

2011 WL 11707638 (Pa.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Pennsylvania.
Lancaster County

Shirley A. CRAMER, by and through Patricia L. Cramer, her Attorney-in-Fact, Plaintiff,

v.

MANOR CARE OF LANCASTER PA, LLC, d/b/a Manor Care Health Services - Lancaster; HCR Manor Care, Inc.; Manorcare Health Services, Inc.; Manor Care, Inc.; GGNSC Lancaster LP, d/b/a Golden Livingcenter-Lancaster; GGNSC Lancaster GP, LLC; GGNSC Holdings, LLC; Golden Gate National Senior Care, LLC; GGNSC Equity Holdings, LLC; GGNSC Administrative Services, LLC, and Faruk Nguyan, NHA, Defendants.

No. CI-11-08592.
September 28, 2011.

Plaintiff's Response to Defendants', GGNSC Lancaster LP d/b/a Golden Living Center-Lancaster, GGNSC Holdings, LLC, GGNSC Lancaster GP, LLC, Golden Gate National Senior Care, LLC, GGNSC Equity holdings, LLC, GGNSC Administrative Services, LLC and Faruk Nguyen, N.H.A., Preliminary Objections to Plaintiff's

Wilkes & McHugh, P.A., By: [Brian L. Strauss](#), Esquire, Identification No. 25779, 400 Market Street, Suite 1250, Philadelphia, PA 19106, (215)972-0811, Email: bstrauss@wilkesmchugh.com, for plaintiff, Shirley A. Cramer, by and through, Patricia L. Cramer, her Attorney-In-Fact.

THIS IS NOT AN ARBITRATION CASE; AN ASSESSMENT OF DAMAGES IS REQUIRED; JURY TRIAL DEMANDED

COMPLAINT

AND NOW, comes the Plaintiff, Shirley A. Cramer, by and through Patricia L. Cramer, her Attorney-in-Fact, by and through her undersigned counsel, and files this Response in opposition to the Preliminary Objections of Defendants', GGNSC Lancaster LP d/b/a Golden Living Center - Lancaster, GGNSC Holdings, LLC, GGNSC Lancaster GP, LLC, Golden Gate National Senior Care, LLC, GGNSC Equity Holdings, LLC, GGNSC Administrative Services, LLC and Faruk Nguyen, N.H.A., and avers as follows:

1-2. Denied as stated. Plaintiff's Complaint is a document that speaks for itself and any characterization as to the same by Defendants is denied.

A. MOTION TO STRIKE PLAINTIFF'S CLAIM OF *NEGLIGENCE PER SE* ARISING UNDER [18 PA.C.S.A. § 2713](#).

3. Denied as stated. Plaintiff's Complaint is a document that speaks for itself and any characterization as to the same by Defendants is denied.

4-5. Denied. These paragraphs contain conclusions of law to which no response is required. To the extent a response is required, the same is denied. By way of further response, Plaintiff refers this Honorable Court to the attached Memorandum of Law in Opposition to Defendants' Preliminary Objections.

B. MOTION TO STRIKE PLAINTIFF'S CLAIM OF *NEGLIGENCE PER SE* ARISING UNDER 35 P.S. § 10225.101 *et seq.*

6. Denied as stated. Plaintiff's Complaint is a document that speaks for itself and any characterization as to the same by Defendants is denied.

7-9. Denied. These paragraphs contain conclusions of law to which no response is required. To the extent a response is required, the same is denied. By way of further response, Plaintiff refers this Honorable Court to the attached Memorandum of Law in Opposition to Defendants' Preliminary Objections.

C. MOTION TO STRIKE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES.

10-18. Denied. These paragraphs contain conclusions of law to which no response is required. To the extent a response is required, the same is denied. By way of further response, Plaintiff refers this Honorable Court to the attached Memorandum of Law in Opposition to Defendants' Preliminary Objections.

