2014 WL 7002587 (Pa.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Pennsylvania.
Allegheny County

Colonel Edward BORING, Jr.,

v.

SKY VUE TERRACE PITTSBURGH PA, LLC, et al.

No. GD12015304.
February 13, 2014.

Civil Division

Plaintiff's Brief in Opposition to Defendants' Preliminary Objections

Wilkes & McHugh, P.A., Peter D. Giglione, Esquire, Pa. I.D. #89523, Ryan J. Duty, Esquire, Pa. I.D. #309685, Wilkes & McHugh, P.A., 437 Grant Street, Suite 912, Pittsburgh, PA 15219, for plaintiff.

Plaintiff, Colonel Edward Boring, Jr., as Executor of the Estate of Eric E. Boring, deceased, by and through his undersigned counsel and Wilkes & McHugh, P.A., files the instant Brief in Opposition to Defendants' Preliminary Objections.

I. INTRODUCTION

Plaintiff commenced the instant nursing home neglect and **abuse** action by way of Praecipe for Writ of Summons on August 22, 2012. Thereafter, Plaintiff filed his Complaint in Civil Action on August 22, 2013.[2] In his Complaint, Plaintiff alleges that the Defendants collectively owned, operated, managed and controlled the skilled nursing facility known as Sky Vue Terrace ("Facility") where Plaintiff's son Eric Boring ("Mr. Boring") was a resident. During his residency at the Facility, the negligent and reckless acts and/or omissions of Defendants caused Mr. Boring to suffer multiple illnesses and injuries, including pneumonia, several wound infections, poor hygiene and severe pain.

On or about January 24, 2014, Defendants filed Preliminary Objections to Plaintiffs Complaint, asserting that (1) Plaintiff's allegations relating to fraudulent documentation should be stricken; (2) Paragraph 91 listing numerous citations levied against the Facility should be stricken as scandalous and impertinent; (3) Plaintiff should be required to file a more specific pleading setting forth more specific facts in Paragraph 91; (4) Plaintiffs Count Two alleging negligence per se should be dismissed as legally insufficient; (5) Plaintiff should be required to re-plead his action to delineate claims against the Defendants; (6) Certain sub-paragraphs under Paragraph 89 should be stricken as insufficiently specific; and (7) Plaintiffs claims for punitive damages should be dismissed as legally insufficient.

For the reasons that follow, Defendants' Preliminary Objections to Plaintiffs Complaint should be overruled in their entirety.

II. QUESTIONS PRESENTED

1. Are Plaintiffs allegations regarding fraudulent documentation sufficient?
Suggested Answer: YES

2. Are Plaintiffs references to Department of Health citations and other residents material and pertinent?

Suggested Answer: YES

3. Are Plaintiffs allegations of negligence and references to Department of Health citations are sufficiently specific?

Suggested Answer: YES

4. Does Plaintiffs Complaint properly set forth a claim of negligence per se under the Neglect of a Care-Dependent Person Statute, 18 Pa.C.S.A § 2713?

Suggested Answer: YES

5. Does Plaintiffs Complaint comply with pleading rules regarding delineation of claims?

Suggest Answer: YES

6. Are Plaintiffs allegations of negligence in Paragraph 89 sufficiently specific?

Suggested Answer: YES

7. Does Plaintiffs Complaint plead sufficient facts to justify an award of punitive damages?

Suggested Answer: YES

III. ARGUMENT

A. Standard for Ruling on Preliminary Objections

Under Pennsylvania law, Preliminary Objections should only be sustained in cases that are free and clear from doubt. *Bower v. Bower*, 531 Pa. 54, 57, 611 A.2d 181, 182 (1992). A court must overrule objections to a plaintiffs complaint if the complaint pleads sufficient facts which, if believed, would entitle the plaintiff to the relief sought. *Wilkinsburg Police Officers Ass'n v. Commonwealth*, 535 Pa. 425, 431, 636 A.2d 134, 137 (1993). When facing Preliminary Objections in the nature of a demurrer, the court must accept as true all material facts set forth in plaintiffs complaint, as well as all inferences reasonably deducible therefrom. *Youndt v. First Nat'l Bank*, 868 A.2d 539, 542 (Pa. Super. 2005); *Vosk v. Encompass Ins. Co.*, 851 A.2d 162, 164 (Pa. Super. 2004). "Thus, the court may determine only whether, on the basis of the allegations the plaintiff pled, he or she possesses a cause of action recognized at law." *In re Adoption of S.P.T.*, 783 A.2d 779, 782 (Pa. Super. Ct. 2001).

