IN THE SUPREME COURT OF MISSISSIPPI

EDITH JORDAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE AND WRONGFUL DEATH BENEFICIARIES OF HAMILTON PETER GUILLOTTE — APPELLANT

vs — CAUSE NO. 2008-CA-00067

DELTA HEALTH GROUP, INC.; DIXIE WHITE HOUSE NURSING HOME, INC.; PENSACOLA HEALTH TRUST, INC.; SCOTT BELL; DENNIS FORSYTHE; WILLIAM TREVVETT; JOHN DOES 1 THROUGH 10; AND UNIDENTIFIED ENTITIES 1 THROUGH 10 (AS TO DIXIE WHITE HOUSE NURSING HOME) — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

BRIEF OF THE APPELLEES, DELTA HEALTH GROUP, INC. AND PENSACOLA HEALTH TRUST, INC.

ORAL ARGUMENT REQUESTED

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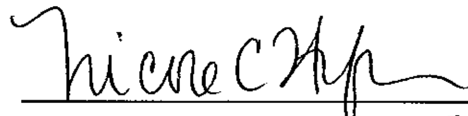
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1.Edith Jordan, Administrator of the Estate of Hamilton Peter Guillotte, Appellant
2. Gale Walker, Attorney for Appellant
3. Lance Reins, Attorney for Appellant
4. Susan Estes, Attorney for Appellant
5. Donald Rafferty, Attorney for Apellant
6. Delta Health Group, Inc., Appellee
7. Dixie White House Nursing Home, Inc., Dismissed party
8. Pensacola Health Trust, Inc., Appellee

9. Scott Bell, Dismissed party
10. Dennis Forsythe, Dismissed party
11. William Trevvett, Dismissed party
12. Honorable Jerry O. Terry, Harrison County Circuit Court Judge
13. Lynda C. Carter, Attorney for Appellees
14. Nicole C. Huffman, Attorney for Appellees
15. Daniel E. Dias, Attorney for Appellees

Respectfully submitted this the 9th day of October, 2008.



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STATEMENT OF THE ISSUES

The Circuit Court's grant of Summary Judgment was proper and well-founded.

I. The *Finley* case is analogous and dispositive.

II. As in *Finley*, Plaintiff has foreclosed the caregiver neglect theory and has failed to establish a theory of corporate negligence.

III. The cases cited by Plaintiff do not contradict *Finley* - in both cases there was evidence of employee negligence.

STATEMENT OF THE CASE [1]

Course of the Proceedings Below

Plaintiff filed the Complaint in this action on December 30, 2002, **over five years ago**, against the Defendants, alleging negligence in the care and treatment of Peter Hamilton Guillotte during his residency at Dixie White House Nursing Home ("Dixie White House") from October 2001 to September 2002. (R. at 23). An Amended Complaint was then filed on January 17, 2003. (R. at 58). Defendants filed their timely answer on March 12, 2003. (R. at 95).

Plaintiff disclosed her experts, Dr. Timothy Hammond, Luanne Trahant, RN, and James Koerber, CPA on or about September 29, 2005. (R. at 488). On January 24, 2006, Defendants initially disclosed Dr. Robert Kelly as their expert, adding Victoria Berry, RN and Kathy Warwick, RD on August 17, 2006 (R. at 570-77) (R. at 1109-16). In the meantime, former Defendants, Dixie White House Nursing Home, Inc., Scott Bell, William Trevett, and Dennis Forsythe were dismissed, and the trial of this matter was

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[1] Throughout Defendants/Appellees' Brief, citations to the lower courts record will be cited as "R.," citations to the Transcript as "T.R.," and citations to the Record Excerpts as "R.E."

set to commence on September 17, 2007 against the current, remaining Defendants (R. at 1373) (R. at 14).

On August 13, 2007, Defendants moved for summary judgment on the basis that Plaintiff was unable to make a prima facie case of negligence in light of the stipulation by Plaintiff's counsel and the testimony of Plaintiff's experts that there would be no expert opinions as to specific caregiver/ employee negligence at trial. Absent such evidence, and absent any evidence of corporate negligence, Plaintiff failed to establish her cause of action. The trial court agreed and entered Summary Judgment for Defendants by Order dated September 18, 2007. (R. at 1880.) (R.E. at 1-4).

Plaintiff filed a Motion for Reconsideration or to Alter or Amend the Final Judgment, which Motion was denied by Order dated December 7, 2007. (R. at 2331) (R.E. at 22). It is from that Order that Plaintiff now appeals.

Statement of the Facts

Despite Plaintiff's lengthy recitation of the testimony of various expert witnesses, the facts that are relevant to the Court's grant of Summary Judgment are simple. The Complaint in this matter was filed several years ago on December 30, 2002. (R. at 24-57). From the beginning, and throughout the course of litigation, Defendants have attempted to ascertain Plaintiff's theory of negligence– whether it be a theory that there were specific caregivers who had a duty to provide care and treatment and, along the way, breached the standard of care causing injury to the resident or, in the alternative, a theory that the corporation, by understaffing, mismanagement, and/or through corporate policies, caused injury to the resident. Four months after Plaintiff filed her Complaint, Defendants propounded Discovery to the Plaintiff seeking, among other

information, the identities of individuals who allegedly violated the standard of care. (R. at 7). Specifically, Interrogatory No. 11 sought the (a) actions or inactions that supported Plaintiff's allegations that Defendants failed to discharge their obligations of care to Mr. Guillotte; (b) the name, address and telephone number of each individual who supported each allegation; and (c) sought copies of all documents which supported each of Plaintiff's allegations. (R. at 1454-56) (R.E. at 13-15). Plaintiff's initial response to this particular Interrogatory made it clear that Plaintiff was not going to allege any individual caregiver breached in the standard of care, but was going to allege a theory of corporate negligence. (R. at 1455-56) (R.E. at 13-15). Specifically, Plaintiff responded that:

> . . . Plaintiff's Complaint makes it very clear that the poor care received at Defendants' nursing home was the result of corporate policies and a systemic program of understaffing the facility and failing to provide adequate training and supervision and hiring of staff. Defendants created an environment in which their employees could not possibly perform to the required standards due to shortages of staff and basic support. . .
>
> Plaintiff does not attempt to lay personal blame for the systemic failures of Defendants' nursing home on any particular nonmanagement employee or former employee (i.e. floor nurses, certified nurses' aides, nurses' aides, housekeepers, maintenance workers or groundskeepers, cook, dietary aides, etc.) . . . In other words, the named Defendants caused the breaches in the standard of care by and of their nonmanagement employees and are responsible for such breaches[2].
>
> (R. at 1455) (R.E. at 14).