D. MOTION TO STRIKE GENERAL, CATCH-ALL OR OTHER NON-SPECIFIC ALLEGATIONS.

19-24. Denied. These paragraphs contain conclusions of law to which no response is required. To the extent a response is required, the same is denied. By way of further response, Plaintiff refers this Honorable Court to the attached Memorandum of Law in Opposition to Defendants' Preliminary Objections.

25-32. Denied. These paragraphs contain conclusions of law to which no response is required. To the extent a response is required, the same is denied. Furthermore, Plaintiff's Complaint is a document that speaks for itself and any characterization by the Defendants of the same is denied. By way of further response, Plaintiff refers this Honorable Court to the attached Memorandum of Law in Opposition to Defendants' Preliminary Objections.

WHEREFORE, Plaintiff, Shirley A. Cramer, by and through Patricia L. Cramer, her Attorney-in-Fact, by and through her undersigned counsel, respectfully requests that this Court overrule Defendants' Preliminary Objections and further order Defendants to file an Answer to Plaintiff's Complaint within twenty (20) days of the date of the order.

Date: September 27, 2011

Respectfully submitted,

WILKES & McHUGH, P.A.

<<signature>>

Brian L. Strauss, Esquire

Attorney for Plaintiff

VERIFICATION

I, Brian L. Strauss, Esquire, verify that the statements made in the foregoing Answer to the Golden Defendants' Preliminary Objections to Plaintiff's Complaint are true and correct based upon present information and belief. I understand that false

statements made herein are made subject to the penalties of [18 Pa.C.S.A. Section 4904](#), relating to unsworn falsification to authorities:

Date: September 27, 2011.

<<signature>>

Brian L. Strauss, Esquire

Attorney for Plaintiff

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS', GGNSC LANCASTER LP D/B/A GOLDEN LIVING CENTER - LANCASTER, GGNSC HOLDINGS, LLC, GGNSC LANCASTER GP, LLC, GOLDEN GATE NATIONAL SENIOR CARE, LLC, GGNSC EQUITY HOLDINGS, LLC, GGNSC ADMINISTRATIVE SERVICES, LLC AND FARUK NGUYEN, N.H.A., PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Plaintiff, Shirley A. Cramer, by and through Patricia L. Cramer, her Attorney-in-Fact, by and through her undersigned counsel, files the within Memorandum of Law in Opposition to the Defendants', GGNSC Lancaster LP d/b/a Golden Living Center - Lancaster, GGNSC Holdings, LLC, GGNSC Lancaster GP, LLC, Golden Gate National Senior Care, LLC, GGNSC Equity Holdings, LLC, GGNSC Administrative Services, LLC and Faruk Nguyen, N.H.A., Preliminary Objections to Plaintiff's Complaint.

I. PROCEDURAL HISTORY

This case arises out of the injuries sustained by Shirley A. Cramer, during her residency at Defendants' nursing facility, Golden Living Center - Lancaster (hereinafter "the Facility") from October 15, 2009 through February 8, 2011. Plaintiff, Shirley A. Cramer, by and through Patricia L. Cramer, her Attorney-in-Fact, filed her Complaint in Civil Action ¹ on August 12, 2011, alleging that Defendants neglected and **abused** Ms. Cramer throughout her residency at the Facility. On or about September 6, 2011, Defendants filed Preliminary Objections to Plaintiff's Complaint, seeking to dismiss Plaintiff's counts of negligence, negligence *per se* and claims for punitive damages.

II. STATEMENT OF QUESTIONS INVOLVED

A. Does Count Five of Plaintiff's Complaint State a Cause of Action for Negligence *Per Se* Under [18 Pa.C.S. § 2713](#), Neglect of a Care-Dependent Person?
Suggested Answer: YES.

B. Does Count Six of Plaintiff's Complaint State a Cause of Action for Negligence *Per Se* Under [35 P.S. § 10225.101, et. seq.](#) Older Adults Protective Services Act?
Suggested Answer: YES.

C. Does Plaintiff's Complaint Plead Sufficient Facts to Support a Claim of Punitive Damages?
Suggested Answer: YES.

D. Are paragraphs in Plaintiff's Complaint sufficiently specific in accordance with the Pennsylvania Rules of Civil Procedure?