B. Plaintiff's Allegations of Fraudulent Documentation are Sufficiently Specific

Defendants' assertion that Plaintiffs Complaint does not sufficiently support allegations of fraud is without merit and premature. Plaintiff is ***not pleading a cause of action for fraud,*** and therefore, do not need to meet the higher pleading requirement, as suggested by Defendants. Plaintiffs allegations that Defendants failed to prevent, and engaged in, "incomplete, inconsistent and fraudulent documentation" and the like, are meant to ***support*** Plaintiffs claims of ***negligence.***[3] For example, paragraph 89 of Plaintiff's Complaint states:

89....the breach of duties, general ***negligence,*** general negligence, professional negligence, corporate negligence, carelessness and recklessness of Defendants... ***were exhibited in*** the following acts and omissions in the care and treatment of Eric Boring: o. ***failing to prevent*** fraudulent documentation and allowing the Defendants' staff to chart that they provided care to Eric Boring on non-existent days, on days when the charting staff member was not actually at work, and/or on days when Eric Boring was not even in Defendants' Facility; [4]

Furthermore, courts in Pennsylvania have held that in situations where the defendant has more knowledge than the plaintiff, the plaintiff is not required to file a more specific complaint without having the opportunity to uncover the facts of a nascent case. See Sprecker v. Minutola, 1950 WL 2978 (1949), and Gill v. Wilkes-Barre Pub. Co., 30 Pa. D. & C.2nd 251 (1963). In overruling the Defendants' preliminary objections, the Court in Sprecker stated that:

> It has been stated that a plaintiff is not bound to embrace in his statement what in the very nature of the particular case he could not know with accuracy: Georges Township v. Union Trust Co., 293 Pa. 364, 378 (1928). **Putting the matter in another way, a more specific statement or complaint should not be required in those matters about which defendant has, or should have, as much or more knowledge than the plaintiff.**

Sprecker, 70 Pa. D. & C. at 596 (emphasis added). Likewise, in Gill, the court ruled that the name of the Defendants' agent or employee need not be identified in plaintiff's complaint where the plaintiff did not identify the name of the agent or employee who negligently gave instructions to plaintiff regarding the operation of an elevator door. Gill, 30 Pa. D. & C.2d at 252-53. The court explained:

> ...tort actions, on the other hand, frequently arise between parties who are utter strangers to each other. **They do not always know the names of all parties involved, and sometimes in the inherent nature of the case cannot know the names of all parties.** *Gill*, 30 Pa. D. & C.2d at 253 (emphasis added).

The same logic applies to the instant matter. Plaintiff's Complaint sufficiently states instances where it is believed Defendants acted in a fraudulent manner, and this allegation supports Plaintiff's claims of negligence. In *Kania v. Extendicare Homes Inc., et.al*, No. 1960 of 2013, the Honorable Judge Caruso of the Westmoreland Court of Common Pleas, rejected this exact argument when offered by the defendants because the plaintiff had not made a claim for damages based on fraud, but rather negligence, and therefore the pleading requiriements under Rule 1019(b) did not apply. [5]

Therefore, Defendants' objection lacks merit and Plaintiff's fraudulent documentation claims should proceed.

C. Paragraph 91 is Material and Pertinent to Plaintiff's Claims of Corporate Negligence and Punitive Damages

Defendants argue that Plaintiff's Complaint contains scandalous and impertinent matter because Paragraph 91 lists the results of numerous Department of Health Surveys and related citations for violations of care regulations. Defendants take issue with the fact that the deficiencies noted in paragraph 91, relate to residents other than Mr. Boring. Contrary to Defendants' objection, the complained of allegations are material and pertinent to Defendants' failures to provide Mr. Boring and other similarly situated residents with adequate care and staff to tend to his needs, exhibiting a reckless disregard to the health and well-being of Facility residents.

