2008 WL 5256338 (Pa.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Pennsylvania.
Allegheny County

Karen HOLMES, Administratrix of The Estate of Richard Hopkins, Deceased, Plaintiff,
v.
GRANE HEALTHCARE, INC. Grane Management, Inc., Highland Park Care Center, LLC d/b/a Highland Park Care Center, Defendants.

No. GD 2006-23221.
May 5, 2008.

Civil Division
Jury Trial Demanded

Brief in Opposition to Preliminary Objections

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BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS

I. INTRODUCTION

On or about April 22, 2004, Richard Hopkins was admitted to Highland Park Care Center, a nursing home owned, operated and managed by all of the named Defendants. In the Complaint, Plaintiff has alleged that the injuries suffered by Mr. Hopkins during his residency at Defendants' nursing home were preventable and that his death was the result of all of the named Defendants' failures to provide adequate and appropriate care to him.

This is not a simple negligence case such as a slip-and-fall in which a person receives a discrete injury due to a single negligent act of a defendant. Nor is this a case involving only medical malpractice issues. Rather, this case involved repeated negligent acts and omissions by Defendants that led to Mr. Hopkins' injuries and death.

Defendants were aware of Richard Hopkins' health condition and his needs related to that condition and held themselves out to him and his family as being able to care for him. Thus, Defendants were entrusted with feeding Mr. Hopkins, bathing him, and caring for his most basic needs because neither he nor his family members could perform those tasks. Rather than uphold that trust and provide Mr. Hopkins with appropriate care, Defendants placed their ability to turn a profit above the care of Mr. Hopkins. The end result was the deprivation of care, which led to Mr. Hopkins' death.

II. STANDARD OF REVIEW

Defendant has set forth numerous objections to Plaintiffs Complaint. However, under Pennsylvania law, preliminary objections should only be sustained in cases that are free and clear from doubt. *See Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). A

court must overrule objections to a complaint when the complaint pleads sufficient facts, which, if believed, would entitle the plaintiff to the relief sought. *See Wilkinsburg Police Officers' Assoc. v. Commonwealth*, 636 A.2d 134, 137 (Pa. 1993). When reviewing preliminary objections in the nature of a demurrer, all material facts set forth in the Complaint, as well as inferences reasonably deducible therefrom, must be treated as true. *Wurth v. City of Philadelphia*, 584 A.2d 404, 407 (Pa. 1990).

A preliminary objection in the nature of a demurrer tests the legal sufficiency of the complaint. *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. 1991). "A demurrer should be granted only where, on the facts averred, the law provides *with certainty* that no recovery is possible." *Bauer v. Pottsville Area Emergency Med. Serv., Inc.*, 758 A.2d 1265 (Pa. Super. 2000)(emphasis added). Any doubts must be resolved in favor of overruling the motion. *Smith v. Wagner*, 588 A.2d at 1311.

Plaintiff is not proceeding under the theory of corporate negligence. Therefore, no certificates of merit were filed in support of a direct liability claim. Plaintiff has asserted valid claims for negligence, breach of breach of fiduciary duty, violation of the Uniform Trade Practices and Consumer Protection Law, violation of the Neglect of Care of Dependant Person Statute, and negligent misrepresentation. The facts of Mr. Hopkins injuries are clearly set forth in specific detail in Plaintiffs Complaint so as to properly apprise Defendant of the allegations against it. All of Defendants' preliminary objections are without merit, and Defendant's Motion should be denied.

III. ARGUMENT

A. THERE IS NO ENFORCEABLE AGREEMENT TO ARBITRATE

1. A valid agreement to arbitrate does not exist between Richard Hopkins and Defendants as Mr. Hopkins intentionally, consciously and purposefully refused to sign the Agreement to Arbitrate Disputes.

The elements of a valid contract are (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, and (4) parties with legal capacity to make a contract. *See Shovel Transfer and Storage, Inc. v. Penn. Liquor Control Bd., 739 A.2d 133 (1999)*. Simply put, there are not two or more contracting parties. Upon admission to Highland Park Care Center, Richard Jackson intentionally, consciously and purposefully refused to sign the Agreement to Arbitrate Disputes attached as Exhibit A. The words "DIDN'T SIGN" are clearly written above the signature line on the second page of the Agreement to Arbitrate Disputes. See Exhibit A at 2. "It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House*, 534 U.S. 279, 294 (2002). Richard Hopkins is not a contracting party to the Agreement to Arbitrate Disputes.

