

2010 WL 5853935 (Ill.) (Appellate Brief)
Supreme Court of Illinois.

Thomas VINCENT, As Legal Representative of the Estate of Margorie Vincent, Deceased Plaintiff, Appellant,
v.
ALDEN-PARK STRATHMOOR, INC., a Corporation, Defendant, Appellee.

No. 110406.
November 25, 2010.

Appeal from the Appellate Court of Illinois, 2nd District
Winnebago County, Illinois Honorable Justice Jorgensen Presiding
Appeal from the Circuit Court of 17th Judicial Circuit, Winnebago
County, Illinois Honorable Edward Prochaska Judge Presiding

Amicus Curiae Brief of the Illinois Trial Lawyers Association in Support of the Plaintiff-Appellant

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***1 INTRODUCTION**

The Illinois Trial Lawyers' Association (“ITLA”), by its volunteer counsel, Steven M. Levin and Michael F. Bonamarte of LEVIN & PERCONTI, for its brief *amicus curiae* pursuant to [Supreme Court Rule 345](#) and in support of the Plaintiff, hereby state as follows.

The Nursing Home Care Act was adopted more than 30 years ago “amid concern over reports of ‘inadequate, improper and degrading treatment of patients in nursing homes.’ ” *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 35758 (1986), quoting Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 184 (statements of Senator Karl Berning). It was described by one of its principal sponsors as a “ ‘full reform of the nursing home industry.’ ” *Harris*, 111 Ill. 2d at 358, quoting Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 181 (statements of Senator Richard M. Daley).

A punitive damage claim survives when the claim is (1) statutorily based or (2) strong equitable considerations favor the survival of a common law punitive damage claim. In the instant case, this Court will address whether a claim for punitive damages survives the death of a nursing home resident pursuant to the Nursing Home Care Act or pursuant to equitable considerations carved out by the Courts. If this case is decided against the survival of punitive damages in nursing home cases it will significantly impact nursing home litigation in Illinois by discouraging nursing home residents and their families from asserting their rights under the Illinois Nursing Home Care Act. Nursing home owners and licensees will be less inclined to comply with Federal and State regulations governing the operation of nursing homes.

It is the position of ITLA that there is a statutory basis for punitive damages *2 pursuant to the Nursing Home Care Act and therefore the claim should survive the death of a nursing home resident. However, even if this Court found that the only claim for punitive damages in a nursing home case is one based on common law, it is the position of ITLA that equitable considerations exist favoring the survival of punitive damages in nursing home cases.

The plain language of the Nursing Home Care Act, the legislative history, and the interpretation of the Act by the Illinois Supreme Court in the cases of *Eads v. Heritage Enterprises, Inc.*, 204 Ill.2d 92, 787 N.E.2d 771 (2003), *Dardeen v. Heartland Manor, Inc.*, 186 Ill.2d 291, 710 N.E.2d 827 (1999), and *Harris v. Manor Healthcare Corporation et al.*, 111 Ill.2d 350, 489

[N.E.2d 1374 \(2003\)](#), provides a statutory basis for the survival of punitive damages in a death case brought pursuant to the Nursing Home Care Act.

In determining whether equitable considerations exist favoring survival of a common law punitive damages claim the courts consider (1) whether the conduct of the Defendant offends clearly articulated public policy, (2) whether the conduct of the Defendant is criminal, or (3) whether absent an award of punitive damages the Plaintiff would receive inadequate or small compensation for the injuries. [Grunloh v. Effingham Equity, Inc.](#), 174 Ill.App.3d 508, 519; 528 N.E.2d 1031; 124 Ill.Dec.140 (4th Dist. 1988). While ITLA will address all three of these factors in this brief, there will be a greater emphasis on the public policy arguments in support of the survival of punitive damages in nursing home cases.

