

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA CIVIL DIVISION

Plaintiff,

vs.

Defendant

Defendants

CASE NO.: 08-CA-0285517

DIVISION: I

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
MOTIONS' TO DISMISS

Plaintiff was a resident of Defendant. While there she became constipated, developed an impaction, developed a rectal fissure, became septic, and died shortly after being transported to Defendant. Plaintiff Estate alleges her death was caused by negligence and or breaches of fiduciary duties. Plaintiff alleges in counts I and II of the complaint that the defendant's operated Defendant, the nursing home where Plaintiff resided, as a joint venture and therefore should be held jointly responsible for her damages in tort. In addition, Plaintiff alleges in count III of the Complaint that Defendant had a fiduciary duty to provide care to plaintiff, that Defendant breached that duty, and that Brandon Healthcare Associates is therefore responsible for damages it caused Plaintiff. All Defendants' have moved to dismiss the Complaint on similar grounds.

COUNTS II AND II

Section 400.023(2) Fla. Stat. states that plaintiff shall have the burden of proving that the defendant owed a duty to the resident, that the defendant breached that duty, and that the breach caused damages to the plaintiff. Counts I and II identify themselves as alleging a cause of action against all defendants under Section 400.023(2) Fla. Stat. The allegations within each count

allege all of the elements of Section 400.023(2) as described above. Specifically, paragraphs 17 and 23 allege defendant's owed plaintiff a duty, paragraphs 18, and 24 allege defendants breached the duty, and paragraphs, 20, and 26 allege the breaches caused plaintiff's damages.

A. Count I and II state a cause of action against the Defendant

Section 400.023(3) states that in a claim brought pursuant to this section, a licensee, person, or entity shall have a duty to exercise reasonable care. There can be no doubt that the above language creates a cause of action against the licensee of the facility for breaches of the standard of care. Plaintiff alleges in Paragraph 9 the ultimate fact that Defendant the licensee of the facility. The allegations in paragraph 9 alleging Defendant is the licensee of the facility coupled with the allegations in paragraphs 17, 18, 20, 23, 24 and 26 that allege duty, breach of duty, and causation of damages, and clearly state a cause of action against defendant.

Defendant's request for any additional allegations in the complaint is simply an attempt to have plaintiff plead evidentiary facts. The rules of civil procedure simply do not require such detailed factual pleading.

B. Count I and II state a cause of action against the non licensee Defendants

Counts I and II also state a cause of action against the other remaining defendants. To understand why these counts state a cause of action against the other defendant's it is important to compare various versions of the Section 400.023. Prior to May of 2001, Section 400.023 limited its cause of action to only the licensee of the facility. However, the version of the statute in place for all causes of action accruing after May 15, 2001, specifically eliminated this limitation. In addition, the new statute added the language cited above that a "licensee, person, or entity shall have a duty to exercise reasonable care." The net effect of these changes

was to expand the cause of action under Section 400.023 to any person or entity that has a legal duty. In this case plaintiff has alleged in paragraphs 11 through 13 the ultimate fact that the non licensee defendants were involved in operating the facility. Plaintiff has alleged in paragraphs 17 and 23 that these defendants had a duty to use reasonable care. These paragraphs taken together with paragraphs 18, 20, 24 and 26 alleging breach of duty and causation of damages state a cause of action against the non licensee defendants. Defendants' requests for any additional allegations in the complaint are simply an attempt to have plaintiff plead evidentiary facts. The rules of civil procedure simply do not require such detailed factual pleading.

C. Joint Venture is a Proper Theory of Recovery in a Nursing Home Case

The non licensee defendants also incorrectly claim that Section 400.023 somehow bars legal theories of liability like joint venture and vicarious liability. They base their argument on the fact that Section 400.023 "provide[s] 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 violation of rights as specified in section 400.022." This argument improperly suggests that the use of the word remedy in this sentence was a reference to barring legal theories of liability other than active negligence.