Mr. Hopkins' daughter, Karrin Holmes, testified in her deposition on February 6, 2008, about her father's state of mind and his decision to not sign the Agreement to Arbitrate Disputes. Ms. Holmes answered the questions of Defendants counsel as follows: Q. Did Mr. Hopkins - - And when I refer to Mr. Hopkins, I'm referring to Richard G. Hopkins,

A. I understand.

Q. Is that okay?

A. Yes.

Q. Did he ever have a court-appointed legal guardian?

A. No.

Q. Did anyone, either a family member or a representative, ever have authority to act on Mr. Hopkins' behalf in relation to his medical care?

A. No.

Q. Did you have authority to act on his behalf in relations to his medical care?

A. When you say “authority” - - he was responsible for hisself [sic]. So I assisted him with some things, but as far as having authority, I couldn't really say I had authority because he made his own decisions.

Q. When he was admitted to Highland Park Care Center, was he competent?

A. Yes.

Q. Was he able to make his own decisions?

A. Yes.

Q. When he was admitted to Highland Park Care Center, who did the admissions process for him? Do you recall?

A. I did.

Q. And why would you have done that instead of him?

A. We were - - Actually, we were doing it together. He couldn't write that well. He could write, but his hands were contracted, so it was hard for him to hold the pencil and sign things, so I would ask him to make an X on things that was - - You know, he could write his name out, but, if his hands didn't permit him to do it that day, then I would help him because there was so many forms involved, so that's why I ended up filling out the papers for him.

Q. Can you tell me what these two pages are?

A. Agreement to Arbitrate Disputes.

Q. And do you have an understanding as to what these two pages mean, what they are?

A. Yes.

Q. On the second page, which is Hopkins 32, there's an indication above the signature line, “didn't sign.” Do you remember ever looking at this particular agreement?

A. I'm pretty sure I did.

Q. And what - Was this agreement one of the ones that you looked over in your meeting with Ms. Begonia?

A. Yes.

Q. And do you not - Do you know - Let me rephrase that. Did you refuse to sign this, or is it something you just didn't want to sign? Why was this particular document not signed?

A. My father and I went -Excuse me. My father and I went over the document, and I just didn't agree and he didn't agree with some of the things that was in here, so we decided not to sign.

Q. Okay. What, in particular, did he not want to agree to?

A. That I don't remember.

Q. Now, this one, again, is dated April 28, 2004, which would have been a little less than a week after your father's admission. Do you recall meeting with Ms. Begonia a second time after his initial admission to go over this particular document?

A. I don't recall. I can't say for sure. I know we discussed it. I don't know what date it was, so I can't say it was the 28th because I don't know.

Q. Your father didn't agree to things in this agreement. Correct?

A. That would be correct.

(Transc. of Dep. Of Karrin Holmes, attached hereto as Exhibit "B", at 27, 30-31, 46-47.) After Defense counsel concluded with Ms. Holmes. Ms. Holmes responded to Plaintiffs counsel questions regarding the Agreement to Arbitrate Disputes as follows:
Q. And what that - When you looked at that agreement did you notice that that was an Agreement to Arbitrate Disputes?

A. Yes, after careful review.

Q. Okay. And you had the chance to speak with the admissions coordinator about that and with your father about it. Is that right?

A. Yes.

Q. What's you recollection about this agreement and your signature on it or lack thereof?

A. That we didn't agree to signing this. We didn't agree with some of the terms in this, so due to the - you know - I'm sorry - my father and I talking, we just decided not to sign this agreement because there's something about this agreement he just didn't like.

Q. Okay. And did you, in fact, go one step further and say, make sure that you put other [sic] that we didn't sign it?

A. I don't recall.

Q. Well, in any event, she did it. Is that right?

A. Yes.

Q. Okay. Did you refuse to sign this agreement?

A. Yes.

Q. Did you think that in refusing to sign that agreement that it would supplement this other agreement that you signed in such a way that the arbitration provisions would not apply?

A. Not to my knowledge.

Q. Okay. But you agree - or you have stated that your father did not want to sign an arbitration agreement. Is that right?

A. Yeah. My father didn't.

Q. Okay. And you have a specific recollection of that?

A. Yes.

Q. You said earlier that - - I guess this was based on your relationship with your father - - that he wanted to know everything. Is that right?

A. Yes.

Q. Okay. That was important to him?

A. Yes, it was very important to him.

Q. And I think your statement was, he wanted to make sure he wasn't giving up anything that he had left. Is that right?

A. That would be correct.

Q. Do you think that his right to voice any grievances that he had about his care in a court of law - - would that be a right that he wouldn't want to give up?

A. That he would want to give up or wouldn't?

Q. That he would not want to give up.

A. That would be correct.

Q. And his constitutionally protected right to a jury trial, would that be something that he would not want to give up?

A. He wouldn't want to give that up.

(Transc. of Dep. Of Karrin Holmes, attached hereto as Exhibit “B”, at 59-62, 68-69).