ARGUMENT

A motion to amend the complaint to include a prayer for relief seeking punitive *3 damages should be granted if the plaintiff establishes “a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.” [735 ILCS 5/2-604.1](#). Punitive damages may be awarded where the defendant commits a tort “with fraud, actual malice, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.” [Cirrincione v. Johnson](#), 184 Ill.2d 109, 115-116; 703 N.E.2d 67; 234 Ill.Dec. 455 (1998) quoting [Kelsay v. Motorola](#), 74 Ill.2d 172, 186; 23 Ill.Dec. 559; 384 N.E.2d 353 (1978)) While the court decides as a matter of law if punitive damages may be sought for a particular cause of action, it is for the jury to decide whether the defendant's conduct is willful and wanton such that the imposition of punitive damages is appropriate. [Cirrincione](#), 184 Ill.2d at 116.

The policy behind punitive damages is punishment and deterrence. [Ziarko v. Soo Line Railroad](#), 161 Ill.2d 267, 276; 641 N.E.2d 402; 204 Ill.Dec. 178 (1994). The tortfeasor is punished for his willful and wanton misconduct and others are deterred from engaging in similar conduct in the future. [Ziarko](#), 161 Ill.2d at 276.

The general rule in Illinois is that an action for punitive damages does not survive the death of the original claimant. [Penberthy v. Price](#), 281 Ill.App.3d 16, 18; 666 N.E.2d 352; 216 Ill.Dec. 902 (5th Dist. 1996). However, the Illinois Courts have carved out exceptions to this general rule. One exception is that a claim for punitive damages will survive the death of the original claimant when there is a statutory basis for the claim or when the claim is an “integral component of the regulatory scheme and of the remedy which is available under it.” [Raisl v. Elwood Industries, Inc.](#) 134 Ill.App.3d 170, 175; 479 N.E.2d 1106; 89 Ill.Dec. 100 (1st Dist. 1985). The other exception where a punitive damage claim will survive is where “strong equitable considerations” favor survival. *4 [Raisl](#), 134 Ill.App.3d at 175.

I. THE NURSING HOME CARE ACT PROVIDES A STATUTORY BASIS FOR A CLAIM FOR PUNITIVE DAMAGES

The Nursing Home Care Act provides a statutory basis for a claim for punitive damages and thus the first exception to the general rule against allowing punitive damage claims to survive applies. The language of the current Illinois Nursing Home Care Act, a line of Illinois Supreme Court cases and the legislative history behind the repeal of the treble damage provision support this argument.

A. THE CURRENT LANGUAGE OF THE ILLINOIS NURSING HOME CARE ACT

The Illinois Nursing Home Reform Act of 1979 has remained relatively unchanged since its adoption with the exception of the repeal of the treble damages provision in 1995. The following provisions are contained in the current version of the Act in succession:

“Owners and licensees of a facility are liable to a resident for injuries caused by *intentional* or negligent acts or omissions of their employees or agents.” [210 ILCS 45/3-601](#) (emphasis added).

“The licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part I of Article II of this Act, are violated.” 210 ILCS 45/3-602.

“A resident may maintain an action *under this Act for any other type of relief*, including injunctive and declaratory relief, permitted by law. 210 ILCS 45/3-603 (emphasis added).

“[t]he remedies provided in Sections 3-601 through 3-607, are in addition to and cumulative with any other legal remedies available to a resident.” 210 ILCS 45/3-604

‘Any other type of relief includes punitive damages. It follows that the statute could *5 arguably read: A resident may maintain an action under this Act for punitive damages. The plain language of the statute makes it clear that ‘any other type of relief may be sought in an action brought ‘under the Act’. The plain language of the statute provides that an action may be brought under the Act for punitive damages. It is significant that liability is imposed against an owner or licensee under the Act for injuries caused by *intentional* and negligent conduct. Intentional misconduct on the part of the defendant is precisely the type of conduct which justifies the imposition of punitive damages. Therefore, the first exception to the general rule against allowing punitive damage claims to survive should apply and a resident's claim for punitive damages should survive the resident's death.