Scandalous averments consist of “any unnecessary allegation which bears cruelly upon the moral character of an individual, or states anything which is contrary to good manners or anything which is unbecoming to the dignity of the court to hear, or which charges some person with a crime, not necessary to be shown.” Ellis v. Nat'l Capitol Life Ins. Co., 35 Pa. D. & C.2d 490,

493-94 (Montg. 1964). Impertinent averments have been defined as "immaterial and inappropriate to the proof of the cause of action." Dept. of Envtl. Res. v. Peggs Run Coal Co., 423 A.2d 765, 769 (Pa. Cmwlth. Ct. 1980). To be relevant, evidence must (only) have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Pa. R.E. 401. Accord, Com. v. Scott, 480 Pa. 50, 54, 389 A.2d 79, 82 (1978). Further, "[t]he right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." Com. v. Hartford Acci. & Indem. Co., 396 A.2d 885, 888 (Pa. Cmwlth. Ct. 1979).

Plaintiff's references to Department of Health citations prior to Mr. Boring's residency are proper for purposes of notice of ongoing care problems at the Facility failure to cure the same.[6] Moreover, Mr. Boring did not reside in a bubble, isolated from the effects of Facility-wide deficiencies which are relevant to Defendants' negligent and reckless operation of the Facility, including chronic understaffing, which increased the risk of harm to all residents, including Mr. Boring. Such deficiencies, which are evidenced by Department of Health Surveys, are material and relevant to Plaintiff's claims of punitive damages and corporate negligence. *See Phillip Morris USA v. Williams*, 127 S.Ct. 1061, 1064 (2007) (holding "Evidence of actual harm to nonparties can help to show that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible"). Indeed, in Scampone v. Grane Healthcare Co., the Pennsylvania Superior Court fily established that understaffing allegations may serve as a basis for punitive damages in healthcare provider **abuse** and neglect cases. 11 A.3d 967, 991 (Pa. Super. 2010), *appealed on unrelated issue,* 15 A.3d 427 (Pa. 2011), affirmed on other grounds, 57 A.3d 582 (Pa. 2012). The Scampone court held that evidence of chronic understaffing at the defendants nursing facility established that defendants acted with reckless disregard to the rights of the facility's residents, which was sufficient to submit the question of punitive damages to the jury. *Scampone,* 11 A.3d at 991.[7]

Accordingly, by referencing other residents and past deficiencies in paragraph 91, Plaintiff demonstrates Defendants' "reckless indifference to the rights of others," thus making punitive damages appropriate and supporting Plaintiff's claims of corporate level negligence.[8]

D. Paragraph 91 is Sufficiently Specific and Should Not Be Stricken

Defendants offer a variation on the preceding objection, claiming that Paragraph 91 is insufficiently specific because Plaintiff purportedly fails to allege how the deficiencies identified by the Department of Heath causally relate to Mr. Boring's injuries. This objection also lacks merit. As explained in the preceding argument section, the systemic failures identified by the DOH, particularly the numerous citations regarding lack of infection control, pertain specifically to uncorrected failures that harmed other residents and eventually harmed Mr. Boring. Plaintiff avers that all named Defendants were aware of these deficiencies and yet did nothing to correct the ongoing care problems before Mr. Boring was injured under similar circumstances.[9]

As established above, these averments go to the notice element under Plaintiff's claims of corporate negligence and punitive damages. As such, Defendants' generic objection that Plaintiff does not plead a causal connection between past care problems and Mr. Boring's injuries is missing the point. Paragraph 91 serves to support Plaintiff's claims that Defendants consciously disregarding the harm they were causing residents through their careless and reckless business model which places profits over people.

Accordingly, Defendants Preliminary Objection in this regard should be overruled.

E. Count Two of Plaintiff's Complaint Alleging Negligence Per Se is Legally Sufficient

Defendants argue that Plaintiff's negligence per se claim under 18 Pa. C.S.A. § 2713 (hereinafter § 2713") is legally insufficient because § 2713 is a criminal statute that does not provide for a private cause of action. Furthermore, Defendants claim that the criminal nature of § 2713 renders it unsuitable the serve as a basis for negligence per se. Defendants' objection lack merit.