The defendants' argument misconstrues the purpose of the exclusive remedy provision. Prior to May 15, 2001, plaintiffs were obtaining damage recoveries for both negligence and violations of resident rights. The double dipping was especially problematic when a resident died. In that case plaintiffs were successfully obtaining damage recoveries under resident rights violations for the plaintiff's pain and suffering and damages under negligence and the wrongful death statute for survivors' pain and suffering. The legislature viewed this as obtaining double recovery against one defendant for the same damages. The exclusive remedy provision was put

in place to eliminate that possibility. The legislature was basically saying that whether you prove negligence or a violation of resident's rights, a plaintiff would only be entitled to obtain one recovery for one type of damage. In fact the legislature made sure this was clear by inserting in the statute just above the exclusive remedy language the specific type of damages a plaintiff is entitled to receive. Simply put, the exclusive remedy provision was meant to restrict damage remedies not legal theories of liability.

In fact, the courts routinely apply common law liability theories that are not specifically barred by statute to statutory causes of action. For example, in *NME Properties, Inc. v. Rudich*, 840 So.2d. 309, (Fla. 4th DCA 2003), the court specifically approved of applying a common law vicarious liability theory to Section 400.023. In *NME*, the court used the non delegable duty doctrine as a vicarious liability vehicle to hold the licensee responsible for the actions of a management company even though the statute does not specifically mention that vicarious liability can be used to create liability. *Id.* at 313-314. In this case plaintiff is using the common law joint venture doctrine as a vicarious liability vehicle to hold non licensee defendants responsible for the licensee's actions. While the common law doctrine is different, the result should be the same. Because Section 400.023 does not bar using common law theories of liability, it should be allowed.

Even if, however, this court concludes the exclusive remedy provision limits not only damage remedies but also limits legal theories of liability, the result should be the same. The statute clearly allows a plaintiff to bring a cause of action for negligence. Vicarious liability theories of recovery such as joint venture are a type of negligence claim called imputed negligence. *Guyton v. Howard*, 525 So.2d 948, 956, (Fla. 1st DCA 1988) citing *Prosser and*

keeton on the Law of Torts 499-50 (5th ed. 1984 & Supp.1988)(concluding that Vicarious liability is a form of “imputed negligence”).

D. Counts I and II properly allege all the elements of Joint Venture

The elements of a Joint venture are the:

- A. A community of interest in the performance of a common purpose;
- B. Joint Control or the right of control;
- C. A joint proprietary interest in the subject matter;
- D. A right to share in the profits; and
- E. A duty to share in the losses.

Arango v. Reyka, 507 So.2d 1211, 1212 (Fla. 4th DCA 1987); *Florida Tomato Packers v. Wilson*, 296 So.2d 536, 539 (Fla. 3rd DCA 1974). Plaintiff has properly alleged each of these elements in paragraph 14 of the complaint. Defendants appear to be complaining because plaintiff added some additional ultimate facts to paragraph 14 based on the *Arango* case. For example, in paragraph 14(a), plaintiff alleged the common purpose was running the nursing home. In paragraph 14(b) plaintiff added that the ultimate fact that the joint right to control was “over some aspect of the business.” This additional language is contained in the *Arango* case to make clear that when health care is involved, the joint right of control does not have to be over health care decisions as long as there is a right of control over some aspect of the business. *Arango* at 1213. In paragraph 14(c) plaintiff added the ultimate fact that the joint proprietary interest was “in the financial benefits generated by the combination of their resources and services.” This additional ultimate fact was also taken word for word from the *Arango* case to define the subject matter of the joint interest. *Id.* at 1214.

Defendants' real concern with the allegations of joint venture in the complaint is their incorrect belief that the legal conclusion that a contract existed between the defendants must be pled. They get their mistaken belief from the fact that the case law does require proof at trial that a contract existed between the defendants. However, the case law also makes clear that the existence of the contract can be implied from the presence of all of the above described elements of joint venture. As the Supreme Court clearly stated in *Florida Tomato Growers*:

It is well established that the contract need not be express or embodied in a formal written agreement specifically defining the rights and duties of the parties. The existence of such a contract- and hence a joint venture- may be implied or inferred from the conduct of the parties or from acts and circumstances which in fact make it appear that they are participants in a joint venture. The courts of Florida have not hesitated to imply the existence of a contract.

Florida Tomato Growers at 539.

COUNT III

Count III of the complaint alleges a breach of fiduciary duty by defendant, the licensee of the facility. Defendants argue that Chapter 400 provides the exclusive remedy, and therefore a separate breach of fiduciary duty count is not proper. The applicable statute provides: "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 Section 400.022." This provision does not bar a breach of fiduciary duty count for the same reason joint venture and vicarious liability theories of recovery are not barred. The statute creates an exclusive damages remedy and not an exclusive theory of liability.

