2010 WL 7097671 (Ky.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Kentucky.
Hopkins County

Pearline W. OFFUTT, as Administratrix of the Estate of Joseph Clint Offutt, deceased, and on behalf of the wrongful death beneficiaries of Joseph Clint Offutt, Plaintiff,

v.

HBR MADISONVILLE, LLC d/b/a Harborside Healthcare - Madisonville Rehabilitation and Nursing Center n/k/a Hillside Villa Care and Rehabilitation Center Sun Healthcare Group, Inc.; Sunbridge Healthcare Corporation; Harborside Healthcare Management, LLC; Massachusetts Holdings II, Limited Partnership; Harborside Administrative Services, LLC; Harborside Health 1, LLC; Harborside Holdings 1, LLC; Kentucky Holdings 1, LLC; HBR Kentucky, LLC; Careerstaff Unlimited, Inc.; Karen Langston, in her capacity as Administrator of Harborside Healthcare Madisonville Rehabilitation and Nursing Center, and John Does 1 through 5, Unknown, Defendants.

No. 09CI00529.
August 11, 2010.

**Plaintiff's Response to Defendants' Motion for Summary Judgment On Plaintiff's Claim for Punitive Damages or, in the Alternative, to Bifurcate the Punitive Damages Claim**

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COMES NOW Plaintiff, Pearline W. Offutt, as Administratrix of the Estate of Joseph Clint Offutt, deceased, and on behalf of the wrongful death beneficiaries of Joseph Clint Offutt, and submits this response to Defendants' Motion for Summary Judgment as to Plaintiffs claim for punitive damages. Alternatively, Defendants seek bifurcation of Plaintiff's punitive-damages claim from the liability portion of the trial. Defendants' motion should be denied. Not only is their motion premature, given Plaintiffs pending motions to compel discovery, there are genuine issues of material fact with respect to Plaintiff's claim for punitive damages such that summary judgment would be inappropriate. Contrary to Defendants' assertion, bifurcation of Plaintiffs punitive-damages claim would be a waste of judicial resources and wholly inefficient in that it would add unnecessary time and expense to trying this matter. Defendants' Motion for Summary Judgment should be denied.

## INTRODUCTION

Joseph Clint Offutt, Plaintiff's husband, was a resident of Madisonville Rehabilitation and Nursing Center n/k/a Hillside Villa Care and Rehabilitation Center from March 25, 2008, until April 3, 2008, when he was transferred to Regional Medical Center and died on April 5, 2008. [1] During his residency at Defendants' facility, Mr. Offutt suffered accelerated deterioration of his health and physical condition beyond that caused by the normal aging process, as well as numerous injuries, including severe dehydration; hypernatremia; malnutrition; multiple pressure sores; infections, including suspected urinary tract infection and sepsis; poor hygiene; unnecessary pain; and death. [2] Mr. Offutt also suffered unnecessary loss of personal dignity, pain and suffering, degradation, emotional distress and hospitalization, all of which were caused by Defendants' wrongful conduct. [3]

Indeed, allegations of neglect of Mr. Offutt have been substantiated by the Adult Protective Service Department of the Commonwealth of Kentucky. [4]

As set forth in Plaintiffs Amended Complaint, Defendants controlled the operation, planning, management, budget and quality control of the Harborside facility. [5] The authority exercised by Defendants over the nursing facility included, but was not limited to, control of marketing, human resources management, training, staffing, creation, and implementation of all policy and procedure manuals used by nursing facilities in Kentucky, federal and state reimbursement, quality care assessment and compliance, licensure and certification, legal services, and financial, tax and accounting control through fiscal policies established by Defendants. [6] Defendants owned, operated and/or controlled, and/or provided services for the Harborside facility, either directly or through a joint enterprise, partnership or the agency of each other and/or other diverse subalterns, subsidiaries, governing bodies, agents, servants or employees. [7]

On April 29, 2009, Plaintiff filed her initial Complaint against Defendants, alleging causes of action against the "Nursing Home Defendants" for negligence, medical negligence, corporate negligence, and violations of Mr. Offutt's Resident's Rights, while alleging ordinary negligence against Administrator Langston. Plaintiff further alleged that all Defendants are liable for Mr. Offutt's wrongful death. On December 1, 2009, this Court permitted Plaintiff to amend her Complaint to add the loss of spousal consortium claim against all Defendants.

