

2012 WL 7177356 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Ethan NEWMAN, Plaintiff,

v.

SELECT SPECIALTY HOSPITAL--ARIZONA, INC., a Delaware corporation, dba Select Specialty Hospital--Arizona (Scottsdale Campus); Select Medical Corporation, a Delaware corporation; Sharon Anthony, Chief Executive Officer; and John Does 1-200, Defendants.

No. CV2010-033589.
December 17, 2012.

Plaintiff's Response to Defendants' Objections to Plaintiff's Statement of Costs

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Honorable [Arthur Anderson](#).

Plaintiff Ethan Newman hereby responds to Defendants' Objections to Plaintiff's Statement of Costs and request that this Court overrule the objection and award Ethan Newman his costs of suit under § 46-455(H)(4) for these reasons; (1) The Plain Language of [A.R.S. § 46-455\(H\)\(4\)](#) entitles Ethan Newman to his costs of suit (2) to the extent that the statutory language is considered ambiguous. the context and purpose of the Adult Protective Services Act demonstrate that the legislature intended that successful plaintiffs recover all their costs of suit; and (3) subsection (O) of the statute, as interpreted by the Arizona Supreme Court precludes the limiting of APSA's awarding of costs of suit by [A.R.S. § 12-332](#) to the alternative, Plaintiff requests that the Court award to him his taxable costs pursuant to [A.R.S. § 46-455\(H\)\(4\)](#) and [A.R.S. § 12-332\(A\)](#).

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND INFORMATION

The jury returned a verdict for Ethan Newman on his APSA claim on November 16, 2012. Defendants insistence on litigating this case to trial resulted in costs of \$48,544.06 to Mr. Newman.

II. LAW AND ARGUMENT

A. The Plain Language of [A.R.S. § 46-455\(H\)\(4\)](#) Entitles Ethan Newman to His Costs of Suit

“The primary rule of statutory construction is to find and give effect to legislative intent.” *Mail Boxes U.S.A. v. Indus Comm'n of Ariz.*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995), To do this, the court “look[s] first to the statute's words.” *Id.* at 121, 888 P.2d at 779. In a statute, “[w]ords have their ordinary meaning unless the context of the statute requires otherwise.” *Id.* at 121, 888 P. 2d at 779. And “[w]here language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary.” *Id.* at 121, 888 P.2d at 779. See also *City of Sierra Vista v. Sierra Vista Wards Sys, Voting Project*, 229 Ariz. 519, 522, 278 P.3d 297, 300 (“If the Statutory language is clear and ambiguous, we look no further and apply it as written.” (quoting *Robson Ranch Mouniains, L.L.C. v. Pinal County*, 203 Ariz. 120, 125, 51 P.3d 342, 347 (Ct. App. 2002))).

The relevant statutory provision provides that the court may order “the payment of actual and consequential damages, *as well as costs of suit*, to those person injured by the conduct described in this section.” *Ariz. Rev. Stat* § 46-455(H)(4). The word “costs” has its ordinary meaning, as the context of the statute does not require otherwise. *See Mall Boxes U.S.A.*, 181 *Ariz. at 121*, 888 P.2d at 779. The ordinary meaning of “costs” is “expenses incurred in litigation.” Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/cost> (last visited Dec 17, 2012). As there is no “clearly expressed legislative intent to the contrary,” 181 *Ariz. at 121*, 888 P.2d at 779, this unambiguous language is conclusive. Therefore, pursuant to [section 46-455\(H\)\(4\)](#). Ethan Newman is entitled to his “costs of suit.” i.e. his expenses incurred in litigation.

B. If “Costs of Suit” Is Ambiguous, the Context and Purpose of the Act Demonstrate that “Costs of Suit” Means Costs of Suit.

If however, the Court considers the statute's language to be ambiguous the Court properly considers the context of the statute and its spirit and purpose. *See, e.g., CNL Hotels & Resorts, Inc. v. Maricopa County*, 230 *Ariz. 21 -- 279 P.2d 1183*, 1185 (2012).

1. The Statute's Context Demonstrates that When the Legislature Wished to Limit Costs, It Knew How to Do So.

While subsection (H)(4) simply permits the court to order payment of “costs of suit” to those injured by conduct proscribed by APSA, subsection (H)(5) permits the court to order “the payment of all costs and expenses *of the prosecution and investigation of the conduct described in this section*, civil and criminal, incurred by the state or county as appropriate” *Ariz. Rev. Stat* § 46, 455(H)(5). Thus, the legislature know how to limit the award of costs when it wished to do so. *Cf. Estate of McGill ex rel. McGill v. Albre??*, 203 *Ariz. 525*, 530-31, 57 P.3d 384, 389-90 (2002) (rejecting the theory that gross negligence rather knows how to require a showing of gross negligence, **abuse** under APSA, as “[t]he legislature surely knows how to require a showing of gross negligence, having used that term in at great number of statutes.”). That it did not limit costs of suit in subsection (H) (4), when it knew how to do so and did in fact do so in the very next subsection of the statute, indicates that the legislature did not wish to limit recovery of costs of suit under subsection (H)(4).