As confirmed by Plaintiff's discovery response and the language of the Complaints, Plaintiff has chosen a theory of liability of corporate negligence/

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2 Recall that this same language was quoted, *and rejected*, by the Court of Appeals in *Estate of Finley v. Beverly Health and Rehabilitation Services, Inc.*, 933 So.2d 1023, 1029 (Miss. Ct. App. 2006).

mismanagement. The theory of liability was yet again confirmed during the deposition of Plaintiff's expert, Dr. Timothy Hammond. During the deposition, Defendants' counsel attempted to elicit testimony as to whether or not Dr. Hammond was "planning at trial to provide opinions as to individual caregivers breaching the standard of care." Dr. Hammond responded that he thought the major problem was a systemic failure of the home. (R. at 1432) (R.E. at 6) (Tr. at 21). Upon seeking clarification of his opinions, Dr. Hammond's testimony was cut-off by the interjection of Plaintiff's counsel:

> [l]et me assure counsel on the record so you can avoid any surprise or unfair prejudice at trial, there will be no opinions as to specific caregivers.
>
> * * *
>
> But my expert is **not going to testify** as to the caregivers by name who fell below the standard of care. . .

(emphasis added)(R. at 1432) (R.E. at 6-8). Thus, Plaintiff's own counsel confirmed that, at trial, there would be no expert testimony as to violations of the standard of care by individual caregivers. Likewise, Plaintiff's nurse expert, Ms. Trahant testified that she had not identified any specific caregivers that she believed had breached the standard of care. (R. at 1437-39) (R.E. at 12).

Absent evidence of caregiver negligence, i.e. breaches of the standard of care by the employees, in order to find the Defendants liable, Plaintiff must establish negligence by the corporation, including a causal link to the resident, Hamilton Guilllotte. Since Plaintiff's experts will not opine that an employee breached the standard of care, the trial court, as in *Finley*, correctly refused to generalized testimony of charting errors, alleged failures to follow orders or provide care to support Plaintiff's

theory of Corporate Negligence. The trial court also correctly held that, in compliance with *Finley*, the experts' general assertions of short staffing amounted to no evidence– no expert completed a staffing analysis and there is no testimony or other evidence that as a result of alleged short-staffing Mr. Guillotte was injured or damages.

The *Estate of Finley v. Beverly Health and Rehab Servs., Inc.* provides that absent a breach in the standard of care by individual caregivers, Plaintiff must prove a prima facie case of negligence on the part of the corporation that was a proximate cause of the injuries to the resident. 933 So.2d 1026, 1035-38 (Miss. Ct. App. 2006). The *Finley* Court rejected blanket assertions of lack of staffing and corporate mismanagement, noting that any action or inaction of the corporation must be shown to be a proximate cause of the injuries to the resident. Having put forth no evidence of corporate negligence, only blanket assertions, Plaintiff's case fails as a matter of law.

Although Plaintiff– through written discovery responses, expert testimony, and interjections of Counsel– has made it clear that she is pursing a theory of liability based upon corporate negligence/ mismanagement, the expert testimony proffered by Plaintiff does not support this theory. Rather, Plaintiff's broad-based "shot-gun" approach to the theory of corporate mismanagement fails as a matter of law.

SUMMARY OF THE ARGUMENT

The trial court correctly determined that Plaintiff failed to meet her burden of establishing a prima facie case of medical negligence against the Defendants. In making this determination, the trial court properly applied the rationale and reasoning set forth by the Mississippi Court of Appeals in *Estate of Finley v. Beverly Health and Rehabilitation Services, Inc.*, which rationale and reasoning remains good law. 933

So.2d 1023 (Miss. Ct. App. 2006).

In *Finley*, the Court of Appeals recognized two theories by which a Plaintiff may hold a nursing home liable for injuries to a resident. The first theory is based on the doctrine of respondeat superior/ vicarious liability and requires Plaintiff to demonstrate a specific breach of the standard of care by a nursing home employee, which breach caused injury to the resident. *Id.* at 1032. It is incumbent upon the Plaintiff to allege a specific act by an employee (or multiple specific acts by multiple employees) so that vicarious liability may be asserted. Generalized allegations are insufficient. *Id.* at 1032, 1036-38. The second theory of liability is based upon corporate mismanagement, understaffing, or a corporate systemic failure. *Id.* at 1035-38. This theory requires that Plaintiff put on specific evidence of corporate negligence along with evidence of causation of injury to the specific resident. *Id.* Each of these theories requires a separate set of proof. In the instant matter, Plaintiff attempts, in her brief, to assert a cause of action based on both theories of liability, however, she ultimately confuses the proof required for each and fails to make a prima facie case of medical negligence under either theory of liability.

