2013 WL 4833754 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Alberto GARCIA and Audrey Dupee, Husband and Wife, Plaintiffs,
v.
VHS ACQUISITION CORPORATION dba/aka Maryvale Hospital, et al., Defendants.

No. CV2010-070091.
June 18, 2013.

Plaintiffs' Trial Brief in Support of Punitive Damages Instruction and APSA Instruction

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Honorable Michael Gordon.

Plaintiffs submit their brief in support of jury instructions on two issues: (1) punitive damages and (2) applicability of the Adult Protective Services Act ("APSA"), A.R.S. §46-455(B),

I. PUNITIVE DAMAGES

A. Punitive Damages Standard

To recover punitive damages at trial, Plaintiffs have the burden of proving by clear and convincing evidence that Defendants acted with an "evil mind." *Rawlings v. Apodaca,* 151 Ariz. 149, 726 P.2d 565 (1986). The required state of mind may be shown by any of the following:

1. Evidence of conscious disregard for the health and safety of the tort victim;

2. Evidence of financial motive of the defendant motivating sub-standard conduct; or

3. Evidence of dishonesty, concealment of facts, fraud, or misleading statements to cover culpability.

See, e.g., Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073, *cert. denied,* 484 U.S. 874 (1987); *White v. Mitchell,* 157 Ariz. 523, 759 P.2d 1327 (App.1988). In *Hawkins,* the Arizona Supreme Court held that a defendant's "evil mind" is found if the defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to the plaintiff. 152 Ariz. at 497, 733 P.2d at 1080. In fact, the Court specifically ruled that evidence of a pattern of misconduct may justify punitive damages:

> We note that unless a defendant is willing to take the stand and admit its "evil mind", a plaintiff must prove entitlement to punitive damages *with circumstantial evidence.* Thus, whether the defendant intended to injure the plaintiff or consciously disregarded the plaintiffs rights may be suggested by a pattern of similar unfair practices.

Hawkins, 152 Ariz. at 497.

Arizona Courts have crafted a succinct definition for conduct that supports punitive damages: the evidence must show the defendant "consciously pursued a course of conduct knowing it created a substantial risk of significant harm to others." *Olson v. Walker*, 162 Ariz. 174, 179, 781 P.2d 1015 (App.1989). This has been used in case after case as the standard to determine punitive damages. *E.g.*, *White*, 157 Ariz. at 528 (punitive damages allowed where, "although not intending to cause injury, defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others"); *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 157 Ariz. 411, 422, 758 P.2d 1313 (1988); *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 171 Ariz. 550, 832 P.2d 203 (1992)(key is wrongdoer's conscious disregard of substantial risk of harm to others); *Belliard v. Becker*, 215 Ariz. 356, 358, 166 P.3d 911 (App. 2007)("Belliard had to prove that Becker 'consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others' "); *Quintero v. Rogers*, 221 Ariz. 536, 541, 212 P.3d 874 (App. 2009)(applying "conscious disregard" standard).

In *Quintero v. Rogers*, the Court allowed the jury to consider punitive damages based on evidence that the defendant was driving 70 miles per hour in a 45-mph zone. 221 Ariz. 536, 541. The Court noted:
Many of the cases in which we permit punitive damage awards include a series of events of deliberate bad faith or breaches of duty. There is, however, no authority that prevents a punitive damage award *arising* from a single event. "While some of the evidence might equally reasonably support alternative inferences that do not suggest an evil mind, the choice among reasonable inferences is one properly reserved for the jury." *Thompson*, 171 Ariz. at 558.

Id. at 542.

In *White*, the Court upheld a $30,000 punitive damages award against a truck driver who knew he had worn-out brakes. *Id.* at 525, 531, 759 P.2d at 1329, 1335. In support of its holding, the Court noted:

> Of course, defendant's state of mind may be evidenced by other factors and may be established or inferred *even if defendant's conduct was outwardly unexceptional.* The inquiry in every punitive damage case focuses on the defendant's state of mind, which may be established by either direct or circumstantial evidence.

Id. at 157 Ariz. 528-29, 759 P.2d at 1332-33 [emphasis added]. Moreover, Arizona specifically allows punitive damages against an employer for acts of its employees "so long as committed in the furtherance of the employer's business and acting within the scope of employment." *Wiper v. Downtown Development Co. of Tucson*, 152 Ariz. 309, 310, 732 P.2d 200, 201 (1987); see *also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 129, 907 P.2d 506, 516 (App. 1995).

In *Olson v. Walker*, the Court affirmed a $100,000 punitive damage award against a drunk driver because "it is sufficient that [he] should have known that his conduct was so egregious that it created a substantial risk of harm to others." 162 Ariz. at 179. In other words, punitive damages are justified "even though defendant had neither desire nor motive to injure" if the jury can conclude that "he acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injure the rights of others." *Bradshaw*, 157 Ariz. at 422.