B. THE ILLINOIS SUPREME COURT CASES OF HARRIS V. MANOR HEALTHCARE CORPORATION, DARDEEN V. HEARTLAND MANOR, INC AND EADS V. HERITAGE ENTERPRISES, INC

Three Illinois Supreme Court cases hold that the Nursing Home Care Act itself provides a statutory basis for a claim for punitive damages. *Harris v. Manor Healthcare Corporation* was decided while the treble damage provision was still in effect. In *Harris*, a resident filed a lawsuit against a nursing home after having her leg amputated as a result of a *decubitus ulcer* that became infected due to improper care and treatment. *Harris v. Manor Healthcare Corporation*, 111 Ill.2d 350, 356; 489 N.E.2d 1374; 95 Ill.Dec. 510 (1986). In her complaint the plaintiff included a count for treble damages and a separate count for punitive damages. The defendant in *Harris* argued that section 3-602, *supra*, which provides that a resident may maintain an action under the Act for any other type of relief permitted by law, authorized the plaintiff to a double recovery of treble damages and punitive damages. *Harris*, 111 Ill.2d at 363. The court disagreed and stated that 3- *6 602 “makes available to plaintiffs several remedies or actions for violations of the Act, which are different or distinct from the damages already provided for in section 3-602.” *Id.* In addition, the *Harris* court notes the use of the word ‘cumulative’ in section 3-604, *supra*. According to *Harris*, ‘cumulative’ means “a remedy created by statute in addition to one which still remains in force.” *Id.* at 364. The *Harris* court concluded that the punitive damage remedy remains in force under the Nursing Home Care Act. *Id.* The court did not require that the plaintiff elect between the two remedies. Rather, the court said that the plaintiff could recover either treble damages or common law punitive damages *under the act* but not both. *Id.* at 365 (emphasis added). To avoid a double recovery where a verdict is returned in the plaintiff's favor on both counts the court should enter judgment on only one of the verdicts. *Id.* at 366.

Dardeen v. Heartland Manor, Inc. contains even stronger language in support of the proposition that the Nursing Home Care Act provides a statutory basis for a punitive damage claim. Further, this decision came after the repeal of the treble damages provision and involved a resident who died as a result of her injuries. The administrator of the deceased resident's estate brought a survival action on behalf of the resident.

The court in *Dardeen* was primarily concerned with whether the repeal of treble damages should have retroactive effect in actions which accrued prior to the repeal but were not filed until after the amendment. *Dardeen v. Heartland Manor*, 186 Ill.2d 291, 292; 710 N.E.2d 827; 238 Ill.Dec. 30 (1999). The court decided to give retroactive effect to the amended version of the Act. *Dardeen*, 186 Ill.2d at 292. However, the language the court uses supports the proposition that the administrator of the estate could bring a survival action alleging punitive damages on behalf of the deceased resident. Citing *7 *Harris* the court states, “the treble damages remedy available under the former section 3-602 and an award for punitive damages *constituted different*

and distinct remedies under the act.” *Id* at 297-298 (emphasis added). The court continued, “because a plaintiff always had to prove willful and wanton misconduct to recover an award of punitive damages... no substantive change in the law occurred as a result of the amendment.” *Id* at 298. Finally the court concludes, “*Under the amended version of the statute, plaintiff may recover actual damages and attorney’s fees upon proof of defendant’s negligent violations of the Act, and may additionally recover common law punitive damages upon proof of willful and wanton misconduct on the part of the defendant.*” *Id* at 300 (emphasis added). That the court made this statement while considering a survival action suggests that a claim for punitive damages has a statutory basis and thus should survive the death of the resident.

Finally, the Supreme Court’s recent decision in *Eads v. Heritage Enterprises, Inc.*, reaffirms the holding that a nursing home resident’s punitive damage claim is statutorily based. The court in *Eads* held, plaintiffs who assert private rights of actions under the Nursing Home Care Act are not required to comply with section 2-622 of the healing arts malpractice act. *Eads v. Heritage Enterprises, Inc.*, 204 Ill.2d 92, 109; 787 N.E.2d 771; 272 Ill.Dec. 585 (2003). Significantly, while noting the distinctions between the two sets of laws the Supreme Court citing *Dardeen* states:

“The opposing nature of the two sets of laws is evident from their provisions. The medical malpractice reform legislation expressly bans recovery of punitive damages in all cases in which the plaintiff seeks damage by reason medical, hospital or other healing art malpractice. By contrast, *the Nursing Home Care Act allows plaintiffs to recover common law punitive damages upon proof of willful and wanton misconduct on the part of the* *8 *defendants.’ Eads*, 204 Ill.2d 103-104.