Under Pennsylvania law, Plaintiff is entitled to bring a negligence per se claim for violation of a criminal statute. Here, Plaintiff alleges that Defendants breached the standard of care as prescribed in § 2713, which conveys an actionable tort duty under Pennsylvania law. As explained below, by reference to the statutory scheme of § 2713, Defendants should be held liable for negligence per se.

At the outset, contrary to Defendants' argument, a claim of negligence *per se* for ***does not require a charge or conviction for violation of a statute.*** *See Hannon v. City of Philadelphia*, 587 A.2d 845, 851 (Pa. Cmwlh. 1991) ("[E]vidence of violation of a statute, such as the Vehicle Code here, may constitute negligence per se, ***irrespective of the criminal penalties contained therein or whether there has been a conviction thereunder.")*** (emphasis added). Moreover, in order to sustain Defendants' demurrer to Count Two, this Court must be convinced that based "on the facts averred, the law says with certainty that no recovery is possible." Mistick, Inc. v. Nw. Nat. Cas. Co., 806 A.2d 39, 42 (Pa. Super. Ct. 2002). As explained below, Plaintiffs pleads a legally cognizable claim for negligence per se in his Complaint which is sufficient at this stage. Any claims by Defendants in the nature of prejudice or confusion of issues which may occur later at the trial in this matter with regard to proving a violation of § 2713 are irrelevant. The only question instantly is whether Plaintiff pleads sufficient facts to preliminarily show a violation of § 2713 - which he has. [10]

Pennsylvania courts have clearly established that a plaintiff asserting negligence per se properly relies upon a statute where: (1) the statute is designed to protect a particular class of individuals from the type of harm suffered by the plaintiff and (2) the claim will further the purpose of the statute. *See Cabiroy v. Scipione*, 767 A.2d 1078, 1081 (Pa. Super. 2001) (citing *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873, 875 (1965)); *Frantz v. HCR Manor Care Inc.*, 64 Pa. D. & C.4th 457, 465 (C.P. Schuylkill 2003) (citing *McCain v. Beverly Health and Rehabilitation Svcs.*, 2002 WL 1565526, at * 1 (E.D. Pa. 2002).

Pennsylvania courts have further clarified the idea that a plaintiff can file suit under a statute that does not provide for a private cause of action, stating that "the concept of negligence per se establishes both duty and required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm." *Frantz*, 64 Pa. D. & C.4th at 461-62 (quoting *Braxton v. PennDOT*, 160 Pa. Cmwlth. 32, 45, 634 A.2d 1150, 1157 (1993)). And, "[i]n analyzing a claim based on negligence per se, the purpose of the statute must be to protect the interest of a group of individuals, as opposed to the general public, and the statute must clearly apply to the conduct of the defendant." Id. at 462. Thus, negligence per se applies where an individual within the class contemplated by the statute suffers the type of harm that the statute seeks to prevent. Id. (citing *Wagner v. Anzon Inc.*, 453 Pa. Super. 619, 627, 684 A.2d 570, 574 (1996)).

Under § 2713 of the Pennsylvania Crimes Code, a caretaker is guilty of neglect of a care-dependent person if he:

> (1) Intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care.

18 Pa.C.S.A. § 2713(a)(1). Further, the statute defines "caretaker" as "an owner, operator, manager or employee of a nursing home." 18 Pa.C.S.A. § 2713(f)(1). Thus, the statute's plain language clearly establishes that its purpose is to prevent a public harm: **elder abuse** and neglect by owners and operators of nursing homes.

In this case, Defendants' conduct breached the standard of care required by § 2713, which in turn makes Defendants liable for negligence per se. Sky Vue Terrace is a skilled nursing facility and therefore falls well within the § 2713 definition of "caretaker." As such, Defendants, who owned, operated, controlled and managed the Facility clearly assumed the role of Mr. Boring's "caretakers" as defined by the statute. [11] Plaintiff's averments, which at this stage must be accepted as true, establish that Defendants failed to meet their responsibilities as statutory caretakers, namely that Defendants failed to "provide treatment,

care, goods or services necessary to preserve the health, safety, or welfare" of Mr. Boring. [12] Thus, the aforementioned language of § 2713 clearly establishes a clear and specific standard necessary to support Plaintiffs claim of negligence *per se.*

