Abuse**” is defined as: any willful act or threatened act by a relative, caregiver, or household member which causes or is likely to cause significant impairment to a vulnerable adult’s physical, mental, or emotional health. **Abuse** includes acts and omissions. “Neglect” is defined as: the failure or omission on the part of the caregiver or vulnerable adult to provide the care, supervision, and services necessary to maintain the physical and mental health of the vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, which a prudent person would consider essential for the well-being of a vulnerable adult. The term “neglect” also means the failure of a caregiver or vulnerable adult to make a reasonable effort to protect a vulnerable adult from **abuse**, neglect, or exploitation by others. “Neglect” is repeated conduct or a single incident of carelessness which produces or could reasonably be expected to result in serious physical or psychological injury or a substantial risk of death. “Exploitation” may include, but is not limited to: 1. Breaches of fiduciary relationships, such as the misuse of a power of attorney or the **abuse** of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property; 2. Unauthorized taking of personal assets; 3. Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or 4. Intentional or negligent failure to effectively use a vulnerable adult’s income and assets for the necessities required for that person’s support and maintenance. *See* § 415.102, Fla. Stat.