Suggested Answer: YES.

III. ARGUMENT

Standard for sustaining 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 plaintiff's complaint if the complaint pleads sufficient facts which, if believed, would entitle the plaintiff to the relief sought. *Wilkesburg 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 plaintiff's 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).

A. Plaintiff has pled sufficient facts to justify a claim for negligence *per se* for Defendants' violations of 18 Pa. C.S.A. § 2713.

Defendants argue that Plaintiff cannot support a claim under 18 Pa. C.S. § 2713 (hereinafter “§ 2713”) because it is a criminal statute enforceable only by the Attorney General. Defendants mischaracterize Plaintiff's claims in this matter, as Plaintiff is *not* attempting to bring a private cause of action under a criminal statute, but intends to use the statute as the standard of care for its negligence *per se* claim.

Under Pennsylvania law, Plaintiff is entitled to bring a negligence *per se* claim for violation of a criminal statute. A claim based upon negligence *per se* is not the same as a private cause of action. Contrary to Defendants' assertions, Plaintiff is *not* asserting a private statutory cause of action under § 2713. Rather, Plaintiff alleges that Defendants breached the standard of care as prescribed in § 2713, which conveys an actionable tort duty, and therefore, Defendants should be held liable for negligence *per se*. The doctrine of *per se* liability does not create an independent basis of tort liability, but rather establishes, by reference to a statutory scheme, the standard of care appropriate to the underlying tort. *Cabiroy v. Scipione*, 767 A.2d 1078, 1082 (Pa. Super. 2001). Here, § 2713 establishes the requisite standard of care for the treatment of care-dependent individuals.

The absence of a statutory right to a private cause of action does *not* preclude a claim of negligence *per se* for violation of the statute. In a similar nursing home **abuse** and neglect case, the Court held that 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). Importantly, the Court noted that:

Courts in Pennsylvania have recognized that the “absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm.” However, it is *just an indicator* or a factor to consider and “*does not necessarily preclude [the statute's/ use as the basis of a claim of negligence per se]*”²

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*, 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*.

Pennsylvania courts have clearly established that a plaintiff asserting negligence *per se* properly relies upon a statute that lacks a private cause of action 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 Services*, 2002 WL 1565526, at * 1 (E.D. Pa. 2002).

Discussing statutes that do not provide for a private cause of action, courts have further clarified this concept as follows:

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 In 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.

Frantz, 64 Pa. D.&C.4th at 461-62 (quoting *Braxton v. PennDOT*, 160 Pa. Cmwlt. 32, 45, 634 A.2d 1150, 1157 (1993)). The *Frantz* court further held: "In 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 section 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 the statute's purpose is to prevent a public harm: **elder abuse** and neglect by owners and operators of nursing homes.

Golden Living Center is a nursing facility and therefore, falls within the definition of "caretaker." Defendants were clearly Ms. Cramer's "caretakers" as defined by the statute.³ *Id.* Plaintiff's averments, if proven, establish that Defendants' reckless failure to provide basic care caused Ms. Cramer avoidable injuries and suffering.⁴ *Id.* Thus, Plaintiff's allegations clearly support a claim that Defendants' conduct falls within the type of harm that the statute seeks to prevent and furthers the statute's purpose. *Id.*

Since Plaintiff is not bringing a private cause of action under § 2713, it is inconsequential that the *enforcement* of the *criminal aspect* of this statute lies with either the District Attorney of the county or the Attorney General of this Commonwealth. Plaintiff *does not seek to bring a criminal action* against Defendants under this statute. Defendants' argument regarding the nature of the statute appears to be an attempt to mischaracterize Plaintiff's claims, and to confuse the Court as to the real issues in this case. Accordingly, Plaintiff's negligence *per se* claims arising from 18 Pa.C.S.A. § 2713 should proceed.