In a similar nursing home **abuse** and neglect case, the Federal District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, held that OAPSA, a statute which does not provide a private right of action, ***can still be utilized to establish negligence per se.*** *McCain v. Beverly Health and Rehabilitation Services,* 2002 WL 1565526 (E.D. Pa. 2002). Essentially, if a plaintiff can prove the defendant's negligence was the proximate cause of the injury in question, then the violation of the applicable statute is negligence per se, and liability may be grounded on such negligence. *Cabiroy,* 767 A.2d at 1079. A similar situation exists in the present matter. Although § 2713 does not provide a private cause of action, Defendants' conduct breached the standard of care required by the statute, which makes Defendants liable for negligence *per se.*

Numerous courts throughout this Commonwealth have held that § 2713 may serve as the basis of a negligence *per se* claim. For example, recently in *Kania v. Extendicare Homes Inc., et.al,* the Honorable Judge Caruso of the Westmoreland Court of Common Pleas overruled a similar preliminary objection to a negligence *per se* claim under § 2713; stating:

> The Neglect of Care-Dependent Persons Statute (18 Pa. C.S.A. § 2713) is sufficiently specific to form the basis of a negligence per se action inasmuch as the statute provides that under certain circumstances particular acts shall or shall not be done, i.e. the statute provides that under circumstances where a care-dependent person is under the care of the defendants, they cannot fail to provide treatment, care, goods or services necessary to preserve the health or welfare of the care-dependent person and failing to do so leaves little doubt that the defendants would violate the reasonable standard of care required of them. [13]

Id. Furthermore, the Honorable Carmen D. Minora's Opinion in South v. Osprey Ridge Healthcare Ctr., et al., held that, "Plaintiff's allegations clearly support a claim that Defendants' conduct falls with the type of harm that the statute seeks to prevent and furthers the statute's purpose." Id. at p. 7. [14] Thereafter, the Honorable Edward E. Guido of the Cumberland County Court of Common Pleas found Judge Minora's reasoning in South persuasive and adopted it in overruling preliminary objections on the same issue. [15] Furthermore, in Ronan v. ManorCare of Carlisle PA, et al., [16] the Honorable M.L. Ebert, also of the Cumberland County Court of Common Pleas, found Judge Guido's ruling persuasive, and adopted the South reasoning in overruling the same preliminary objection. Thereafter, Judge Solomon and Judge Vernon of the Fayette County Court of Common Pleas, followed suit and agreed the § 2713 could serve as a basis for a negligence per se claim in two separate nursing home neglect and **abuse** cases. [17]

Accordingly, Defendants' objection should be overruled and Plaintiff's negligence per se claims arising from 18 Pa.C.S.A. § 2713 should proceed.

F. Plaintiff's Complaint Does Not Violate the Rules Regarding Delineation of Claims

Defendants argue that Plaintiff fails to set forth each cause of action against each defendant in a separate count. Although Defendants cite no rule to this effect, Pennsylvania Rule of Civil Procedure 1020(a) provides that:

> The plaintiff may state in the complaint more than one cause of action cognizable in a civil action against the same defendant. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief

Pa. R. Civ. P. 1020(a) (emphasis added). Defendants misinterpret this rule which requires separate "causes of action" to be pled in separate counts - not the same cause of action pled against more that one defendant. Moreover, "[i]t has been repeatedly held that where a plaintiff sues several defendants jointly, alleging liability jointly, separate counts are not required. " *Seruga v.*

Tuskes, 21 Pa. D. & C.3d 111, 113 (Pa. Com. Pl. 1981) (citing Goodrich-Amram 2d. §. 020(a):1). The court in Seruga reasoned that since "factual background is identical for all of defendants ... separate pleadings or counts are not needed." Id. Such is the case here. Defendants are joint tortfeasors whose collective failures caused Mr. Boring's harm. A separate count for each Defendant is not necessary. [18]