With respect to a theory based on respondeat superior/ vicarious liability, the words of the Plaintiff, her experts, and her counsel have made it clear that she had no intent of identifying any specific acts or omissions of any specific employees[3]. In

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[3] Plaintiff has unsuccessfully attempted to distinguish *Finley* by citing two recent Supreme Court decisions: *Mariner Health Care, Inc. v. Estate of Edwards*, 964 So.2d 1138 (Miss. 2007)(which case even cited *Finley* as good law) and *Delta Regional Medical Center v. Venton*, 964 So.2d 500 (Miss. 2007). However, in both of these cases vicarious liability was predicated on direct evidence of employee negligence. In *Edwards*, the evidence came from caregivers "who either provided or saw the effects of substandard care on Edwards." 964 So. 2d

Plaintiff's initial written interrogatory response, she specifically stated– using the same language highlighted in *Finley*, that she was not attempting to lay "personal blame" on any employee of the nursing home and that she was not identifying any individual whose actions or inactions fell below the standard of care. (R. at 1455) (R.E. at 14). Rather, Plaintiff characterized any negligence as to Mr. Guillotte as being "the result of corporate policies and a systemic program of understaffing the facility and failing to provide adequate training and supervision . . ." (R. at 1455) (R.E. at 14). Both Plaintiff's experts, Dr. Hammond and Ms. Trahant, likewise testified that they could not identify any specific caregivers who breached the standard of care. (R. at 1772) (R.E. at 5) and (R. at 1438) (R.E. at 12). However, more notable is the fact that Plaintiff's own counsel interjected that:

> [l]et me assure counsel on the record so you can avoid any surprise or unfair prejudice at trial, there will be no opinions as to specific caregivers.
>
> * * *
>
> But my expert is **not going to testify** as to the caregivers by name who fell below the standard of care. . .

(emphasis added)(R. at 1432) (R.E. at 7-8).

Thus, Plaintiff made clear that she was not– despite what her brief may now argue– pursuing a cause of action based on vicarious liability as she repeatedly did not identify **specific** acts or omission of Defendants' employees that breached the standard of care and also caused injuries to, or the death of, Mr. Guillotte. Moreover, even

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at 1150. While in *Venton*, the testimony came via experts and they medical records "pointed to" in that case. 964 So.2d at 505. Most importantly, neither *Venton* or *Edwards* dealt with either written admissions, or interjections of Plaintiff's counsel stipulating that there would be no expert testimony of caregiver negligence. Thus, neither *Edwards* nor *Venton* can form the basis of a reversal of the trial court's decision herein.

though Plaintiff later attempted to give names of caregivers who allegedly violated the standard of care, the list did not identify and **specific** breaches, and, Plaintiff's experts and Plaintiff's own counsel foreclosed the possibility of any expert testimony as to specific breaches of the standard of care by specific employees. Without the required expert testimony, Plaintiff's claims under the first theory of liability (i.e. individual caregiver negligence) fail in any respect and were insufficient to survive a Motion for Summary Judgment. *Barner v. Gorman*, 605 So.2d 805 (Miss. 1992).

Failing under the first theory, Plaintiff also attempted– albeit unsuccessfully– to state a cause of action under a theory of Corporate Negligence/Mismanagement. To succeed under this theory, Plaintiff has to put forth evidence causally connecting the corporate defendant to the alleged injuries and/or death of Mr. Guillotte. Rather than putting forth actual, relevant, and probative evidence of corporate negligence or mismanagement, Plaintiff's sole causation expert, Dr. Timothy Hammond, went with his unsupported "gut" feeling. Further, with respect to any allegations of lack of staffing, Plaintiff's expert relied on a May 5, 2001 survey, which survey was conducted five months prior to Mr. Guillotte's residency. (R. at 1772) (R.E. at 5). *Finley*'s mandate directly rejects testimony of short-staffing that does not provide "specific testimony" to the resident. *Id.* at 1035-36.

Finally, with respect to the second theory, while Plaintiff continues to assert generalized allegations of staff, the *Finley* court determined that alleged failures of staff can not, and do not, support a theory of corporate mismanagement when a Plaintiff **admits** that the alleged failures of the staff **did not constitute a breach of the**

standard of care. *Id.* at 1036-37. (emphasis added). Simply put, the interjection of Plaintiff's counsel, her sworn discovery responses along with the (insufficient) testimony of her experts demonstrates that Plaintiff has admitted that no staff members breached the standard of care. As such, Plaintiff cannot meet her burden under this theory of liability and summary judgment was properly granted by the trial Court.

Failing to prove a prima facie case under either theory, Plaintiff cannot avert summary judgment. As a result, this Court should affirm the trial court's grant of summary judgment.

STANDARD OF REVIEW

The standard of review for trial court's granting of summary judgment is *de novo*. *Webb v. Braswell,* 930 So.2d 387, 395 (Miss. 2006)(citing *Williams v. Bennett,* 921 So.2d 1269, 1271 (Miss. 2006)). All evidentiary matters must be examined, "including, inter alia, admission in pleadings, answers to interrogatories, depositions, and affidavits." *Id.* (citing *McCullough v. Cook,* 679 So.2d 627, 630 (Miss. 1996)). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Tool Mart, Inc.* v. *BancorpSouth Bank*, 930 So.2d 487, 489 (Miss. Ct. App. 2006)(citing *McMillan v. Rodriguez,* 823 So.2d 1173, 1177 (Miss. 2002)). If, in this view, there is no genuine issues of material fact, and the moving party in entitled to judgment as a matter of law, summary judgment should be entered in his favor. *Id.*

ARGUMENT

I. THE FINLEY CASE IS ANALOGOUS AND DISPOSITIVE

Mississippi case law is clear that in order to find a nursing home liable for

negligent care and treatment of a resident, the Plaintiff has two distinct theories from which to choose: (1) a theory based upon the doctrine of respondeat superior/vicarious liability where the Plaintiff must provide a specific showing of a breach of the standard of care by a nursing home employee, which breach caused injury to the resident; and which employee's breach is then imputed to the nursing home operator; or (2) a theory based upon corporate mismanagement, understaffing or corporate systemic failure where Plaintiff must put on evidence of corporate negligence, along with evidence of causation of injury to the specific resident. *Estate of Finley v. Beverly Health and Rehab. Servs., Inc.*, 933 So.2d 1026 (Miss. Ct. App. 2006). Under either theory, Plaintiff must provide supporting evidence through expert testimony on each element of her claim. *See Barner v. Gorman*, 605 So. 2d 805, 808-09 (Miss. 1992).