More importantly, however, the statute makes clear; Chapter 400 provides an exclusive remedy for negligence claims and resident rights violations. Even if the court were to conclude that Chapter 400 applied to legal theories of liability, it does not bar claims that do not arise out

of negligence or resident rights violations. A breach of fiduciary duty is neither a claim of negligence or for resident rights violations. Instead it is an independent tort.

The Florida Supreme Court has recognized breach of fiduciary duty as a separate and distinct cause of action which is dependent upon the relationship and conduct of the parties. Such a cause of action imposes a duty upon one who acquires and accepts a confidential relationship and imposes liability for the tortious conduct, which breaches this duty. In *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002), the Supreme Court stated:

This court has characterized a fiduciary relationship in the following manner: The relation and duties involved need not be legal; they may be moral, social, domestic or personal. *If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial.* *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419, 421 (1927)(emphasis added). A fiduciary relationship may be implied by law, and such relationships are “premised upon the specific factual situation surrounding the transaction and the relationship of the parties.” *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. 3d DCA 1994).

Under section 874 of the Restatement (Second) of Torts, Violation of Fiduciary Duty, “[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” Thus, “[a] fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act...[T]he liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.” Restatement (Second) of Torts Section 874 cmt. b (1979). Moreover, “[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation.” *Id.* at cmt. a. Florida courts have recognized a cause of action for breach of fiduciary duty.

Precisely because breach of fiduciary duty is an independent tort recognized by Florida law, Brandon Health’s argument fails. In *Moss v. Appel*, 718 So.2d 199, 200-201 (Fl.4th DCA 1998), the Fourth District acknowledged that a breach of fiduciary duty cause of action is distinct from a negligence cause of action-the duty in a breach of fiduciary duty claim is higher. Chapter

400 is only the exclusive remedy for a negligence claim or for a breach of fiduciary duty claim. Since the claim for breach of fiduciary duty is neither type of claim, Count III is not precluded by §400.023, Fla. Stat.

The Complaint itself evidences this state of affairs. The Complaint specifically refers to Chapter 400 in counts I and II. However, Count III involving breach of Fiduciary duty specifically states in paragraph 33 “ As a result of the above described special trust and confidence the Defendant had a fiduciary duty to the Plaintiff exclusive of and in addition to any duty arising out of negligence or Chapter 400 Fla. Stat.” Moreover, the Plaintiff has specifically alleged all of the elements of a breach of fiduciary duty claim in compliance with the parameters set forth by the Fourth District in *Greenfield v. Manor Care, Inc.* , 705 So.2d 926, 932 (Fla.4th DCA, 1997), a nursing home case. Paragraph 29 of the Complaint alleges the Plaintiff was incapable of independently providing for her daily care, protection, and personal needs without reliable assistance. Paragraph 30 alleges plaintiff was particularly dependent on the Defendant and placed a special trust and confidence within it to provide for her. Paragraph 31 alleges the Defendant accepted the special trust and confidence. Paragraph 43 alleges the Defendant breached the fiduciary duty and paragraph 35 alleges the breach caused damages.

Lastly, the Defendant suggests that because the claim for breach of fiduciary duty includes a prayer for personal injury damages that it ought to be dismissed. The Defendant is in error. It is black-letter law that a breach of fiduciary duty claim may seek personal injury damages. Restatement (Second) of Torts §874(b)(breach of fiduciary duty claim includes tort damages for harm caused by breach; damages found in §901-932); Restatement (Second) of Torts §901-932 (outline damages available including personal injury damages and punitive damages). In fact, the Florida Supreme Court has consistently permitted a breach of fiduciary

duty solely for personal injury damages. *See Doe*, 814 So.2d 370; *Gracey v. Eaker*, 837 So.2d348 (Fla. 2002). Because Florida law permits a plaintiff to recover personal injury damages for breach of fiduciary duty, Brandon Health's argument fails.

WHEREFORE, THE PLAINTIFF, by and through L. DAVID SHEAR, as Personal Representative of the Estate respectfully requests this Court to enter an Order granting his Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by First Class U.S. Mail and facsimile on _____ to:

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