Two things are worth noting in this excerpt. First, the Supreme Court states the Act itself allows for the recovery of punitive damages. Second, the Supreme Court uses the term plaintiffs as opposed to limiting the remedy to residents. The term plaintiff suggests that the punitive damage claim is available to an individual who brings the claim on behalf of a deceased resident.

Harris, Dardeen, and Eads all contain language stating that the Nursing Home Care Act provides a statutory basis for punitive damages. It is the Plaintiff’s position that the Trial Court and the Appellate Court have attempted to clarify this Court’s language when no such clarification is needed. It is Plaintiffs position that the language in the Nursing Home Care Act, and the Supreme Court cases of *Harris, Dardeen, and Eads* unambiguously provide a statutory basis for a punitive damages claim.

C. THE LEGISLATIVE HISTORY BEHIND THE REPEAL OF TREBLE DAMAGES

Aside from the language of the Nursing Home Care Act and the line of Supreme Court cases cited *supra*, the legislative intent behind the repeal of treble damages also suggests that punitive damages are available under the Nursing Home Care Act. Particularly persuasive are comments made by Senator Fawell at the 1995 General Assembly meeting which repealed the treble damage provision. Senator Fawell stated: “The elimination of the mandatory provision in *no way prevents a judge or jury from awarding punitive damages* in any amount, even in excess of triple actual damages, if actions of the nursing home or any of its employees or agents are deemed to be intentional or willful and wanton.” 89th Ill.Gen.Assem., Senate Proceedings, May 24, 1995 m at 90 (emphasis added).

*9 Representative Tenhouse, a supporter of the bill stated, “I think one thing that we need to point out here, **WE’RE NOT ELIMINATING PUNITIVE DAMAGES** *Punitive damages can still be pursued in cases of abuse and personal injury. I think that we also need to point out that this proposal does not modify the section of the nursing home act which provides that the owner and licensee are liable to resident for any intentional or negligence acts or omission by their agents or employees.*” 89 General Assembly House of Representatives Transcription at page 30, May 23, 1995. Representative Tenhouse specifically stated punitive damages were not being eliminated by taking away automatic treble damages and he makes reference to the Act’s imposition of liability on nursing home owners and licensees for intentional acts or omissions, the very type of conduct for which punitive damages can be awarded.

Pursuant to the Supreme Court holdings in *Harris, Dardeen* and *Eads*, the inclusive and express language of the Nursing Home Care Act, and the legislative intent expressed by Senator Fawell and Representative Tenhouse, there is a statutory basis for

punitive damages pursuant to the Nursing Home Care Act and therefore a claim for punitive damages should survive the death of a nursing home resident. It is our position that the repeal of treble damages only meant that punitive damages were not automatic. Based on what Senator Fawell and Representative Tenhouse stated, punitive damages are still available under the Act but such damages can only be awarded upon a showing of intentional or willful and wanton conduct.

II. STRONG EQUITABLE CONSIDERATIONS EXIST IN FAVOR OF ALLOWING FOR PUNITIVE DAMAGES TO SURVIVE THE DEATH OF A NURSING HOME RESIDENT

The second exception where a claim for punitive damages will survive the death of the original claimant is where strong equitable considerations exist favoring survival of ***10** the claim. *Raisl*, 134 Ill.App.3d at 175. If this exception applies then the court will allow a representative of the decedent to maintain the decedent's punitive damage claim. *Id.* This exception applies even where there is no statutory basis for the punitive damage claim.