Plaintiff alleges that Defendants are directly or vicariously liable for any acts and omissions by any person or entity, controlled directly or indirectly, including any governing body, officer, partner, employee, ostensible or apparent agent, consultant or independent contractor, whether in-house or outside individuals, entities, agencies or pools. [8] Defendants authorized or ratified or should have anticipated the acts and omissions in question. [9] Plaintiff's case depends upon obtaining outstanding discovery crucial to proving her entire case, including her claim for punitive damages.

## LAW AND ARGUMENT

### A. Defendants' Motion for Summary Judgment is Premature Given Plaintiff's Pending Motions to Compel Defendants' Production of Outstanding Discovery in this Matter.

Plaintiff's entire case, including her punitive-damages claim, hinges on the discovery sought in this matter. On the day after her initial Complaint was filed, Plaintiff served her first set of interrogatories and requests for production of documents on Defendants, to which they filed their separate answers/responses and objections on June 18, 2009. Defendants objected to the discovery requests and so far have provided scant information and documentation that is needed to adequately respond to Defendants' Motion for Summary Judgment. Indeed, Plaintiff has filed two motions to compel documents pending and has sought to take deposition testimony from Defendants' Rule 30.02(6) corporate representatives without success.

"... [S]ummary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence." *Pendleton Bros. v. Fin. & Admin. Cabinet*, Ky., 758 S.W.2d 24, 29 (1988)(citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, Ky. App., 579 S.W.2d 628 (1979)). Defendants' motion is premature in that discovery is ongoing in this matter. Plaintiff should be given an opportunity to complete discovery and supplement her response if necessary. [10] Considering "Plaintiffs pending motions with respect to outstanding discovery in this matter, especially before depositions of the Rule 30.02(6) corporate representatives have been taken, Defendants' motion is clearly premature.

**B. There Are Genuine Issues of Material Fact As to Whether Punitive Damages Are Warranted Such That Summary Judgment At This Time Would Be Inappropriate.**

In *Steelvest, Inc. v. Scansteel Service Center,* 807 S.W.2d 476 (Ky. 1991), the Kentucky Supreme Court analyzed and reaffirmed its stricter standard for considering and granting summary judgment than that imposed in many jurisdictions. The movant should not succeed unless its right to judgment is shown with such clarity that there is no room left for controversy. It is the movant who must convince the court, by the evidence of record, of the nonexistence of an issue of material fact. *Id.* Even if the opposing party utterly fails to come forward with any proof in opposition to the motion, to be entitled to judgment as a matter of law the burden is on the movant to show that *"it would be impossible for the respondent to produce evidence at the trial warranting a judgment in her favor and against the movant."* Steelvest, 807 S.W.2d at 483 (emphasis added).

Defendants seek summary dismissal of Plaintiff's punitive-damages claim citing KRS 411.184(2), which provides for punitive damages only upon a showing of oppression, fraud, or malice. [11] Plaintiff properly alleged in her Amended Complaint that Defendants acted with oppression, fraud, malice, *or were grossly negligent by acting with wanton or reckless disregard for the health and safety of Joseph Clint Offutt.* [12] In order to justify punitive damages for gross negligence, there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety or property of others. *Ferriell v. Podgursky,* 2009 WL 5124926 (Ky. App. Dec. 30, 2009)(*citing City of Middlesboro v. Brown,* 63 S.W.3d 179, 181 (Ky. 2001)). Citing KRS 411.184(2), the court in *Horton v. Union Light, Heat and Power Co.,* 690 S.W.2d 382 (Ky. 1985), stated that a punitive damage claim must be based on misconduct that is "outrageous," regardless of whether it was negligently or intentionally inflicted. *Horton,* 690 S.W.2d at 389-90. The Court defined "outrageous" conduct as "willful, malicious, and without justification." *Id.* Malice may be implied from outrageous conduct and need not be expressed so long as the conduct is sufficient to evidence conscious wrongdoing. *Bowling Green Municipal Utilities v. Atmos Energy Corp.,* 989 S.W.2d 577 (Ky. 1999). The mere fact that an act is intentional or reckless does not justify punitive damages absent a finding that the defendant's conduct amounted to fraud, oppression, malice, or gross negligence. *Banks v. Fritsch,* 39 S.W.3d 474, 480 (Ky. App. 2001).