This testimony is unmistakably clear that Mr. Hopkins intentionally, consciously and purposefully did not execute the Agreement to Arbitrate Disputes. Mr. Hopkins and Ms. Holmes were able to read and understand the Agreement to Arbitrate Disputes and chose to not enter into such an arbitration agreement. There is not a valid and enforceable arbitration agreement between the parties, jurisdiction is proper in the court of Common Pleas of Allegheny County, Pennsylvania. Defendants' preliminary objections should be denied.

2. A valid agreement to arbitrate does not exist between Richard Hopkins and Defendants under the Extended Health Care Services Agreement (“EHCSA”).

As reflected above, Mr. Hopkins specifically rejected entering into an arbitration agreement with Defendants. He intentionally did not sign a separate, independent two page document titled Agreement to Arbitrate Disputes. Regardless, Defendants assert that Plaintiff is bound to arbitration based upon initials beside a paragraph buried in a seven page document. This seven page document is the EHCSA, attached hereto as Exhibit C. The EHCSA contains 32 paragraphs that must be initialed by the resident or resident's representative. Paragraph 25 of 32 is titled Dispute Resolution and is on page six of the EHCSA. Given Mr. Hopkins objection to the separate independent Agreement, it would be unreasonable to find that he entered into an arbitration agreement based upon the initials beside this paragraph.

Ms. Holmes initialed the EHCSA prior to being presented with the Agreement to Arbitrate Disputes. Significantly, the Agreement to Arbitrate Disputes contains a revocation clause that provides as follows:

> Resident understands that he/she has the right to consult legal counsel concerning this arbitration agreement; that execution of this arbitration agreement is not a condition of admission or to the furnishing of services to the Resident by the Center; and that this arbitration agreement may be rescinded by written notice delivered to the Center within ten (10) days of signature.

(Paragraph 5, Exhibit A). Therefore, to the extent Mr. Hopkins may have consented to arbitration in the EHCSA, such consent was revoked in writing by the words “DIDN'T SIGN” above the resident's signature line.

B. PUNITIVE DAMAGES

Plaintiff has pled a valid claim for punitive damages. The Medical Care Availability and Reduction of Error Act (“Act”) provides, in relevant part:

> (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 Pa.C.S. § 1303.5(a). The Act specifically includes “nursing home” within the definition of “health care provider.” *See* 40 Pa.C.S. §1301.503. *See also, Peldv. Merriam,* 506 Pa. 383, 395, 485 A.2d 742, 747 (1984). Furthermore, this is only the preliminary objection stage, and, as one court observed “preliminary objections are poor means of attacking punitive damages.” *Michael v. Gettysburg,* 30 Pa. D. &C. 4th 31, 39 (Adams 1995).

In *Continental Grain Co. v. SHV Coal, Inc.,* 587 A.2d 702 (Pa. 1991), the Pennsylvania Supreme Court set forth the factual elements that justify an award of punitive damages: Assessment of punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct, and are awarded to punish that person for such conduct. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. *Continental,* 587 A.2d at 704 (citations omitted). In discussing the concept of “reckless indifference,” the Court, citing *Martin v. Johns-Manville Corp.,* 494 A.2d 1088 (Pa. 1985), applied comment (a) of section 908(2) of the Restatement (Second) of Torts, and held that 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 conscience disregard of, or indifference to, that risk, punitive damages may be assessed. *Continental,* 587 A.2d at 704-05. *See also, Feld v. Merriam,* 485 A.2d 742 (Pa. 1984) (adopting Restatement (Second) of Torts, § 908(2)).

Recently, the Supreme Court of Pennsylvania held that punitive damages could be awarded to a plaintiff in a negligent supervision case. In *Hutchison v. Luddy,* 870 A.2d. 766, (Pa. 2005), the Supreme Court held that: In Pennsylvania, a punitive damage claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. *Hutchison* at 772 (citation omitted). The Court further noted that:

> A jury cannot be instructed that, having found negligence, an award of punitive damages is appropriate. But, neither is there anything in law or logic to prevent 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.

Id. "Thus, provided the plaintiff demonstrates that the defendant acted with at least a mental state of recklessness (conscious disregard), punitive damages may be recovered on a claim sounding in negligence." *Stroud v. Abington Memorial Hosp.* Slip Copy, 2008 WL 1757926, (E.D.Pa. 2008).