There are three factors commonly considered when deciding whether strong equitable considerations are present favoring survival of a claim for punitive damages. The plaintiff need not prove the existence of all three factors in order for the punitive damages claim to survive. Factor number one is whether the conduct of the defendant offends clearly articulated public policy. *Grunloh v. Effingham Equity, Inc.*, 174 Ill.App.3d 508, 519; 528 N.E.2d 1031; 124 Ill.Dec.140 (4th Dist. 1988). Factor number two is whether the conduct of the defendant is criminal as opposed to or in addition to willful and wanton misconduct. *Grunloh*, 174 Ill.App.3d 519. Finally, the court will consider factor number three, whether absent an award of punitive damages the plaintiff would receive inadequate or small compensation for her injuries. *Id.*

A. THE DEFENDANT'S CONDUCT OFFENDS CLEARLY ARTICULATED PUBLIC POLICY

In *Raisl v. Elwood Industries, Inc.*, the Appellate Court allowed a plaintiff's claim for punitive damages to survive. *Raisl*, 134 Ill.App.3d at 175-176. At issue in the *Raisl* case was the Workmen's Compensation Act. While the Act does not specifically provide for punitive damages the court stated that the Act illustrates the Legislatures' public policy goals of "allowing injured workers to freely file compensation claims." *Id.* Thus, legislative enactment of a statute protecting a group of citizens is evidence of the public policy of the state.

There is overwhelming evidence which illustrates the legislative intent and public ***11** policy of protecting nursing home residents from willful and wanton misconduct by employees of nursing home.

The Illinois Nursing Home Reform Act of 1979 was enacted "*amid concern over reports of inadequate, improper and degrading treatment of patients in nursing homes*" Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 184 (statements of Senator Karl Berning). In addition, Senator Fawell's and Representative Tenhouse's comments that punitive damages are still available in nursing home cases after the repeal of treble damages also show the legislative intent to allow residents to seek punitive damages where the defendant's conduct is intentional or willful and wanton. It is not without note that Chicago Mayor Richard Daley was the chief sponsor of the Act while serving as a Senator for the 23rd District. An article published by Mayor Daley and Dean Timothy Jost highlights the four focuses of the act:

"First, it sets forth the rights of long term care facility residents and the responsibilities of long term care facilities. Second, it extensively expands the powers of the state to deal with facilities which provide inadequate care. Third, it requires training and minimum qualifications for non-licensed staff. Fourth, and most important, it provides extensive new opportunities for residents, and community advocates to become involved in assuring quality nursing home care."

The Act has remained relatively unchanged since its adoption with the exception of the repeal of the treble damages provision in 1995. When examining the legislative history behind the repeal of treble damages and the Supreme Court cases of *Harris*,

Dardeen, and *Eads* it is clear that it is the intent of the legislature to allow residents to seek punitive damages for violations of their rights pursuant to the Nursing Home Care Act.

The Illinois State Legislature has enacted numerous laws, aside from the Nursing *12 Home Care Act, in order to protect the rights of the **elderly**. By enacting these laws the Legislature has clearly articulated that it is the public policy of Illinois to shield the **elderly** from **abuse** and neglect and to protect their rights and interests. The Illinois Administrative Code at 77 Ill.Admin.Code, Ch.I, §300.110 et seq. contains laws governing the operation of nursing homes in Illinois and in large part mirrors the Federal Omnibus Budget Reconciliation Act of 1987 (“OBRA”) which nursing homes must remain in substantial compliance with in order to obtain funding from Medicare. The Illinois Administrative Code provisions applicable to the operation of nursing homes in this State were promulgated by the Illinois Department of Public Health, the state agency responsible for the regulation of nursing homes in Illinois. The Illinois Department of Public Health has a hotline, 1-800-252-4343, specifically for nursing home residents and family members of nursing home residents to call and report **abuse** and neglect at nursing homes.

Aside from the Nursing Home Care Act and provisions of the Illinois Administrative Code, the Legislature has enacted The **Elder Abuse** and Neglect Act which became law in 1988. 320 ILCS 20/1 et seq. This legislation addresses domestic **abuse** and neglect of the **elderly**. Molly Hoffer, *The Elder Abuse and Neglect Program in Illinois*, <[http:// www.urbanext.uiuc.edu/elderabuse/](http://www.urbanext.uiuc.edu/elderabuse/)>. The **Elder Abuse** and Neglect Act, among other things, grants civil and criminal immunity to those who in good faith report suspected **abuse** or cooperate with an investigation. *Elder Abuse and Neglect Act and Related Laws*, Illinois Department of Aging, April 2003, p.2. The Older Adult Services Act Illinois P.A. 093-1031, is new legislation designed to provide the delivery of services to the **elderly** who wish to remain in their home during their **elder** years. Illinois *13 Department of Aging, *The Older Adult Services Act*, <[http:// www.state.il.us/aging/lathome/2880.htm](http://www.state.il.us/aging/lathome/2880.htm)>. The Illinois Criminal Code makes it a class 3 felony to **abuse** a long term care facility resident. 720 ILCS 5/12-19. The Criminal Code defines **abuse** as: “intentionally or knowingly causing any physical or mental injury or committing any sexual offense set forth in this Code. *Id* (emphasis added). Criminal neglect of a long-term care facility resident is a class 4 felony and rises to a class 3 felony where the neglect results in the death of the resident. *Id*. Criminal neglect is defined:

“an act whereby a person *recklessly* (i) performs acts that cause an **elderly** person's or person with a disability's life to be endangered, health to be injured, or pre-existing physical or mental condition to deteriorate, or (ii) fails to perform acts that he or she knows or reasonably should know are necessary to maintain or preserve the life or health of an **elderly** person or person with a disability, and that failure causes the **elderly** person's or person with a disability's life to be endangered, health to be injured, or pre-existing physical or mental condition to deteriorate, or (iii) abandons an **elderly** person or person with a disability.” *Id*.

While the Criminal Code articulates the public policy against the **abuse** and neglect of nursing home residents, it is appropriate at this time to note that the type of misconduct described by the criminal code is precisely the type of misconduct for which punitive damages are appropriate. It follows that the public policy factor merges with the second factor that the court considers in determining whether strong equitable considerations exist in favor of allowing a claim for punitive damages to survive: whether the conduct of the defendant is criminal as opposed to or in addition to willful and wanton.

Legislation protecting the rights of the **elderly** also includes The Assisted Living and Shared Housing Act. 210 ILCS 9/1 et seq. This legislation requires the Illinois *14 Department of Public Health to regulate assisted living and shared housing facilities. Illinois Department of Aging, ... *A Look at Assisted Living and Shared Housing*, <http://www.state.il.us/aging/lnews_pubs/onagel4.htm> (February 1, 2000). The legislation clearly articulates Illinois' public policy of protecting the **elderly** and residents of nursing homes from **abuse** and neglect.

In addition to legislation addressing protection of the rights of **elderly**, the number of agencies throughout the state responding to **elder abuse**, neglect and financial exploitation is evidence of Illinois' public policy of protecting the **elderly**. The following is a list of such agencies:

County	Agency
Adams	West Central Illinois CCU
Alexander	Shawnee Alliance for Seniors
Bond	Southwestern Illinois VNA
Boone	VNA of Rockford
Brown	West Central Illinois CCU
Bureau	Alternatives for the Older Adult
Calhoun	West Central Illinois CCU
Carroll	Intouch Services of LSSI
Cass	Prairie Council on Aging
Champaign	Senior Resource Center
Christian	Macoupin County Programs for the Elderly
Clark	Cumberland Associates, Inc.
Clay	Effingham City/County Com. on Aging
Clinton	Southwestern Illinois VNA
Coles	Cumberland Associates, Inc.
Crawford	SWAN (Stopping Woman Abuse Now)
Cumberland	Cumberland Associates, Inc.
DeKalb	Elderly Care Services of DeKalb Co.
DeWitt	CHELP
Douglas	Cumberland Associates, Inc.
DuPage	DuPage Co. Dpt. Of Human Resources
Edgar	Cumberland Associates, Inc.
Edwards	SWAN
Effingham	Effingham City/County Com. on Aging
Fayette	Effingham City/County Com. on Aging
Ford	Elder Care Services of Ford-Iroquois Counties
Franklin	Shawnee Alliance for Seniors
Greene	Prairie Council on Aging