Plaintiff's nurse expert, Cynthia Clevenger, testified that state and federal regulations, as well as a facility's policies and procedures, help define the standard of care. [13] In reviewing Mr. Offutt's medical records, Clevenger stated that there were multiple deviations in the standard of care, for example, omissions with Mr. Offutt's intake and output. [14] She testified, "There was no nutrition and hydration care plan at all, which I found very disturbing. I thought that was a really - well, an outrageous deviation in standard of care." [15] Clevenger also stated, "There was no reason not to provide someone with nutrition and hydration that has a tube." [16] She described it as "blatant disregard" that Mr. Offutt failed to receive proper nutrition and hydration considering he had a tube. [17] According to Clevenger, there was "a trend of poor care throughout his very short stay there." [18]

Dr. Leonard S. Williams described Mr. Offutt as "profoundly dehydrated." [19] He testified as to how easy it would have been for the nursing staff to ensure that Mr. Offutt was hydrated when he stated, "And it was simple enough because he had the tube in. So if there was any question about he's not drinking enough, just put it through the tube. It was simple. It was a non-problem really." [20] Dr. Williams further testified that some degree of dehydration in sick **elderly** patients is understandable, "[b]ut when the fluid deficit is so severe like in [Mr. Offutt's] case, he has what we call hypernatremic dehydration. Okay. Hypernatremic dehydration is the severest type of dehydration that you can have." [21] He testified, "It would take a tremendous - it's a very significant amount of fluid deficit to get hypernatremic dehydration." [22]

Following a thorough investigation involving Defendants' facility, the Commonwealth of Kentucky's Adult Protection Services ("APS") substantiated a finding of extreme maltreatment toward Mr. Offutt. Tonya Cain, an APS employee, testified that the investigation revealed that documentation of Mr. Offutt's care did not support claims made by his caregivers with respect to,

for example, his intake of food through his feeding tube to prevent starvation and how often he was turned and repositioned to prevent pressure sores. [23] Also, Cain testified that Mr. Offutt's care plan had been revised after an assessment showed that Mr. Offutt had wounds that had significantly worsened over the course of five days. [24]

Defendants' own nurse consultant testified that the nursing staff at the Harborside facility breached the standard of care on several occasions with respect to their care and treatment of Mr. Offutt. Debbie Cascaden, currently the Regional Director of Clinical Operations for Sun Bridge Healthcare since 2007, directs the five facilities she oversees, including the Harborside facility, to provide quality care. [25] Cascaden testified that the facility's failure to document the characteristics of Mr. Offutt's wounds upon admission was a breach of the standard of care. [26] She conceded that the facility did not begin documenting crucial care Mr. Offutt required until March 30, 2008, five days after admission and after pressure sores had developed or significantly worsened. For example, there was no wound care sheet charting for his sacral wound; no documentation that his heels were floated to relieve pressure; and no indication that he was turned and repositioned every two hours. [27] Cascaden testified that these were breaches of the standard of care. With respect to Mr. Offutt's fluid intake, Cascaden admitted that charting in this regard was never completely filled out during his residency. [28] She also testified that dehydration while on a tube is neither a good outcome *nor a normal one* given that the staff controls what nutrition and hydration a person gets through tube feedings. [29] She also testified that the standard of care requires staff to chart when a physician responds to their attempts to obtain an order, especially when following up on recommendations, and that the facility's failure to do so amounted to a breach of the standard of care. [30] Cascaden also testified that the facility's failure to timely obtain a telephone order for increased tube feedings for Mr. Offutt was a breach of the standard of care. [31]

In cases alleging gross negligence and requesting punitive damages, "[a] party plaintiff is entitled to have [her] theory of the case submitted to the jury if there is any evidence to sustain it." *Fuel Transport, Inc. v. Gibson,* 2009 WL 3047578 (Ky. App. Sept. 25, 2009)(citing *Shortridge v. Rice,* 929 S.W.2d 194-, 197 (Ky. App. 1996)). In opposing Defendants' motion, Plaintiff is not required to prove her case, but only to make "some showing to offset the impact of the matters presented in support of the motion." *Hayes v. Rodgers,* 447 S.W.2d 597, 600 (Ky. 1969)(quoting 7 W. Clay, Kentucky Practice, CR 56.05, Comment 4 (3rd ed. 1974)). The above testimony shows that there are indeed genuine issues of material fact as to whether Defendants' conduct warrants punitive damages. This issue should be tried to a jury.