G. Plaintiff's Negligence Claims Are Sufficiently Specific

Defendants cannot look at each section of Plaintiffs Complaint in a vacuum. In a complaint, a plaintiff is required to state the "material facts on which a cause of action is based... in a concise and summary form." Pa.R.C.P. 1019(a). This rule has been interpreted to require that the complaint give notice to the defendant of an asserted claim, and synopsizes the essential facts to support it. *Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 235, 622 A.2d 355, 357 (1993). A complaint is sufficiently specific if it provides the defendant with enough facts to enable the defendant to frame a proper answer and prepare a defense. *Smith v. Wagner*, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991); Milk Mktg. Bd. v. Sunnybrook Dairies, Inc., 29 Pa. Cmwlth. 210, 370 A.2d 765 (1977). A pleading must achieve its purpose of informing the adverse party or parties and the court of the matters at issue. *Commonwealth of Pennsylvania, Department of Transportation v. Shipley Humble Oil Company*, 370 A.2d 438 (Pa. Cmwlth. 1977). However, nowhere does it say that Plaintiff must construct her complaint in such a way that each section must be read in a vacuum.

Defendants aver that sub-sections (k), (n), (o), (p), (r), (s), (v), (x), (aa), (bb), (ee) and (ff) under Paragraph 89 of Plaintiff's Complaint are vague, overbroad and capable of "amplification" at a later date. Essentially, Defendants complain that the allegations contained in the aforementioned paragraph violate Connor v. Allegheny General Hospital, 501 Pa. 308, 461 A.2d 600 (1983). Defendants incorrectly rely upon Connor, which prohibits pleading general, vague allegations such as "in otherwise failing to use due care and caution under the circumstances," commonly called a "catchall" allegation. 501 Pa. 308, 461 A.2d 601. The Pennsylvania Superior Court further clarified Connor in Reynolds v. Thomas Jefferson University Hospital, 450 Pa. Super. 327, 676 A.2d 1205 (1996). The Superior Court discussed Connor and held that the key inquiry is whether or not an allegation allows the plaintiff to pursue an entirely different theory by amending their complaint to bring an entirely new cause of action. See id.; see also Junk v. East End Fire Dept., 262 Pa. Super. 473, 490-91, 396 A.2d 1269, 1277 (1978) (stating that a new cause of action arises if amendment proposes different theory or different kind of negligence than that previously raised, or if operative facts supporting claim are changed).

Clearly, the allegations identified by Defendants as lacking specificity do not allow Plaintiff to pursue ***an entirely different cause of action i***n this case. Rather, the identified paragraphs constitute allegations that Defendants failed to comply with, inter alia, numerous provisions of the state and federal skilled nursing regulations which govern the operation of skilled nursing facilities in Pennsylvania. These allegations are not catch-all allegations but rather specific allegations of Defendants' overall negligence, corporate negligence and recklessness in this case.

Accordingly, Defendants Preliminary Objection should be overruled.

H. Plaintiff's Claims for Punitive Damages Are Legally Sufficient

Defendants argue that this Court should strike Plaintiffs claims for punitive damages because he fails to allege facts that suggest intentional, willful, or wanton conduct on the part of the Defendants. Even a cursory review of Plaintiffs Complaint proves that Defendants' argument lacks merit.

Punitive damages are awarded in cases in which Defendants' exhibited "outrageous" conduct; that is, for acts done with "an evil motive" or "a reckless indifference to the rights of others." *See Scampone*, 11 A.3d at 991. Such "wanton" conduct, as distinguished from ordinary negligence, "is characterized by a realization on the part of the tortfeasor of the probability of injury to another, and a reckless disregard of the consequences." 1 P.L.E. Negligence § 48 (2005).

In addressing the concept of "reckless indifference," the Pennsylvania Supreme Court has held that punitive damages may be assessed where an actor knows, or has reason to know, of facts which create a high degree of risk of physical harm to another and deliberately proceeds to act (or fails to act) in conscious disregard of, or indifference to, that risk. *See SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 494-95, 587 A.2d 702, 704-05 (1991) (citations omitted). Actual knowledge of harm or evil intent is not a requirement, only an appreciation by the actor that his conduct might substantially increase the risk of serious harm to another in a perceptible way. See Hall v. Jackson, 2001 Pa. Super. 334, 799 A.2d 390, 403 (2001).