Grundy	Grundy County Health Department
Hamilton	SWAN
Hardin	Shawnee Alliance for Seniors
Henderson	Alternatives for the Older Adult, Inc.
Henry	Alternatives for the Older Adult, Inc.
Iroquois	Elder Care Services of Ford-Iroquois Counties
Jackson	Shawnee Alliance for Seniors
Jasper	SWAN
Jefferson	Effingham City/County Com. on Aging
Jersey	Prairie Council
JoDaviess	Stephenson County Senior Center
Johnson	Shawnee Alliance for Seniors
Kane	Senior Services Associates (Elgin)
Kankakee	Catholic Charities - Diocese of Joliet
Kendall	Senior Services Associates, Inc.
Knox	Alternatives for the Older Adult
Lake	Catholic Charities - Chicago Arch.
LaSalle	Alternatives for the Older Adult
Lawrence	SWAN
Lee	Intouch Services of L.S.S.I.
Livingston	PATH
Logan	Senior Services of Central Illinois
Macon	CHELP
Macoupin	Macoupin County Programs for the Elderly
Madison	Southwestern Illinois VNA
Marion	Effingham City/County Com. on Aging
Marshall	Seniors trength
Mason	Senior Services of Central Illinois
Massac	Shawnee Alliance for Seniors

McDonough	Alternatives for the Older Adult, Inc.
McHenry	Senior Services Associates
McLean	PATH
Menard	Senior Services of Central Illinois
Mercer	Alternatives for the Older Adult
Monroe	Southwestern Illinois VNA
Montgomery	Montgomery County Health Dpt.
Morgan	Prairie Council on Aging
Moultrie	Cumberland Associates, Inc.
Ogle	Intouch Services of L.S.S.I.
Peoria	SeniorStrength
Perry	Shawnee Alliance for Seniors
Piatt	Senior Resource Center
Pike	West Central Illinois CCU
Pope	Shawnee Alliance for Seniors
Pulaski	Shawnee Alliance for Seniors
Putnam	Alternatives for the Older Adult
Randolph	Southwestern Illinois VNA
Richland	SWAN
Rock Island	Alternatives for the Older Adult
Saline	Shawnee Alliance for Seniors
Sangamon	Senior Services of Central Illinois
Schuyler	West Central Illinois CCU
Scott	Prairie Council on Aging
Shelby	Cumberland Associates, Inc.
St. Clair	Southwestern Illinois VNA
Stark	SeniorStrength
Stephenson	Stephenson County Senior Center
Tazewell	SeniorStrength

Union	Shawnee Alliance for Seniors
Vermilion	CRIS Senior Services
Wabash	SWAN
Warren	Alternatives for the Older Adult
Washington	Southwestern Illinois VNA
Wayne	SWAN
White	SWAN
Whiteside	Intouch Services of L.S.S.I.
Will	Senior Services Center of Will County
Williamson	Shawnee Alliance for Seniors
Winnebago	VNA of the Rockford
Woodford	SeniorStrength
Cook County	
Northeast	Catholic Charities Elder Protective Services
Northwest	Catholic Charities Elder Protective Services
Southeast	S.E. Metropolitan Family Services
Central	Metropolitan Family Services
West	Metropolitan Family Services
Southwest	Metropolitan Family Services
Suburban Cook County	
Berwyn, Cicero	Berwyn-Cicero Council on Aging
Barrington, Hanover, Palatine, and Wheeling Townships	Catholic Charities (Northwest Senior Services)
Bloom, Bremen, Calumet, Rich and Thornton Townships Cities served: Dixmoor, Harvey, Homewood, Markham, Burnham, Dolton, Calumet City, East Hazel Crest, Lansing, Phoenix, Riverdale, South Holland, Thornton	Catholic Charities (South Suburban Senior Services)
Elk Grove, Schaumburg	Kenneth W. Young Centers
Leyden, Norwood Park	Leyden Family Services
Evanston, Niles	Metropolitan Family Services
Maine, New Trier, Northfield	North Shore Senior Center

Oak Park, River Forest	Oak Park Township
Lemont, Orland, Palos, and Worth Townships	PLOWS Council on Aging
Proviso Twshp. (except the Villages of Brookfield and LaGrange Park)	Proviso Council on Aging
Lyons and Riverside Townships and the Villages of Brookfield and LaGrange Park	SW Suburban Council on Aging
Stickney Twshp.	Stickney Twshp. Office on Aging

*17 The Nursing Home Care Act is designed to deter nursing homes from engaging in conduct that infringes upon the rights of residents. Unfortunately, due to their advanced age, nursing home residents often die as a result of the willful and wanton misconduct they suffer from during their stays at long term care facilities. If punitive damages are not allowed to survive the death of the resident then the deterrent purpose of the Nursing Home Care Act will be compromised.