Punitive damages have been upheld where a corporation knew that its employees were improperly spraying a pesticide and tried to conceal the danger from its customers instead of stopping the practice. *Hooper v. Truly Nolen of Am.*, 171 Ariz. 692, 694-95, 832 P.2d 709, 711 (App.1992) ($500,000 in punitive damages). In *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132-33, 907 P.2d 506 (App.1995), where an attorney sacrificed one client's interests to protect another client, a $3 million punitive damage award was again affirmed. To meet the punitive damages standard, a plaintiff need only show that a defendant acted to serve its own interest in the face of a substantial risk that its conduct might injure others. *Bradshaw*, 157 Ariz. at 422.

B. Evidence of Conscious Disregard of Mr. Garcia

Plaintiffs have met this burden, and then some. The following are reasonable inferences from the evidence presented so far supporting a finding by the jury of neglect and/or **abuse** (as defined by A.R.S. 46-451) in the care of Plaintiff:

> Defendant, by and through its nursing staff, didn't adequately assess the risk of pressure sores.

> Defendant didn't Care Plan for pressure sore prevention until after Plaintiff started to develop sores and didn't amend the Care Plan as conditions changed.

> Defendant didn't turn and reposition enough especially after the sores first developed.

> Defendant didn't move him in bed properly to avoid “shear” injury.

> Defendant didn't inform a physician of sores for 3 days until 1/15.

> Defendant didn't inform the Infectious Disease physician until 1/19.

> Defendant didn't inform the Internal Medicine physician until 1/21.

> Defendant didn't inform a Surgeon until 1/29.

> Defendant never informed the Dietician of the pressure sores.

> Defendant didn't understand that a “turning bed” was not enough to offload the sores.

> Defendant didn't recognize that the Clinitron bed wasn't serving its intended purpose and move him back to an air loss mattress.

> Defendant's staff didn't follow Policies and Procedures to assess his skin condition each shift, measure and describe the sores, but left that to the Wound Care Nurse, because they were uneducated in proper wound care.

> Defendant didn't call in the Wound Care Nurse for 3 days after sores started to develop nor after the 19th as they worsened.

> The Wound Care Nurse didn't follow up to check on the sores, because she was too busy with other assignments.

> Defendant's staff didn't document IF they were having trouble turning him as alleged, nor develop a Care Plan nor inform a physician of difficulty turning him.

> Defendant didn't arrange for home wound care nor educate Audrey in wound care, exposing the wounds to risk of infection.

> Defendant discharged him without having attempted to heal the wounds.

> Defendant violated Policies and Procedures in regard to the above matters.

The above types of breaches of the standard of care reflect a conscious disregard for the well-being of Plaintiff, justifying a punitive damages instruction.

Finally, it is a fair inference that given the extent of the wounds and nurse testimony that she would sit down at end of each shift and do her charting, rather than at the time of the events, as is required. Thus, she fabricated her documentation. This is evidence of dishonesty and fraud, further grounds for punitive damages. See *Hooper*, 171 Ariz. at 694-95.

II. *THE ADULT PROTECTIVE SERVICES ACT (APSA)*

A. Plaintiff was a Vulnerable Adult

The Adult Protective Services Act ("APSA"), A.R.S. §46-455(B), allows a "vulnerable" OR "incapacitated" adult whose life or health has been injured by neglect, **abuse** or exploitation to file an action against "any person or enterprise that has been employed to provide care" to such vulnerable or incapacitated adult. The APSA defines a "vulnerable adult" as an adult "who is unable to protect himself from **abuse**, neglect or exploitation by others because of a physical or mental impairment." §46-451(A)(10). An "incapacitated adult" is an adult who suffers from:
"an impairment by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate informed decisions concerning his person." A.R.S. § 46-451(A)(5).

Thus, Plaintiffs only need to show that Alberto Garcia was "vulnerable," i.e., having a physical or mental impairment such that he was unable to protect himself from **abuse** or neglect. §46-451(A)(10). In *Davis v. Zlatos*, 211 Ariz. 519,123 P.2d 1156 (App. 2005), the Court of Appeals explained the distinction between vulnerable and incapacitated:

> To apply the APSA to Mrs. Zlatos it is only necessary to find that she was either incapacitated or vulnerable. Although a person may be both, the terms are not equivalent and address distinct dangers to the **elderly**. An incapacitated person cannot make informed decisions. A vulnerable person may be able to make such decisions, but is unable to protect herself against being **abused**, neglected or exploited. The protections of the statute extend to a vulnerable adult even if the person is not incapacitated.