The *Finley* case was a nursing home claim brought by the same Plaintiff's Firm as the one herein, Wilkes and McHugh, and is nearly identical to the case before the Court– the allegations, theories of recovery and evidence are the same in both *Finley* and in the instant matter. In *Finley*, the Plaintiff, Jordan, contended:

> the poor care Willie Finley received at Defendants' nursing home was a result of corporate policies and a systemic program of understaffing the facility and failing to provide adequate training and supervision and hiring of staff. Defendants created an environment in which their employees could not possible [sic] perform to the required standards due to shortages of staff and basic support. Thus, the named Defendants are directly responsible for all breaches in the standards of care provided to Willie Finley. . .
>
> * * *
>
> **Plaintiff does not attempt to lay personal blame for the systemic failures of Defendants' nursing home on any particular nonmanagement employee or former employee (i.e. floor nurses, certified nurses' aides, nurses' aides, housekeepers, maintenance workers or groundskeepers,**

cooks, dietary aides, etc.) It is Plaintiff's position, based on medical records, and information obtained in discovery, that nonmanagement employees could not provide the appropriate standard of care to Willie Finley because of the actions of the named Defendants. In other words, the named Defendants caused the breaches in the standard of care by any of their nonmanagement employees and are responsible for such breaches.[4]

Id. at 1029 (emphasis supplied by the Court). Jordan's contentions support a theory of liability of corporate mismanagement, or the familiar theme of "Profits over People."

In *Finley,* the defendants served Jordan with Requests for Admission seeking Jordan to admit whether or not each individual caregiver acted within the standard of care. *Id.* at 1028. Rather than filing an appropriate response, Jordan initially responded: "Plaintiff does not attempt to lay personal blame for the systemic failures of Defendants' nursing home on any particular nonmanagement employee or former employee (i.e. floor nurses, certified nurses' aids, housekeepers, maintenance workers or groundskeepers, cooks, dietary aides, etc.) . . . " *Id.* at 1029. (emphasis by Court)[5]. In other words, rather than admitting that any care givers' or inactions fell below the standard of care, Jordan chose the second theory of recovery and simply attempted to argue a blanket cause of action based on alleged systemic failures of the nursing home. The trial court found the responses to be inadequate and ordered Jordan to provide sufficient responses. When the plaintiff filed her Amended Responses, Jordan pursued "a course of attempting to state on the one hand that employees had breached

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[4] With the exception of the resident's name, the introductory sentence, and the one sentence objection to the Requests for Admission, the response given in *Finley* is <u>identical</u> to the response provided by this Plaintiff.

[5] Again, an almost identical response at to Plaintiff's response to Defendants' Interrogatories in this case.

the standard of care and on the other hand that no employee had breached the standard of care." *Id.* at 1032. The trial court, as later affirmed by the Court of Appeals, again rejected Jordan's "jumbled responses," deeming the answers admitted. *Id.* Thus, having it deemed admitted that individual caregivers did not breach the standard of care, "[i]n order to succeed on her claims, Jordan must show that any negligence on the part of the Beverly [the corporate defendant] was a proximate cause of Finley's injures." (emphasis added). *Id.* at 1035.

Although Jordan made broad-based assertions of lack of staffing and/or corporate mismanagement, a shot-gun approach to be sure, nothing in the record indicated that any action or inaction by **Beverly** was a proximate cause of Finley's injuries and death. *Id.* Even though Jordan presented testimony from former employees that there were times when the facility was short-staffed and the residents were left unattended, nothing in the record indicated that Finley himself suffered as a result of the alleged shortage in personnel. *Id.* at 1036. The testimony by the former employees about the shortages in staff pertained to the general conditions at the Beverly facility and were insufficient to establish causation for Jordan's claims– no one could recall any specific instance where Finley received substandard care as a result of shortages in staff or lack of supplies. *Id.* As a consequence of Jordan being unable to prove his claim under *either* theory, the Court of Appeals found that summary judgment was appropriate.

As in *Finley*, the Defendants herein have attempted to obtain information regarding Plaintiff's theory because, similar to *Finley*, Plaintiff's contentions have been "jumbled." This Plaintiff's discovery response to Interrogatory 11, as detailed above, is

identical to the discovery response filed by the Plaintiff in *Finley*, and, as worded, attempts to set forth a theory of corporate negligence/ mismanagement. Following additional discovery, Plaintiff's chosen theory has become abundantly clear - Dr. Hammond, Plaintiff's causation expert, has testified that no specific caregivers breached the standard of care. Plaintiff's injuries were allegedly incurred as a result of "systemic" failures. (R. at 1432) (R.E. at 6). Plaintiff's nurse expert also testified that she had not identified any specific caregivers that she believed had breached the standard of care. (R. at 1439) (R.E. at 12). If that were not clear enough, counsel for the Plaintiff interjected at the deposition of Dr. Hammond and clearly stated that there would be no expert testimony as to breaches of the standard of care by individual caregivers. (R. at 1434-35) (R.E. at 6-8).

While the instant Defendants chose different discovery vehicles than the Defendants in *Finley*– Interrogatories, depositions, and the interjection by Plaintiff's counsel, rather than Requests for Admissions– the result is the same: the Plaintiff has not, and will not, provide expert opinions of negligence against Defendants' employees for which Defendants may be held vicariously liable via the doctrine of respondeat superior. Instead, as in *Finley*, the Plaintiff herein has pursued the corporate negligence/ mismanagement theory of liability.