Another public policy goal is to address the concerns of the general public and family members of nursing home residents. It is an emotional decision to place a loved one in a nursing home. If the nursing home is accountable for punitive damages upon the death of a resident it is more likely that the home will take steps to ensure that the *18 resident receives proper care and treatment. This may include greater supervision of the nursing home staff to make sure that the rights of the resident are protected. The family members of the residents can feel more secure in their decision to place a loved one in a long-term care facility and in the event of mistreatment they will be encouraged to seek legal redress and assert their rights.

B. THE CONDUCT OF THE DEFENDANT IS CRIMINAL

A second factor the courts will consider when determining whether a claim for punitive damages should survive is whether the conduct on the part of the defendant is subject to criminal penalty. This determination is made on a case by case basis. As noted earlier, the Illinois Criminal Code does impose criminal penalties for criminal **abuse** and criminal neglect of a nursing home resident. 720 ILCS 5/12-19. Criminal **abuse** and criminal neglect are felonies codified by the Criminal Code. An examination of the definitions of criminal **abuse** and criminal neglect reveals that this type of conduct is often the type of conduct for which an award of punitive damages is appropriate. The defendant's conduct at issue in this case fits within the definition of criminal neglect:

“an act whereby a person *recklessly* (i) performs acts that cause an **elderly** person's or person with a disability's life to be endangered, health to be injured, or pre-existing physical or mental condition to deteriorate, or (ii) fails to perform acts that he or she knows or reasonably should know are necessary to maintain or preserve the life or health of an **elderly** person or person with a disability, and that failure causes the **elderly** person's or person with a disability's life to be endangered, health to be injured, or pre-existing physical or mental condition to deteriorate, or (iii) abandons an **elderly** person or person with a disability.” 720 ILCS 5/12-19.

C. ABSENT AN AWARD OF PUNITIVE DAMAGES THE PLAINTIFF WOULD RECEIVE INADEQUATE COMPENSATION FOR THE INJURIES SUFFERED

*19 The last factor the court will consider when determining whether an award for punitive damages should survive is whether absent an award of punitive damages the plaintiff would receive inadequate or small compensation for her injuries. As noted in *Harris*, nursing home residents, “either because of their advanced age, mental or physical infirmities or lack of financial resources are often unlikely to pursue costly and time consuming litigation in the hope of receiving an uncertain or small recovery.” *Harris*, 111 Ill.2d at 369. The same policy arguments applicable at the time of the *Harris* decision are applicable

today. Outside the potential for recovery of punitive damages there is little incentive for nursing home residents to seek redress when their rights have been violated. The compensatory damages suffered by residents are often minimal. The majority of residents do not have wage loss claims. Without the potential to recover punitive damages, the legislature has duly noted that residents are unlikely to assert their rights and thus the deterrent purpose of the Nursing Home Care Act is compromised. Absent the imposition or at least the threat of punitive damages nursing homes would not be held accountable for their misconduct because residents would be more inclined to enjoy the later stages of their lives as opposed to engaging in litigation which can impose physical and emotional hardship on the resident.

Strong equitable considerations favor survival of Plaintiffs claim for punitive damages. An award of punitive damages will cause the defendant and other nursing homes to take steps to cure chronic problems at nursing homes. Willful and wanton misconduct against nursing home residents offends the clearly articulated public policy goals of Illinois in protecting the rights of the **elderly** and in particular, protecting residents of long term care facilities. Finally, absent the possibility of an award for ***20** punitive damages nursing home residents would receive inadequate compensation for their injuries.

CONCLUSION

WHEREFORE, the Illinois Trial Lawyers' Association ("ITLA"), by its volunteer counsel, Steven M. Levin and Michael F. Bonamarte of LEVIN & PERCONTI, asks that this Honorable Court reverse the decision of the Appellate Court and allow Plaintiff to seek punitive damages.

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