B. Plaintiff has pled sufficient facts to justify a claim for negligence *per se* for Defendants' violations of 35 P.S. § 10225.101, *et seq.*

Defendants challenge Plaintiff's negligence *per se* claims under the Older Adult Protective Services Act (OAPSA), 35 P.S. § 10225.102, which sets forth civil and administrative penalties for **abuse** of a care-dependent person. This Act expresses its legislative purpose as follows: "It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of **abuse**, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them." 35 P.S. § 10225.102. Consistent with this purpose, the Third Circuit has held that OAPSA provides a proper

basis to establish a nursing home resident's claim for negligence *per se* under Pennsylvania law. See *McCain v. Beverly Health and Rehabilitation Services*, 2002 WL 1565526, at *1 (E.D. Pa. 2002).

The *McCain* court reasoned:

Courts in Pennsylvania have recognized that the “absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm.” However, it is just an indicator or a factor to consider and “does not necessarily preclude [the statute's] use as the basis of a claim of negligence *per se*.” A statute may still be used as the basis for a negligence *per se* claim when it is clear that, despite the absence of a private right of action, the policy of the statute will be furthered by such a claim because its purpose is to protect a particular group of individuals.

Id. Applying this rationale, the court found that a nursing home resident who allegedly developed **pressure sores** as a result of the defendant nursing home's conduct fell within the class of person and type of harm that OAPSA sought to address. *Id.* Accordingly, the court deemed the statute's lack of a private cause of action insufficient “to preclude the use of the relevant policies expressed in the statutes” as a basis for negligence *per se*. *Id.*

Similarly, the averments set forth in Plaintiff's Complaint are more than sufficient to support Plaintiff's claims for negligence *per se* stemming from Defendants', violations of this statute. Plaintiff alleges that Defendants' failures to provide basic care caused Ms. Cramer's needless pain and suffering.⁵ Moreover, in a similar nursing home **abuse** and neglect case, the Honorable Judge Carmen D. Minora held that “the law supports [p]laintiff's claim for negligence *per se* arising from [defendants' alleged OAPSA violations.” See the Honorable Judge Carmen D. Minora's Opinion in *South v. Osprey Ridge Healthcare Ctr., et al.* p. 9.⁶ Similar Orders have also been issued in the Common Pleas Courts of neighboring counties.⁷ Thus, there is little doubt that Plaintiff's claim for negligence *per se* arising from Defendants' OAPSA violations should proceed. Therefore, Plaintiff respectfully requests that this Court overrule Defendants' Preliminary Objections.

C. Plaintiff has pled sufficient facts to justify an award of punitive damages.

In their Preliminary Objections and supporting Memorandum of Law, Defendants argue that this Court should strike Plaintiff's claims for punitive damages and the allegations supporting them. Even a cursory review of the Complaint proves that Defendants' argument is without merit.

“Punitive damages are awarded for outrageous conduct; that is, for acts done with a bad motive or with a reckless indifference to the interest of others.”⁸ For example, punitive damages may be awarded if the actor's conduct was wanton, willful, or exhibited a reckless indifference to the rights of others.⁹ Wanton negligence, 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.”¹⁰

Discussing 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 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 *e.g.*, *Hall v. Jackson*, 2001 Pa.Super. 334, 799 A.2d 390, 403 (2001).

Our 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).¹¹ The Court reasoned that neither law nor logic “prevents] 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.” *Hutchinson*, 582 Pa. at 124-125.¹² In *Capriotti v. Beverly Enterprises Pennsylvania Inc.*, 72 Pa. D.&C.4th 564 (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 under-funded the facility; failed to appropriately train the staff; and knowingly permitted Ms. Capriotti to be neglected.” *Id.* at 572. 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 concluded that the same allegations, “if believed, would entitle the plaintiff to relief under the corporate negligence theory.” *Id.* at 572.