The Pennsylvania Supreme Court has also established that punitive damages may be appropriate in negligent supervision cases based upon a theory of direct liability. *See Hutchinson v. Luddy*, 582 Pa. 114, 124-125, 870 A.2d 766, 772 (2005). [19] The court in Hutchinson reasoned that neither law nor logic "prevent[s] the plaintiff in a case sounding in negligence from undertaking the additional burden of attempting to prove, as a matter of damages, that the defendant's conduct not only was negligent but that the conduct was also outrageous, and warrants a response in the form of punitive damages." *Id.* at 124-125. [20]

In Scampone, the Pennsylvania Superior Court firmly established that understaffing allegations may serve as a basis for punitive damages in healthcare provider **abuse** and neglect cases. The Scampone court held that evidence of chronic understaffing at the defendants' nursing facility established that defendants acted with reckless disregard to the rights of the facility's residents, which was sufficient to submit the question of punitive damages to the jury. Scampone, 11 A.3d at 991. The court concluded that "[t]he evidence [of understaffing and insufficient care] in question related to all residents of [the nursing facility]; [the decedent] was clearly a resident of [the nursing facility] during the time covered by these witnesses. In addition, as analyzed above, the effects of understaffing was specifically connected to [the decedent's] care." *Id.*

Recently, the Pennsylvania Superior Court, relying heavily on Scampone, overturned a trial court's dismissal of punitive damages claims in a nursing home **abuse** and neglect case, and remanded for a separate trial on punitive damages. See Hall v. Episcopal Long Term Care, 54 A.3d 381 (Pa. Super. 2012). The court in Hall found that, similar to Scampone, the plaintiff had presented evidence of chronic understaffing and that complaints of understaffing went unheeded. Id. at 396-97. Thus, the court concluded that punitive damages were appropriate because the defendant had "acted in an outrageous fashion in reckless disregard to the rights of others and created an unreasonable risk of physical harm to" the decedent. Id.

Similarly, in *Capriotti v. Beverly Enterprises Pennsylvania Inc.*, 72 Pa. D. & C.4th 564, 572 (C.P. Fayette 2004), the court considered allegations of corporate negligence, including claims "that the corporate defendants knowingly, and with reckless disregard for the health and well-being of the facility residents, grossly understaffed and underfunded the facility; failed to appropriately train the staff; and knowingly permitted [the resident] to be neglected." The *Capriotti* court had no trouble finding that these allegations of corporate neglect, "if believed, would entitle the plaintiff to punitive damages." *Id.* at 576. The court also held that the same allegations, "if believed, would entitle the plaintiff to relief under the corporate negligence theory." *Id.* at 572.

In this case, Plaintiff's Complaint alleges specific facts that Defendants grossly and chronically understaffed the Facility, to the point that Defendants knew that the personnel on duty would not be able to properly attend to the medical needs of the Facility's residents, leading to numerous injuries that Mr. Boring suffered. [21] The Complaint alleges that the Defendants knew, or should have known, that their actions would lead to severe injuries like those suffered by Mr. Boring. [22] More specifically, at the time of Mr. Boring's residency, Defendants were aware that they had been cited on numerous occasions by the Pennsylvania Department of Health for several failures regarding resident care at the Facility. [23]

Under the law discussed herein, Plaintiffs allegations are sufficient to overrule Defendants' Preliminary Objection to Plaintiff's claims for punitive damages. Similar conduct in numerous cases has warranted punitive damages in the Commonwealth of Pennsylvania. [24] For instance, the Honorable Bradford H. Charles dismissed like preliminary objections to plaintiff's claims

of punitive damages in his opinion in *Brasher v. Manor Care of America, Inc., et al.* [25] More recently, in *Kania and Ronan, supra*, Judges Caruso and Ebert dismissed defendants' preliminary objections to plaintiff's punitive damages claim. [26]

Accordingly, Defendants' Preliminary Objection should be overruled and Plaintiff's claim for punitive damages should proceed.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court overrule Defendants' Preliminary Objections and order Defendants to file an Answer to Plaintiff's Complaint within twenty (20) days of the date of the Order.

Date: 2/13/14

Respectfully submitted,

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Footnotes

2 Plaintiff's Complaint in Civil Action is attached hereto as Exhibit "A."

3 Exhibit "A" at ¶72.

4 Exhibit "A" at ¶ 84 (o.) (emphasis added).

5 The Honorable Judge Caruso's 7/9/2013 Order is attached hereto as **Exhibit "B.**"

6 Notably, the citations levied against the Facility pertain specifically to one major deficiency which directly harmed Mr. Boring - lack of adequate infection control. See Exhibit "A" at ¶ 91.