Although the *Finley* case correctly explains the requirements to allege the nursing home operator's vicarious liability for its employees, it bears noting that the application of the doctrine of respondeat superior is not unique to nursing homes. Simply put, "[a]n action against an employer based on the doctrine of *respondeat superior* is a derivative claim arising solely out of the negligent conduct of

its employee within the scope of his or her employment." *J & J Timber v. Broome*, 932 So. 2d 1, 2 (Miss. 2006). A "vicarious liability claim itself is extinguished when the solely negligent employee is released. There can be no assessment of damages against the employer when no action can be brought against the only negligent party-the employee." *Id.* at 6[6]. As the Court of Appeals in *Finley* stated, "[i]f [Plaintiff] has specific instances where something had happened to Finley through an employee's breach of the standard of care, then that incident **should have been included** in the response with an unequivocal statement that the caregiver had in fact breached the standard of care." 933 So.2d at 1032. (emphasis added). Moreover, the Court noted that, based upon the allegations that the defendant employees "could not possibly perform to the required" standard of care, "then one of them must have violated the standard of care, *even if the fault was corporate policy and not the employee's personal negligence.*" *Id.* at 1032. (emphasis supplied by Court). It follows that, to be held negligent via respondeat superior, particularly in light of *Finley*, that the Plaintiffs are required to provide testimony at trial regarding specific acts or omissions of Defendants' employees and whether or not said actions or omissions were a proximate cause of Mr. Guillotte's injuries and death. The Plaintiff's discovery responses, expert testimony, and interjection of Plaintiff's counsel all make clear that Plaintiff is not attempting a theory of liability predicated upon an specific employee act or omission, which claims are, in effect, a release of the individual employees. As a result, there can be no

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6 *See also Whittaker v. T&M Foods, Ltd.,* - - So.2d - - , 2008 WL 4427231 (Miss. October 2, 2008)(A Plaintiff may choose not to seek recovery from the personal assets of an employee, and instead, seek to hold an employer vicariously liable for the actions or inactions of its employee and seek all monetary judgment from the employer.)

recovery on the basis of vicarious liability; it is clear that the failure of Plaintiff herein to identify any specific caregivers whose actions or inactions fell below the standard of care is fatal to Plaintiff's claims.

II. AS IN *FINLEY*, PLAINTIFF HAS FORECLOSED THE CAREGIVER NEGLECT THEORY AND HAS FAILED TO ESTABLISH A THEORY OF CORPORATE NEGLIGENCE

As previously stated, according to *Finley*, there are two distinct theories of liability that one may pursue in a nursing home negligence case: (1) Caregiver Neglect/ vicarious liability and (2) Corporate Negligence/Mismanagement. While these theories are not mutually exclusive, each requires its own set of proof. Failure to show the required set of proof for one theory does not preclude the other. However, failure to prove *either* theory, as in the instant case, warrants summary judgment.

A. Plaintiff Cannot Prove Specific Caregiver Negligence

1. Plaintiff's Discovery Responses

From the beginning of this case, and throughout the course of the matter, Defendants have repeatedly tried to ascertain whether or not Plaintiff is attempting to place any specific blame on any specific employee. In accordance with those attempts, Defendants, in **April 2003,** propounded Interrogatories to Plaintiff seeking the identities of individuals who allegedly violated the standard of care. Plaintiff's initial responses to discovery made clear Plaintiff's position– that Plaintiff was not identifying any particular individual whose actions or inactions fell below the standard of care[7]. Rather, Plaintiff chose to pursue a theory of corporate mismanagement, in accordance with the contentions set forth in Plaintiff's Complaint that "makes it very clear that the poor care .

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[7]*See* Plaintiff's Response to Written Interrogatory 11. (R. at 1455) (R.E. at 13-15).

. . was a result of corporate policies and a systemic program of understaffing the facility and failing to provide adequate training in the supervision and hiring of staff." (R. at 1455) (R.E. at 14). Regardless of the spin that Plaintiff now has put on her experts' testimony, and despite Plaintiff's lengthy attempts to blur the evidentiary lines between the two theories of liability, by not identifying specific individuals' acts or omissions, a theory of vicarious liability for caregiver neglect remains unavailable to the Plaintiff.

In June 2007– over three years after the filing of her initial discovery responses– Plaintiff attempted to provide a laundry list of fifty-five (55) caregivers who allegedly violated the standard of care. (R. at 1463-68) (R.E. at 19-21). However, this list was of no effect as the Plaintiff's experts and Plaintiff's counsel already foreclosed on any testimony regarding any alleged breaches by said employees. Noting this the trial court held that:

> despite the supplementation, Plaintiff has failed to provide supporting evidence through expert testimony. As confirmed by the deposition testimony of Plaintiff's experts, as well as Plaintiff's counsel's interjection at the deposition of Dr. Hammond, Plaintiff's medical experts will not be providing testimony at trial regarding specific acts or omissions of the Defendants' employees and whether or not said acts or omissions were a proximate cause of Guillotte's injures and/or death. Without such expert testimony, Plaintiff cannot survive a motion for summary judgment.

(R. at 1882) (R.E. at 3). Clearly, this was a last-minute effort of Plaintiff to avert summary judgment. However, even if Plaintiff articulated specific breaches for each of the listed employees, which *she did not*, such testimony would be insufficient as Plaintiff's experts– and even Plaintiff's own counsel– testified that there would be no expert testimony (which is required) as to any specific breaches of the standard of care

by Defendants' employees. Without the required specificity and the required causal link via expert testimony, Plaintiff's attempted "list" is of no consequence.

2. Plaintiff's Expert Testimony

Despite the fact that Plaintiff, in her brief, cites multiple areas of care where alleged negligent conduct occurred, Plaintiff conveniently overlooks the fact that her own counsel, at the deposition of Dr. Hammond, and the testimony of her own experts, foreclosed the possibility of her recovering on a theory of caregiver negligence. Without expert testimony as to specific acts or omissions of Defendants' employees, Plaintiff cannot survive a Motion for Summary Judgment.

According to Plaintiff's own causation expert, Dr. Timothy Hammond, "I think the major problem is the systemic failure of the home. The home is not monitoring the care and doesn't have the policies and procedures in place to assess, reassess, and deliver a care plan." (R. at 1432) (R.E. at 6). He could not identify any particular caregivers that he believed breached the standard of care. (R. at 1772) (R.E. at 5). Likewise, Plaintiff's nurse expert, Ms. Trahant testified that she had not identified any specific caregivers that she believed had breached the standard of care. (R. at 1438) (R.E. at 12).