Similarly, in *McCain v. Beverly Health and Rehabilitation Services, Inc.*, 2002 U.S. Dist. LEXIS 12984 (E.D. Pa. 2002), the defendants' motion to dismiss punitive damages was denied. *Id.* In that case, the plaintiff alleged that the defendants knew of the decedent's “high risk” of developing [pressure sores](#) and failed to take preventive measures. *See Id.* In addition, in the recent landmark decision, *Scampone v. Grane Healthcare Co.*, 11 A.3d 967 (Pa. Super. 2010), the Superior Court firmly established that understaffing can serve as a basis for punitive damages in nursing home [abuse](#) and neglect cases, such as the instant matter. 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, 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.*

Here, Plaintiff's Complaint similarly alleges that the Defendants grossly and chronically understaffed and under-funded the Facility.¹³ Plaintiff alleges that the Defendants were aware that they had been cited by the Department of Health for failing to accommodate residents' needs, failing to implement care plans, and failing to maintain residents' physical, mental and psychosocial well-being.¹⁴ Yet despite that knowledge, Defendants knowingly understaffed the Facility, creating recklessly high nurse/resident ratios, to the point where Defendants knew that the personnel on duty would not be able to properly attend to the medical needs of the Facility's residents and that Defendants knew, or should have known that their actions would lead to severe injuries.¹⁵ Under the law cited herein, the above allegations are sufficient to overrule Defendants' preliminary objection to strike Plaintiff's claims for punitive damages. Moreover, similar conduct has warranted punitive damages throughout the Commonwealth of Pennsylvania.¹⁶

Accordingly, Defendants' Preliminary Objection must be overruled.

D. All paragraphs in Plaintiff's Complaint are sufficiently specific in accordance with the Pennsylvania Rules of Civil Procedure.

Defendants aver that paragraphs 101 through 113, 204(e), (i), (j), (k), (l), (m), (n), (o), (p), (q), (ft (s), (ft (aa), (bb), (cc), (ee), (ff), (gg), (hh), (ii), (kk), and 205 through 207 of Plaintiff's Complaint lack specificity and/or are overly broad. Essentially, Defendants complain that the allegations contained in the aforementioned paragraphs violate *Connor v. Allegheny General Hospital*, 501 Pa. 308, 461 A.2d 600 (1983). This argument lacks merit.

A complaint must give notice to a defendant of an asserted claim and synopsise the essential facts to support it. *Krajsa v. Key Punch, Inc.*, 424 Pa. Super. 230, 235, 622 A.2d 335, 357 (1993). Moreover, 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. Commw. 210, 370 A.2d 765 (1977). As shown below, Plaintiff's Complaint consisting of sixty-two (62) pages provides Defendants with the requisite notice of the claims asserted against them.

Defendants incorrectly rely upon case law stemming from the decision in *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. *Connor*, 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 new cause of action arises if amendment proposes different theory or different kind of negligence than that previously raised, or if operative facts supporting the claim are changed).

Defendants wrongfully assert that the following paragraphs of Plaintiff’s Complaint somehow are not sufficiently specific and do not suffice to put Defendants on notice of their alleged liability: ¹⁷

101. At all times material hereto, the Golden Living Defendants made a conscious decision to operate and/or manage the Golden Living Facility so as to maximize profits and/or excess revenues at the expense of the care required to be provided to its residents, including Shirley A. Cramer.

102. In their efforts to maximize profits and/or excess revenues, the Golden Living Defendants negligently, intentionally and/or recklessly mismanaged and/or reduced staffing levels below the level necessary to provide adequate care to residents, which demonstrates a failure to comply with the applicable regulations and standards for nursing homes.

103. The Golden Living Defendants recklessly and/or negligently disregarded the consequences of their actions, and/or negligently caused staffing levels at the Golden Living Facility to be set at a level such that the personnel on duty at any given time could not reasonably tend to the needs of their assigned residents, including Shirley A. Cramer.

104. Over the past several years, and at all times material hereto, the Golden Living Defendants have intentionally increased the number of sick, **elderly** and frail residents with greater health problems requiring more complex medical care.

105. The Golden Living Defendants knew that this increase in the acuity care levels of the resident population would substantially increase the need for staff, services, and supplies necessary for the new resident population.

106. The Golden Living Defendants knew, or should have known, that the acuity needs of the residents in their nursing homes increased and, therefore, the resources necessary increased, including raising the amount of staffing required to meet the needs of the residents.