7 Moreover, The Scampone court held that evidence of understaffing, including "evidence related to **problems with other patients** caused by understaffing," is relevant to establishing corporate negligence against nursing facilities **and their corporate operators.** Id. (emphasis added).

8 *See* Exhibit "A" at ¶¶ 35-47, 82-91.

9 See Exhibit "A," ¶¶ 85-91.

10 Defendants' claims regarding "proof beyond a reasonable" at the time of trial are without merit. Defendants cite no legal authority which requires such a heightened standard to prove a statutory violation for negligence per se purposes. Moreover, Plaintiff is not attempting to seek penal punishment for the violation of §2713, which would be the only rationale to support the application of the heightened standard. As such, Defendants' unsubstantiated objections in this regard should be overruled.

11 *See* Exhibit "A" at 4-19.

12 *See* Exhibit "A" at ¶¶ 97-102.

13 See Exhibit "B."

14 See The Honorable Judge Minora's 6/24/2011 Order is attached hereto as Exhibit "C."

15 See The Honorable Judge Guido's 1/10/12 Order, attached hereto as Exhibit "D."

16 See The Honorable Judge Ebert's 8/27/12 Order and Opinion, attached hereto as Exhibit "E."

17 Judge Soloman's 12-19-13 Order and Judge Vernon's 1-29-14 Order are attached hereto as Exhibit "F" and Exhibit "G," respectively.

18 Defendants reliance on General State Authority v. Lawrie and Green, 256 A.2d 851 (Pa. Cmwlth. 1976) is misplaced. In that case, Plaintiff was required to re-plead his complaint with additional counts for each defendant because his case "relied upon two separate and distinct contracts giving rise to the respective causes of action." Id. at 854. Clearly this is distinguishable from the case at bar involving a joint tortfeasor negligence action.

19 Under the doctrine of corporate negligence, "a corporation is held directly liable, as opposed to vicariously liable, for its own negligent acts. " *Welsh v. Bulger*, 548 Pa. 504, 513, 698 A.2d 581, 585 (Pa. 1997) (emphasis added). The doctrine imposes a "non-delegable duty" on an institution to "uphold a proper standard of care for patients." *Rauch v. Mike-Mayer*, 783 A.2d 815, 826 (Pa. Super. 2001). In short, "[a] cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself" *Welsh*, 698 A.2d at 585.

20 *See, e.g.*, *Ditzler v. Wesolowski*, 2006 WL 2546857, at *2 (W.D. Pa. 2006). In rejecting defendants' conclusion that punitive damages are not recoverable for negligent conduct, the court relied upon the Supreme Court's decision in Hutchinson and stated that "negligent conduct may be so egregious that it may fairly be described as outrageous." Id.

21 *See* Exhibit "A" at ¶¶ 35-48, 85-91.

22 *See* Exhibit "A" at ¶¶ at ¶¶35-48, 85-91.

23 *See* Exhibit "A" at ¶¶ 90-91.

24 *See Zaborowski v. Hospitality Care Center of Hermitage, Inc.*, 60 Pa. D & C. 4th 474, 501-503 (Mercer County, 2002) (the nursing home resident's injuries were weight loss, dehydration, a Stage I pressure sore and death, and the Court held that the allegations of improper hiring, training and supervision of employees to ensure that adequate care was delivered was sufficient to award punitive damages); Zassera v. Roche, 54 Pa. D. & C. 4th 225 (Lackawanna 2001) (allowing punitive damages claim to proceed against physician who operated on right carotid artery when patient had been hospitalized for surgery to left); Medvecz v. Choi, 569 F.2d 1221 (3d Cir. 1987). (anesthesiologist abandoned patient in operating room to get lunch); and Hoffman v. Mem'l Osteopathic Hosp., 492 A.2d 1382 (Pa. Super. 1985) (defendant allowed patient with neurological paralysis to remain crying on floor of emergency room, repeatedly stepping over him for hours, telling him there was nothing wrong with him).

25 *See* 1/21/04 Order and Opinion, attached hereto as Exhibit "H."

26 *See* Exhibit "B" at 2; Exhibit "E" at 10-12.

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