In this matter, as in *Finley,* Plaintiff has maintained over the years that she would not be providing any testimony or evidence regarding specific acts or omission of Defendants' employees that violated the standard of care, even going so far as to interject this position at the deposition of Dr. Hammond. (R. at 1434-35) (R.E. at 6-8). Plaintiff's experts confirmed this during their depositions. Without expert testimony establishing a breach in the standard of care <u>and</u> a causal connection to the resident's

injuries, a negligence action based on caregiver neglect cannot be maintained as astutely noted by the trial court in its Order. (R. at 1882) (R.E. at 3).

Although Plaintiff's experts testified as to "staff" failures and similar conduct, as cited throughout Plaintiff's brief, such failures cannot support a theory of negligence based upon respondeat superior when a Plaintiff fails to provide expert testimony that the employees involved were negligent or breached the standard of care. It is clear that in order to find liability, there must be specific acts for which a party or it's employee may be held liable. Simply put, vague allegations in the complaint which fail to identify specific acts, combined with insufficient expert testimony, cannot avert a Motion for Summary Judgment. *See Busby v. Mazzeo*, 929 So.2d 369 (Miss. Ct. App. 2006)(plaintiff's vague allegations in the Complaint, lack of specific negligent acts in the medical records, and absence of the required expert testimony amounted to a summary judgment in favor of the defendants).[8]

3. Confirmation by Plaintiff's Counsel

At Dr. Hammond's deposition, while being questioned regarding whether or not there were individual caregivers who breached the standard of care, Plaintiff's counsel abruptly stopped the testimony, stating that:

> [l]et me assure counsel on the record so you can avoid any surprise or unfair prejudice at trial, there will be no opinions as to specific caregivers.
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> * * *

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[8] *See also Brown v. McQuinn*, 501 So.2d 1093, 1095 (Miss. 1986)(Where plaintiff's expert, "enumerated **specific acts** of negligence, both by omission and commission) a genuine factual issue was created) (emphasis added). As such, vague generalizations, such as the ones proffered by Plaintiff herein, are simply insufficient to create a genuine issue of material fact.

> But my expert is not going to testify as to the caregivers by name who fell below the standard of care. . .

Deposition of Dr. Hammond. (R. at 1434-35) (R.E. at 7-8).

The statement of the Wilkes and McHugh counsel during Dr. Hammond's deposition makes it abundantly clear that Plaintiff has no intention of identifying specific acts or omissions of Defendants' employees– despite the fact that Plaintiff's counsel had been made acutely aware of the risks of their failure to do so via the *Finley* decision.

As is clear from the *Finley* mandate, for Plaintiff to be able to successfully advance a theory of individual caregiver negligence for which the nursing home operator is to be held vicariously liable, Plaintiff and her experts are required to identify **specific** acts or omissions of Defendants' employees that breached the standard of care. Rather than permitting expert testimony that would identify breaches of the standard of care by Defendants' employees, Plaintiff's counsel wholly limited the testimony of the sole causation expert, Dr. Hammond. In doing so, Plaintiff has clearly failed to establish all the elements of her claim of individual caregiver negligence, making summary judgment appropriate, as without such expert testimony, a Plaintiff cannot survive a motion for summary judgment. *Barner v. Gorman*, 605 So. 2d 805, 808-09 (Miss. 1992) and *Paepke v. North Miss. Med. Ctr., Inc.,* 744 So.2d 809 (Miss. App. 1999). As such, the Defendants herein are entitled to summary judgment on the theory of individual caregiver negligence

B. Plaintiff has failed to Establish a Theory of Corporate Negligence/ Mismanagement

In the instant case, Plaintiff's counsel has again, like in *Finley*, attempted to advance a theory of corporate negligence – not one of individual caregiver liability. Plaintiff's sworn Interrogatory Response succinctly states:

> Plaintiff has already stated to Defendants and to the Court that the injuries sustained by Mr. Guillotte are of a nature that they evolved over a period of time and were not necessarily directly caused by one specific person's actions or inaction on a specific date. Plaintiff's complaint makes it very clear that the poor care received at Defendants's nursing home **was a result of corporate policies and a systemic program of understaffing** the facility and failing to provide adequate training and supervision and hiring of staff.

(R. at 1429) (R.E. at 14).(emphasis added). Plaintiff goes on to further admit that the "Interrogatory calls for expert opinion testimony. . . " (R. at 1429) (R.E. at 14). However, as will be shown below, Plaintiff's experts failed to establish a prima facie case of corporate negligence/ mismanagement.

The only attempt of proof by Plaintiff to establish a claim of corporate negligence/ mismanagement was an unsupported "gut feeling" of her expert, Dr. Hammond, as disclosed during his deposition. Plaintiff has failed to put forth any evidence probative of this fact– Plaintiff has proffered no staffing analysis or opinions based upon the actual staffing levels at the facility during Mr. Guillotte's residency. Instead, Plaintiff has based her theory on the expert's gut feeling and the results of a state survey that was conducted *prior* to Mr. Guillotte's residency. Specifically, Plaintiff's expert, Dr. Hammond, testified that "the only evidence I have for lack of staffing . . is in the survey where they say that activities were not done . . . which *suggested* to me that there was

a lack of staffing." (R. at. 1772) (R.E. at 5)(emphasis added). Likewise, Dr. Hammond testified that "[o]ne of the quality of life deficiencies cited in the May 5, 2001 survey" supported an additional basis for a systemic staffing problem. Depo. (R. at 1772) (R.E. at 5). However, the survey referenced by Dr. Hammond occurred **five** months prior to Mr. Guillotte's residency. It should go without saying that the May 2001 survey makes no references to Mr. Guilllotte, and therefore, amounts to no evidence. *Finley, supra.*

Similarly, in *Finley*, the Court rejected as evidence a Mississippi Department of Health survey that was conducted "*after* Finley died, and made no specific reference to Finley." *Finley,* 933 So.2d at 1036. (emphasis supplied by Court). Indeed, the *Finley* Court wholeheartedly rejected the same shotgun approach that Plaintiff's counsel has attempted to utilize in the instant matter. In *Finley*, the Court held that where Plaintiff presented testimony to the effect that the facility was short-staffed at times, but failed to provide "specific testimony" regarding Finley, such testimony was insufficient to create a genuine issue of material fact so as to preclude summary judgment. *Id.* at 1035-36.