107. The Golden Living Defendants failed to provide resources necessary, including sufficient staff, to meet the needs of the residents, including Shirley A. Cramer.

108. The Golden Living Defendants knowingly established staffing levels that created recklessly high resident to staff ratios, including high resident to nurse ratios.

109. The Golden Living Defendants knowingly disregarded patient acuity levels while making staffing decisions; and, also knowingly disregarded the minimum time required by the staff to perform essential day-to-day functions and treatments.

110. The acts and omissions of the Golden Living Defendants were motivated by a desire to increase the profits and/or excess revenues of the nursing homes, including the Golden Living Facility, by knowingly, recklessly, and with total disregard for the health and safety of the residents, reducing expenditures for needed staffing, training, supervision, and care to levels that would inevitably lead to severe injuries, such as those suffered by Shirley A. Cramer.

111. The actions of the Golden Living Defendants were designed to increase reimbursements by governmental programs, which, upon information and belief, are the primary source of income for the Golden Living Facility.

112. The aforementioned acts directly caused injury to Shirley A. Cramer and were known by the Golden Living Defendants.

113. During the residency of Shirley A. Cramer at the Golden Living Facility, the Golden Living Defendants knowingly sacrificed the quality of care received by all residents, including Shirley A. Cramer, by failing to manage, care, monitor, document, chart, prevent, diagnose and/or treat the injuries and illnesses suffered by Shirley A. Cramer, as described herein, which included the development and/or worsening of multiple [pressure sores](#), Stage II left upper thigh pressure wound, wounds to sacrum, left upper and lower buttocks, exacerbation of respiratory failure, infections, contractures, poor hygiene, and severe pain.

204. At all times material hereto, the breach of duties, general negligence, professional negligence, corporate negligence, carelessness and recklessness of the Golden Living Defendants, individually, vicariously and/or acting by and through their officers, board members, physicians, physicians' assistants, nurses, certified nurses' aides and office staff who examined, treated and/or communicated the condition of Shirley A. Cramer, and through the administrative personnel responsible for hiring, retaining and/or dismissing staff, staff supervision and policy-making and enforcement, as well as any agents, servants, employees, contractors, subcontractors and/or consultants of the Golden Living Defendants consisted of the following acts and omissions in the care and treatment of Shirley A. Cramer:

e. failure to provide adequate pain management;

i. failure to ensure complete, consistent documentation and avoid fraudulent documentation by failing to update MDS with significant changes in conditions, and failing to provide complete and consistent documentation;

j. failure to develop an appropriate therapeutic care plan by failing to develop a comprehensive care plan and revise it to reflect current conditions, and failing to provide social services such as physical therapy, occupational therapy and speech therapy in order to attain the highest practicable physical, mental, and social well being;

k. failure to ensure that each resident receives and that the Golden Living Facility provides the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care;

l. failure to ensure that based on the comprehensive assessment of a resident, the Golden Living Facility must ensure that a resident who enters the Golden Living Facility without [pressure sores](#) does not develop [pressure sores](#) unless the individual's clinical condition demonstrates that they were unavoidable, and that a resident having [pressure sores](#) receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing;

m. failure to ensure that the Golden Living Facility uses the results of the assessment to develop, review and revise the resident's comprehensive plan of care, developing a comprehensive care plan for each resident that includes measurable objectives and timetables to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment, describing the services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being;

n. failure to ensure that the Golden Living Facility has sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by the resident assessments and individual plans of care, providing services by sufficient number of each of the required types of personnel on a twenty-four hour basis to provide nursing care to all residents in accordance with resident care plans;

o. failure of the Golden Living Facility to be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident;