**C. Bifurcation of Plaintiff's Punitive Damages Claim Would Be A Waste of Judicial Resources and Wholly Inefficient in That it Would Add Unnecessary Time and Expense to Trying This Matter.**

When actions involve a common question of law or fact, the Court "may order a joint hearing or trial of any or all the matters in issue." [32] Actions involving the same questions of fact and/or law may thus be consolidated to "avoid unnecessary costs or delay." Although Rule 42.02 permits separation of issues under certain circumstances, bifurcation of Plaintiffs punitive-damages claim would not be practical. In *V.S. v. Commonwealth,* 706 S.W.2d 420 (Ky. App. 1986), an action to terminate parental rights, the defendant moved twice to separate the trial against her from the trial against her parents. She argued that the Court's failure to separate the two separate defendants prejudiced her and violated her due process rights, asserting on appeal "that the trial court's decision to try the cases together meant that she had to defend her parents' social services history of six years and hope that the trial court would be able to keep the cases separate. She believes she became a victim of guilt by association." The Kentucky Court of Appeals found no **abuse** of discretion, holding that from "a practical standpoint the cases cannot be separated." [33] The Court held that, although there may be two sets of defendants, cases involving the same operative facts should be tried together: "If the cases were separated, there would be a retrial and rehash of practically the same evidence. Cases as intermeshed as these should be tried together." [34]

The same is no less true in the present matter. The facts in the "bifurcated" proceedings suggested by Defendants are the same, both concerning the injuries sustained by Mr. Offutt at the Harborside facility. Based upon experience, the length of this trial is

likely to be considerable, taking upwards of two weeks. Yet, Defendants propose to try the same case twice, notwithstanding the fact that the evidence would be the same in each trial. Contrary to Defendants' assertion, Plaintiff will indeed suffer prejudice because the cost of the proposed separate trials would be great. Under Defendants' plan, *Plaintiff would be forced to try the same case twice.* Plaintiff would have to call the same witnesses, including experts, to each of the separate trials, which may be heard years apart. Plaintiffs recovery against Defendants could potentially be delayed for years. The burden and expense of forcing Plaintiff to conduct two trials alone is sufficient to justify denying Defendants' motion. The threat of prejudice to the Plaintiff's case under Defendants' suggested “bifurcated” proceedings is real and severe, weighing heavily in favor of a single trial. Defendants, on the other hand, have presented no evidence that they will suffer prejudice by having a single trial involving the same operative facts. Defendants' alternative motion to bifurcate Plaintiff's punitive-damages claim should be denied.

## CONCLUSION

WHEREFORE, all premises considered, Defendants' Motion for Summary Judgment should be denied at this stage of the proceedings because it is premature given that discovery is ongoing. Alternatively, genuine issues of material fact remain as to whether punitive damages in this case are warranted such that Defendants' motion should be denied. Moreover, given the prejudice Plaintiff will suffer and the waste of resources, this Court should also deny Defendants' alternative motion to bifurcate the proceedings.

Respectfully submitted this *10* day of August, 2010.

Pearline W. Offutt, as Administratrix of the Estate of Joseph Clint Offutt, deceased, and on behalf of the wrongful death beneficiaries of Joseph Clint Offutt

Footnotes

1 Amended Complaint at ¶3.
2 Amended Complaint at ¶27.
3 Amended Complaint at ¶27.
4 Amended Complaint at ¶27.
5 Amended Complaint at 1122.
6 Amended Comlaint at ¶22.
7 Amended Complaint at ¶25.
8 Amended Complaint at ¶26.
9 Amended Complaint at ¶26.
10 *See* Rule 56.06 Affidavit of Richard E. Circeo, attached hereto as **Exhibit A.**
11 Part of this statute was found to be unconstitutional in the case of *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), although the court found that the question of the constitutionality of section (2) was not properly before the Court.
12 *See* Amended Complaint at ¶¶32, 34, 40, 48, 54, 65, 71, and 75.
13 *See* deposition excerpts of Cynthia Clevenger, attached hereto as **Exhibit B** at 36.
14 Ex. B at 43-44.
15 Ex. B at 43-44.
16 Ex. B at 50.
17 Ex. B at 69-70.
18 Ex B at 78
19 *See* deposition excerpts of Dr. Leonard S. Williams, attached hereto as **Exhibit C** at 44.
20 Ex. C at 42-43.
21 Ex. C at 45.
22 Ex C at 89.

23 *See* deposition excerpts of Tonya Lynn Cain, attached hereto as **Exhibit D** at 32-36.
24 Ex. D at 32-36.
25 *See* deposition excerpts of Debbie Cascaden, attached hereto as **Exhibit E** at 6-10.
26 Ex. E at 95-96.
27 Ex. Eat 100, 108 and 111-16.
28 Ex. E at 130-31.
29 Ex. E at 119.
30 Ex. E at 148-49.
31 Ex. E at 150-51.
32 CR 42.01.
33 *Id.*
34 *Id.*

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