Here, just as in *Finley*, Plaintiff has no proof of systemic failures, much less any proof that alleged systemic failures caused injury to Mr. Guilllotte. Having no reliable, well founded, expert opinions on staffing— Plaintiff cannot establish the required elements, including the causal link, to support her corporate mismanagement theory. Just as in *Finley*, the **only** testimony addressing "failures" of the nursing home is related to generalized staff failures (which staff did not breach the standard of care per Plaintiff's experts and Plaintiff's counsel), **not** failures on the part of **the corporation**. As determined by the *Finley* court, alleged failures of the staff can not support a theory of corporate mismanagement when a Plaintiff **admits** that the alleged staff failures **did**

not constitute a breach of the standard of care. (emphasis added). *Id.* at 1036-37. In *Finley*, Jordan's admission came by way of responses to Requests for Admission, while in this case, Plaintiff's admission has come by way of expert testimony, sworn discovery responses, and the interjection of Plaintiff's counsel at the deposition of Dr. Hammond.

III. THE CASES CITED BY PLAINTIFF DO NOT CONTRADICT FINLEY– IN BOTH CASES THERE WAS EVIDENCE OF EMPLOYEE NEGLIGENCE

Although the *Finley* Court acknowledged that there may be a possibility of corporate negligence without the showing of a specific employee breach of the standard of care, such possibilities are greatly limited and require specific evidence of negligence on the part of the **corporate** operator causally linked to the injuries of the specific resident-- "In order to succeed on her claims, Jordan [Plaintiff] **must show** that any negligence on the part of Beverly [Corporation] was a proximate cause of Finley's injuries." *Id.* at 1035. (emphasis added). Notably, no case has yet articulated specific examples of this second theory. Otherwise, as clearly noted by the Court of Appeals in *Finley*, and as confirmed by the Supreme Court in *Edwards* and *Venton*, a Plaintiff must show a breach of the standard of care by an employee in order to recover, regardless of whether the theory of liability is the traditional vicarious liability theory or a theory regarding corporate mismanagement/ policy issues, which gave rise to a breach by the employees due to the lack of ability to provide care.

A. The *Edwards* Case is Consistent with *Finley*

Plaintiff has misconstrued the holding in *Edwards* as overruling the requirement set forth in *Finley* wherein a Plaintiff must provide specific evidence of caregiver neglect

to the resident in order to sustain a cause of action against a nursing home. The *Edwards* Court, citing *Finley*, recognized the core premise that summary judgment is appropriate where the Plaintiff has failed to set forth evidence of a "specific instance where [the resident] received substandard care;" generalized testimony/evidence is not probative to the question of liability. *Mariner Health Care Inc.* v. *Estate of Edwards* 964 So.2d 1138, 1150 (Miss. 2007)(emphasis added)[9]. The Court in *Edwards* distinguished its case from *Finley*, finding that the Plaintiffs in *Edwards* put forth specific evidence of caregiver neglect– specific testimony of caregivers "who either provided or saw the effects of substandard care on Edwards" was provided at trial. *Id.*

As such, unlike in this case and in *Finley*, the *Edwards* Plaintiffs provided specific evidence of caregiver neglect to the resident. In *Edwards*, there was nothing preventing such testimony at trial– there was no Request for Admission admitting no breaches in the standard of care by the caregiver employees (as in *Finley*), nor was there expert testimony and counsel's interjection that none of the caregivers breached the standard of care (the instant case). Contrary to *Edwards*, in the instant matter there is a total lack of evidence of any specific breaches in the standard of care by the employees. Indeed, not only did Plaintiff refuse to name any **specific caregiver acts or individuals** in its discovery responses, Plaintiff's counsel boldly asserted that even their expert witnesses would not be testifying at trial as to any negligence by individual caregivers. (R. at 1434-35).

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[9] Clearly, the Supreme Court recognized as good law *Finley's* rejection of a shot-gun approach to liability.

B. The Holding in *Venton* is Consistent with *Finley* and the Ruling in this Case

Decided on the same day as *Edwards*, the *Venton* case remains consistent with the holdings in *Edwards* and in *Finley* and does not form a basis for this Court to reverse the trial court's grant of summary judgment. *Delta Regional Medical Center* v. *Venton*, 964 So.2d 500 (Miss. 2007). In *Venton*, the Plaintiff filed suit against the hospital and ten unnamed staff members[10]. Although Plaintiff did not name the staff members specifically, the Plaintiff did allege and prove by expert testimony that members of the staff breached the standard of care, even pointing to specific medical records. *Id.* at 504-06. Staff negligence was proven "by a preponderance of the evidence that negligent acts and/or omissions of the nursing staff and other employees and personnel of DRMC in failing to . . ." *Id.* at 503. To the contrary, in *Finley*, as well as in this case, there are admissions that the caregivers were not negligent, or more specifically in this case, there will be no expert opinions of specific employee negligence.

The *Venton* decision was supported by expert testimony as to the alleged staff neglect, and, more importantly, those experts were not precluded by their own testimony or by stipulation of counsel, from providing expert opinions on caregiver breaches of the standard of care.

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[10] Although it is not explicit as to why the ten staff members remained unnamed, under the Mississippi Tort Claims Act, individual employees cannot be held personally liable for acts or omissions occurring within the course and scope of their duties. In order to hold employees personally liable, Plaintiff must show fraud, malice, libel, slander, defamation or criminal offense. Miss. Code Ann. § 11-47-7(2).

Contrary to Plaintiff's continuous assertion that Defendants are interpreting the case law as requiring caregiver names, it is not specific names of caregivers that the cases require, it is the specificity of the breaches in the standard of care– the acts or omissions of the caregivers— that is required[11]. In *Venton*, Delta Regional appealed the trial court's decision contending "that there was no proof of negligence on the part of the employees," as well as a lack of causation. *Id.* at 503. The Supreme Court disagreed and addressed the testimony of the experts and the medical records "pointed to" by the experts to establish breaches of the standard of care on the part of the employees. *Id.* at 505.