- p. failure of the Golden Living Facility to develop and implement written policies and procedures that prohibit mistreatment, neglect, and **abuse** of residents and misappropriation of the resident's property;
- q. failure of the Golden Living Facility to ensure that the services provided or arranged by the Golden Living Facility must be provided by qualified persons in accordance with each resident's written plan of care;
- r. failure to oversee and supervise all persons who practiced nursing and/or skilled healthcare in the Golden Living Facility who failed to: provide adequate and appropriate health care to prevent the development and/or worsening of multiple **pressure sores**, Stage IT left upper thigh pressure wound, wounds to sacrum, left upper and lower buttocks, and severe pain, properly notify physicians in a timely manner, follow physician orders, develop and revise appropriate care plans, provide adequate nutrition and fluids to prevent malnutrition and dehydration, provide adequate hygiene and fluids to prevent **urinary tract infections**, provide complete and consistent documentation, provide appropriate treatment, services and adequate assessments following change in condition to prevent the development and/or worsening of multiple **pressure sores**, Stage II left upper thigh pressure wound, wounds to sacrum, left upper and lower buttocks, and severe, pain;
- s. failure to formulate, adopt and enforce adequate rules, procedures and policies to ensure quality healthcare for residents by failing to: provide adequate and appropriate health care to prevent the development and/or worsening of multiple **pressure sores**, Stage II left upper thigh pressure wound, wounds to sacrum, left upper and lower buttocks, and severe pain, properly notify physicians in a timely manner, provide safe transfers, follow physician orders, provide complete and consistent documentation, provide appropriate treatment, services and adequate assessments following change in condition to prevent the development and/or worsening of multiple **pressure sores**, Stage II left upper thigh pressure wound, wounds to sacrum, left upper and lower buttocks, and severe pain;
- t. acting in a grossly negligent manner, with reckless indifference to the rights and safety of Shirley A. Cramer;
- aa. failure to ensure that the Golden Living Facility was properly funded,
- bb. failure to implement a budget that would allow the Golden Living Facility to provide adequate and appropriate healthcare to Shirley A. Cramer including adequate staff and supplies;
- cc. grossly understaffing the Golden Living Facility;
- ee. failure to evaluate the quality of resident care and efficiency of services, identify strengths and weaknesses, set in place measures for improvements where necessary, and, evaluate progress and institute appropriate follow-up activities;
- ff. failure to set in place a functional table of organization with standards of accountability and hold department heads accountable for the performance of their respective departments;
- gg. failure to maintain open lines of communication with the governing body, department heads, Golden Living Facility staff and its residents to assure resources are properly allocated and that resident care is maintained at a high level;
- hh. failure to maintain compliance with governmental regulations;
- ii. failure to implement personnel policies and procedures that define job responsibilities, accountability and the performance appraisal process and emphasize the importance of the health care team in the delivery of quality resident care;
- jj. failure to coordinate training programs to improve employee skills and to enhance employee performance; and,

kk. failure to develop a budget with an objective of the delivery of quality care.

205. The Golden Living Defendants, as the corporate owners, board members and/or managers of the Golden Living Facility, breached their duty and were, therefore, negligent, careless and reckless in their obligations to Shirley A. Cramer.

206. The corporate conduct of the Golden Living Defendants was independent of the negligent conduct of the employees of the Golden Living Facility, and was outrageous, willful, and wanton, and exhibited a reckless indifference to the health and well-being of the residents, including Shirley A. Cramer.

207. At all times material hereto, Golden Living Defendants owed and failed to fulfill the following duties to Shirley A. Cramer: use reasonable care in the maintenance of safe and adequate facilities and equipment; select and retain only competent staff; oversee and supervise all persons who practiced nursing, medical and/or skilled healthcare within the Golden Living Facility; and, formulate, adopt, and enforce rules, procedures and policies to ensure quality care and healthcare for all residents.

The allegations contained in the aforementioned paragraphs address Defendants' failure to adequately operate the facility and relate directly to Ms. Cramer's injuries. Such paragraphs provide sufficient notice of Plaintiff's intent to prove that the lack of care afforded to Ms. Cramer resulted from Defendants' corporate negligence, neglect and recklessness as it related to the care (or lack thereof) provided to Ms. Cramer. Thus, these allegations are not overly broad and do not allow the Plaintiff to pursue entirely different theories of recovery.