123 P.3d at 1162 (emphasis in original). The Court in *Zlatos* next considered whether Mrs. Zlatos was "impaired" and thus unable to protect herself from **abuse**, neglect or exploitation. 123 P.3d at 1164. The Appeals Court applied dictionary definitions of "impairment," describing it as "something that causes a decrease in strength, value, amount, or quality" and referring to "injury, deterioration, or lessening." 123 P.3d at 1162. The Court considered the following facts: Mrs. Zlatos lived at home and had caregivers that would come in daily and assist her in cooking, dressing, toileting, etc. She was "totally dependent" on her caregivers for her daily needs, and an "earlier fall had shown her inability to look after her physical needs without the assistance of others, and indeed, the potential danger to her life if she tried." *Ibid.* From these facts, the Court found that Mrs. Zlatos was unable to protect herself from **abuse**, neglect, or exploitation, and was therefore a vulnerable adult. *Ibid.* Thus, the main criteria on vulnerability from *Zlatos* is the inability to look after one's needs without assistance, which obviously applies to Mr. Garcia, who was heavily sedated for most of the first three weeks of his Maryvale admission due to pneumonia. Moreover, even Defendant concedes that he was "very ill" throughout his stay, and was extremely physically impaired. He clearly meets the definition of "vulnerable" under *Zlatos*. 123 P.3d at 1164.

B. The *McGill* test is met

Next, the Court must consider whether the alleged negligent acts and omissions give rise to an APSA claim. As an **elderly**, vulnerable adult, Plaintiff met the qualifications under the APSA. In *McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (2002), the Arizona Supreme Court reaffirmed that "the statute was intended to increase the remedies available to and for **elderly** people who had been harmed by their caregivers." 203 Ariz. 525, 528 (2002). The Legislature has a compelling interest in protecting Arizona's sizable **elderly** population, who are often vulnerable to mistreatment and neglect by others due to their

compromised physical and mental states. Incapacitated or vulnerable adults are similar to children because of their inability to care for themselves or defend themselves from harm. *See, e.g.*, *State v. Smith*, 193 Ariz. 452 at ¶ 48, 974 P.2d 431 (1999) ("the legislature determined that the young and old are especially vulnerable and should be protected"). Thus, the legislature recognized this "special class" of tort victims and allowed broader remedies for them. In fact, in interpreting the APSA, the Courts have consistently rejected attempts to limit the statute and instead have held that it is remedial in nature and should be construed *broadly*. *Estate of Braden v. State*, 228 Ariz. 323, 325 (2011) (APSA is remedial in nature and should be interpreted broadly); see *also In re Estate of Wyttenbach*, 219 Ariz. 210, 193 P.3d 814 (App. 2008); *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 629 ¶ 36 (App. 2006).

McGill v. Albrecht provides a four-part test in determining whether the APSA applies. According to *McGill*, the negligent act or acts of the caregiver:

(1) must arise from the relationship of caregiver and recipient;

(2) must be closely connected to that relationship;

(3) must be linked to the service the caregiver undertook because of the recipient's incapacity (vulnerability); and

(4) must be related to the problem or problems that caused the incapacity (vulnerability).

203 Ariz. at 530. The *McGill* case only dealt with a patient who was incapacitated, so the term "vulnerable" was not used. But the reasoning is the same whether the victim is incapacitated or vulnerable.

Hospital nursing staff assess and care for patients using a multi-disciplinary approach: they attend to a patient's respiration, circulation, neurological, mobility, nutrition, gastrointestinal, toileting, hygiene, infection control, therapy, and other needs. Nursing staff do not limit their care to one single problem, *i.e.*, treating pneumonia. An overriding concern is to "first, do no harm," that is, ensure that the patient does not suffer further illness or injury while under care. Thus, a hospital is responsible for a patient's overall well-being and safety for as long as the patient is admitted. In this case, Mr. Garcia came to the hospital because he was unable to care for himself, particularly with regard to his difficulty breathing and pneumonia. Because of his conditions he was weak and was totally dependent on the nursing staff for his daily needs. While there, he became even more vulnerable when he was heavily sedated, and then bedbound, which made him at risk for pressure ulcers. By performing a Braden Risk Assessment, Defendant's nursing staff recognized that he was at risk for developing pressure ulcers. The evidence shows that they attempted, albeit negligently, to provide pressure management with a specialty mattress.

So this case passes the four-part test with flying colors. Regarding the failure to prevent the fall in the first place, the hospital's negligent acts (1) arose from the relationship of caregiver and recipient - Mr. Garcia was a patient of Defendant; (2) the negligence was closely connected to that relationship - nursing had a duty to ensure that their patient did not acquire pressure ulcers; (3) the negligence was linked to the service the caregiver undertook because of Mr. Garcia's vulnerability - his need for off-loading given his immobility and risk for skin breakdown; and (4) the negligence was related to the problems that caused the vulnerability - Mr. Garcia was weak and unable to protect himself because of his pneumonia and multiple medical problems rending him physically weak and totally dependent on hospital staff. See *McGill*, 203 Ariz. at 530.

Defendant's negligent care of Mr. Garcia clearly gives rise to an APSA claim. The APSA jury instruction should be given.

DATED this 18th day of June, 2013.

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