Defendants' contention herein is the same as Delta Regional's contention that there was no proof of negligence on the part of the employees– but, unlike *Venton*, we have outright denials of employee negligence. Plaintiff's discovery responses, Plaintiff's expert testimony, and Plaintiff's counsel's interjection all consistently support Defendants' contention that the Plaintiff has no proof of negligence on the part of the employees. By denying caregiver negligence, or by stipulating that there will be no expert testimony of caregiver negligence, Plaintiff has foreclosed any possibility of proving negligence as to Defendants based upon a theory of vicarious liability/ respondeat superior. Thus, Plaintiff's only potential theory of liability is corporate negligence/ mismanagement ("corporate policy") . As correctly held by the trial court, Plaintiff failed to provide supporting evidence of corporate negligence through expert

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[11] Plaintiff has argued that ascertaining the names of all of the individuals in the chart was "impossible." However, this argument lack merit as it is not the specific name that is required– it is the specific act or omission which allegedly harmed the resident that must be identified. Moreover, to the extent any names were even illegible, such illegibility would not preclude an expert from being able to point to record where the alleged negligence occurred.

testimony. As the trial court stated, referencing Plaintiff's discovery response and *Finley*, "[i]f the employees could not perform to the required of standard of care, then one of them **must** have violated the standard of care, even if the fault was corporate policy and not the employee's personal negligence." *Finley,* 933 So.2d at 1032. (R. at 1882) (R.E. at 3). As such, *Venton* provides no basis for reversal of the trial court's grant of summary judgment.

CONCLUSION

The issue in this matter is simple, Plaintiff has failed to put forth evidence demonstrating that there is a genuine issue of material fact which would preclude summary judgment in this case. Despite Plaintiff's attempt to flip the burden, the burden to produce expert testimony in support of her claim rests squarely on the shoulders of the Plaintiff. *Scales v. Lackey Memorial Hosp.,* 988 So.2d 426, 433 (Miss. Ct. App. 2008)("A defendant in a medical malpractice action may meet its summary judgment burden by pointing out to the court that the plaintiff has failed to produce sworn expert testimony supporting his or her allegations.").

It is not– as Plaintiff would have this Court believe– Defendant's expert's duty to show each and every instance of good care. Rather, as articulated by the *Finley* Court, it is the Plaintiff who must provide specific evidence to support a theory of liability based on individual caregiver negligence and/or a theory of liability based upon corporate negligence/ mismanagement. Despite this burden, Plaintiff did not put forth the required proof for all elements of either theory of liability. With respect to a theory of individual caregiver liability, as admitted in Plaintiff's sworn Interrogatory Responses, coupled with her expert's testimony, and sealed by Plaintiff's counsel's interjection that

there would be **no expert testimony** as to any specific caregiver negligence, Plaintiff completely foreclosed any recovery based upon vicarious liability/ respondeat superior. Even if Plaintiff's discovery supplementation naming fifty-five (55) allegedly negligent caregivers was proper, which it was not, such statements are of no consequence as, per Plaintiff's own counsel's statement, there would be no *expert testimony* as to any specific caregiver whose acts or omissions breached the standard of care. As such, Plaintiff still lacks the required causal connection to establish a prima facie case of negligence. Further, the Supreme Court cases Plaintiff cites in an attempt to distinguish *Finley*, actually support the Court of Appeals' holding in *Finley* and demonstrate, again, that specific evidence of caregiver negligence is required to support a claim based on vicarious liability.

Likewise, with respect to a theory of liability based upon corporate negligence/ mismanagement, Plaintiff could not argue any alleged staff failures since Plaintiff– through written discovery, experts, and interjection of her counsel– admitted that no staff members breached the standard of care. As such, Plaintiff was required to put forth evidence relating to her allegations of a "systemic program of understaffing." Plaintiff failed to meet this requirement as her expert simply went with this gut feeling in relying on a survey conducted *five months prior* to the residency of Mr. Guillotte. This survey made no specific reference to Mr. Guillotte, and, under the guidelines of *Finley*, is insufficient to create a genuine issue of material fact. As such, Plaintiff's attempts at recovery under this second theory of liability fail as a matter of law.

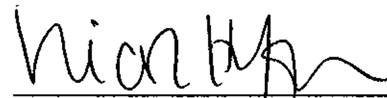
In any event, Plaintiff has failed to put forth a prima facie case of negligence against any caregiver and/or any corporate Defendant. The trial court correctly

determined that Plaintiff failed to provide any proper causation testimony either on the part of individual caregivers or as related to corporate Defendants themselves. Plaintiff's claims fail as a matter of law, and the summary judgment entered by the trial court was proper and should be upheld.

WHEREFORE, PREMISES CONSIDERED, the Appellees respectfully request that the Appellant's appeal be denied and the decision of the trial court be affirmed.

Respectfully submitted,

Delta Health Group, Inc. And Pensacola Health Trust, Inc.



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CERTIFICATE OF FILING

I, NICOLE C. HUFFMAN, attorney for the Defendants/Appellees, do hereby certify that I have this day caused to be hand delivered by courier to the Mississippi Supreme Court Clerk's Office, the following documents and copies:

The original and four (4) copies of the above Appellees' Brief.

The original and four (4) copies of the Appellees' Record Excerpts.

One (1) disk containing the Appellees' Brief & Record Excerpts.

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.

This the 9 day of October, 2008.

NICOLE C. HUFFMAN

CERTIFICATE OF SERVICE

I, NICOLE C. HUFFMAN, do hereby certify that I have this day caused to be mailed, by United States Mail, certified, first-class, postage pre-paid, pursuant to Miss. R. App. P. 25, a true and correct copy of the foregoing to:

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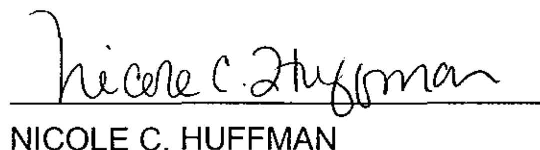
This the 9 day of October, 2008.



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