Moreover, in a similar nursing home **abuse** and negligence case in Lackawanna County, the Honorable Carmen D. Minora held that all paragraphs of the plaintiff's complaint were plead with specificity because the allegations contained within those paragraphs were detailed, not overly broad when read as a whole, and did not allow the plaintiff to pursue entirely different theories of recovery. See the Honorable Judge Carmen D. Minora's Opinion in *South v. Osprey Ridge Healthcare Ctr., et al.*, p. 4.¹⁸ In fact, Judge Minora held that the defendants' preliminary objection was disingenuous at best because the plaintiff's complaint contained extremely detailed allegations of the defendants' negligence, which provided sufficient notice to the defendants as to the claims asserted against them. *Id.* Thus, similar logic should be applied in this case. Additionally, Common Pleas Courts in neighboring counties have issued similar Orders on this issue.¹⁹ Accordingly, Defendants' Preliminary Objections must be overruled.

IV. CONCLUSION

WHEREFORE, Plaintiff, Shirley A. Cramer, by and through Patricia L. Cramer, her Attorney-in-Fact, by and through her undersigned counsel, respectfully requests that this Court overrule Defendants' Preliminary Objections and further order Defendants to file an Answer to Plaintiff's Complaint within twenty (20) days of the date of the order.

Date: September 27, 2011

Respectfully submitted,

WILKES & McHUGH, P.A.

<<signature>>

Brian L. Strauss, Esquire

Attorney for Plaintiff

Footnotes

- 1 See Plaintiff's Complaint in Civil Action, attached hereto as Exhibit "A."
- 2 *McCain*, at *1, citing *Fallowfield Development Corp. v. Strunk*, 1990 WL 52745, at *19 (E.D. Pa. 1990) (emphasis added).
- 3 *Complaint* at ¶¶ 87-91.
- 4 *Id.* at ¶¶ 112-13, 122-25, 151-53.
- 5 *Complaint*, at ¶¶ 112-13, 122-25, 151-53.
- 6 Attached hereto as Exhibit "B."
- 7 See e.g. the Honorable William Carpenter's 12/19/08 Order (Montgomery County); see also the Honorable Edward Griffith's 6/1/09 Order (Chester County); see also the Honorable George A. Pagano's 6/1/09 Order (Delaware County); see also the Honorable Sandra Mazer Moss's 12/1/09 Order (Philadelphia County), attached hereto collectively as Exhibit "C."
- 8 1 SUMMARY OF PENNSYLVANIA JURISPRUDENCE 2d, TORTS ("SUMM. PA. JURIS. 2d, TORTS"), § 9:93, at 399 (2005) (emphasis added). Outrageous conduct is an "act done with a bad motive or with reckless indifference to the interests of others." *Focht v. Rabada*, 217 Pa. Super. 35, 38, 268 A.2d 157, 159 (1970). The punitive damage provisions of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P. S. § 1303.101 *et seq.*, also utilizes the same standard. The Act, which includes "nursing home" within the definition of healthcare provider, provides:
- (a) AWARD. -- Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others
- 40 P.S. § 1303.505.
- 9 *Id.* at 399-400.
- 10 1 P.L.E. NEGLIGENCE, § 48 (2005).
- 11 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-Maver*, 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.
- 12 See e.g., *Ditzler v. Wesolowski*, 2006 WL 2546857, at *2 (W.D. Pa. Sept. 1, 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.*
- 13 *Complaint* at ¶¶ 102-03, 105-10, 151-52, 204(cc).
- 14 *Complaint* at ¶¶ 202, 206.
- 15 *Complaint* at ¶¶ 102-03, 105-10, 151-52.
- 16 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 supervising 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).
- 17 See Defendants' Preliminary Objections, attached hereto as Exhibit "D."
- 18 Attached hereto as Exhibit "B."
- 19 See e.g., the Honorable Edward Griffith's 6/1/09 Order (Chester County); see also the Honorable George A. Pagano's 6/1/09 Order (Delaware County), attached hereto collectively as Exhibit "C."