2. APSA's Purpose Is Upheld by Not limiting Costs of Suit

The policy of APSA is “to increase the remedies available to **elder abuse** victims.” *In re Estate of Winn*, 214 *Ariz. 149*, 151, 150 P.2d 236, 238 (2007). *See also Estate of McGill*, 203 *Ariz. at 528*, 57 P.3d 387 (“We continue to believe it clear from the text of statute the conditions prevalent in this state, and the sparse legislative history that the statute was intended to increase the remedies available to and for **elderly** people who had been harmed by their caregivers.”). Moreover, APSA is a remedial statute, and as such must be construed broadly. *In re Estate of Winn*, 214 *Ariz. 149*, 150, 150 P.3d 236, 237 (2007) (“The amended statute creates a remedial cause of action against those who **abuse**, neglect, or exploit the **elderly**. We construe such remedial statutes broadly to effectuate the legislature's purpose in enacting them.”) (citation omitted).

Construing “costs of suit” broadly is consistent with APSA's policy of increasing remedies available to **elder abuse** victims. In fact, such a construction is particularly appropriate in APSA cases since, as the victims are not employed, no recovery for lost earnings or diminished earnings capacity can be maintained. *Cf. In re Guar??ianship/Conservatorship of Denton*, 190 *Ariz. 152*, 156, 945 P.2d 1283, 1287 (1997) (reasoning that damages for pain and suffering may be maintained in an APSA suit notwithstanding the survival statute in part because there can be no recovery for lost earnings or diminished earnings capacity). Therefore, the Court should construe “costs of suit” broadly, as such a construction accords with the policy of APSA and its remedial nature.

C. Subsection (O) Prevents A.R.S. § 12-332 from Limiting Ethan Newman's Recovery of Costs

A.R.S. § 12-332 generally limits recoverable costs to six specific categories. See *Ariz. Rev. Stat. § 12-332(A)*. However, subsection (O) of section 46-455 provides that “[a] civil action authorized by this section ... does not limit and *is not limited* by ... any other provision of law.” *Ariz. Rev. Stat. § 46-455(O)* (emphasis added). The cases interpreting subsection (O) make clear that this subsection precludes the application of section 12-532 to limit Ethan Newman's recovery of costs of suit.

1. Case Law

Three Arizona Supreme Court decisions teach that other statutes cannot operate to limit remedies provided by APSA.

In *In re Denton*, the trial court granted defendants' motion for judgment on the pleadings for damages for pain and suffering in an APSA case where the victim had died while the complaint was pending, 190 *Ariz. at 154, 945 P.2d at 1285*. The Arizona Supreme Court reversed, Holding that these damages claims were not limited by Arizona's survival statute. *Id. at 157, 945 P.2d at 1288*. Defendants argued that the survival statute, which provided that “upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.” *Ariz. Rev. Stat. § 14-3110*, prevented the recovery of pain and suffering damages after the death of the victim 190 *Ariz. at 156, 945 P.2d at 1287*. The supreme court however, observed that applying the survival statute would have limited the APSA civil claim, and that such limiting was precluded under subsections (M) and (O) (now subsections (O) and (P). respectively) of section 46-455. See *id. at 156, 945 P.2d at 1287*.

In *Estate of McGill*, plaintiff brought suit under both the Medical Malpractice Act and APSA. 203 *Ariz. at 527 57 P.2d at 386*. The trial court dismissed the APSA claim, reasoning that, because plaintiff theories were based on medical malpractice an APSA action was precluded. *Id. at 527, 57 P.3d at 386*. The Arizona Supreme Court reversed, holding that MMA did not limit APSA claims, *Id. at 531, 57 P.3d at 390*. Defendants argued that acts of medical malpractice could not form the basis of an APSA action because malpractice claims could only be made under MMA. *Id. at 530, 57 P.3d at 389*. The supreme court, however, reasoned that under that theory the MMA statute would have impermissibly limited APSA claims, in violation of A.R.S § 46-455(M) (now (O)). *Id. at 531, 57 P.3d at 389*.

In *In re Estate of Winn*, Plaintiff brought an APSA claim against defendants on behalf of his deceased wife. 214 *Ariz. at 150, 150 P.3d at 237*. More than two years after his wife's death, he was appointed personal representative of her estate. and moved to substitute himself in that capacity as the plaintiff. *Id. at 150, 150 P.3d at 237*. The trial court granted summary judgment to defendants on the ground that A.R.S. § 14-3108(4) precludes a personal representative appointed more than two years after the decedent's death from prosecuting claims on the estate's behalf. *Id. at 150, 150 P.3d at 237*. The Arizona Supreme Court reversed, reasoning that “[t]he language of APSA § 46-455 is clear in creating a remedial cause of action that may not be limited by the death of the vulnerable adult ‘or any other provision of law.’ ” *Id. at 151, 150 P.3d at 238*. As the probate code provision would have limited the APSA claim, it could not be applied. See *id at 151, 150 P.2d at 238*.

2. Application

section 46-455(H)(4) provides that a court may order the payment of “costs of suit” to a plaintiff. *Ariz. Rev. Stat § 46-455(H)(4)*. Section 12-332 would limit “costs” to the categories of costs enumerated therein. See *Ariz. Rev. Stat, § 12-332(A)*, Therefore, under *in re Denton*, *Estate of McGill*, and *In re Estate of Winn*, section 12-332 is inapplicable because it would limit an APSA action in violation of § 46-455(O) (providing that an APSA action. “is not limited by ... any other provision of law”). Accordingly all costs of suit, and not merely costs as limited by section 12-332, are properly awardable to Ethan Newman.

III. CONCLUSION

Ethan Newman requests that the Court award to him his costs of suit as authorized by A.R.S. § 46-455(H)(4). In the alternative, Ethan Newman requests that the Court award to him his taxable costs pursuant to A.R.S. § 46-455(H)(4) and A.R.S. § 12-332(A).

Dated this 17th day of December, 2012.

WILKES & MCHUGH, P.A.

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