In *McCain v. Beverly Health and Rehabilitation Services, Inc.*, 2002 U.S. Dist. LEXIS 12984, 2002 WL 1565526 (E.D.Pa. 2002), the defendant's motion seeking to dismiss the plaintiffs request for punitive damages was denied. The nursing home transported the decedent in an ill-fitting wheelchair that caused pressure sores, despite their knowledge that he was at a "high risk" of developing pressure sores. The court held that these allegations were sufficient to establish "willful or wanton conduct or reckless indifference to the rights of others." *Id. *2.* The facts in this case are the same as Defendants transported Mr. Hopkins in an ill-fitting wheelchair. Additionally, plaintiff alleges that the Defendants knew upon admission that Mr. Hopkins required the following:

• monthly change of the suprapubic catheter,

• daily care of the suprapubic catheter,

• specific nutrition,

• treatment to prevent skin breakdown, and

• treatment of existing skin breakdown.

Despite this knowledge, Defendants did not provide this care. The allegations in Plaintiffs Complaint meet the standard for punitive damages. *See also*, *Zassera v. Roche*, 54 Pa. D. & C.4th 225 (Lackawanna 2001) (allowing a punitive damages claim to proceed against a physician who operated on the right carotid artery when the patient had been hospitalized for surgery to the left); *Medvecz v. Choi*, 569 F.2d 1221 (3d Cir. 1987) (anesthesiologist abandoned patient in the operating room to get lunch); and *Hoffman v. Mem'l Osteopathic Hosp.*, 492 A.2d 1382 (Pa. Super. 1985) (defendant allowed a patient with neurological paralysis to remain crying on the floor of an emergency room, repeatedly stepping over him for hours, telling him there was nothing wrong with him).

Thus, a punitive damages claim must be supported by facts sufficient to establish that: (i) the defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and (ii) he acted, or failed to act, in conscious disregard of that risk. *Martin, supra*, 494 A.2d at 1097-98. Knowledge or 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*, 788 A.2d 390 (Pa. Super. 2001). Here, the allegations of Plaintiffs Complaint are sufficient to permit claims for punitive damages. The Complaint contains allegations of severe neglect, recklessness, and the probability of substantial physical harm, all of which occurred in this case.

Plaintiff's allegations in this case are specifically tailored to meet the requirements of Pennsylvania law. The line of reasoning is simple, but powerful: sufficient numbers of adequately-trained caregivers were needed to give care to Richard Hopkins, and Defendants knew it. Defendants did not provide those caregivers and ignored warnings from within their own organization that Highland Park Care Center was understaffed. Richard Hopkins suffered for it by not receiving daily and monthly catheter site

care, adequate nutrition, daily treatment of areas with skin breakdown, a properly fitted wheelchair, or assistance in turning and repositioning. The result was debilitating injuries. Defendants acted in this manner to maximize profit at the expense of resident care. The evidence in this case at minimum creates a question of fact as to liability for punitive damages.

Similar evidence in nursing-home cases has consistently supported significant awards of punitive damages. For example, in *Beverly Enterprises - Florida, Inc. v. Spilman,* 661 So. 2d 867 (Fla. Ct. App. 1995), the evidence showed that the resident lost an excessive amount of weight, became increasingly confused and agitated, and became non-ambulatory, was restrained in a geri-chair almost everyday for hours at a time. When the nursing home was understaffed, he was often left sitting in soiled clothing, and on a number of occasions he attempted to untie his restraints to escape his chair. When he was unsuccessful, he dragged the chair around with him. He was supposed to receive help eating, but when the nursing home was understaffed, he received no help and his tray was thrown away. At times his chart was documented to show that he was fed when he was not. Each wing of the nursing home contained 60 patients to be cared for by one charge nurse, one regular nurse and three certified nursing assistants. A certified nursing assistant was required to perform a nurse' job. The head nurse was unavailable for hours at a time. The nursing staff knew when the state would come to inspect and on those occasions increased staff. *Id.* at 870-71.

Likewise, in *Advocat v. Sauer,* 111 S.W.3d 346 (2003), the Arkansas Supreme Court upheld a significant punitive award, writing:

Here, Mrs. Sauer died in the care of Rich Mountain from severe malnutrition and dehydration. There was evidence presented that she was found at times with dried feces under her fingernails from scratching herself while lying in her own excrement. At other times, she was not “gotten up” out of her bed as she should have been. Often times, Mrs. Sauer's food tray was found in her room, untouched because there was no staff member at the nursing home available to feed her. She was not provided with “range of motion” assistance when the facility was short of staff.

Mrs. Sauer was often times found wet without being changed in four hours. She had pressure sores on her back, lower buttock, and arms on days she was found sitting in urine and excrement....at times she had no water pitcher in her room; nor did she receive a bath for a week or longer, due to there not being enough staff at the facility.... at the time she was hospitalized prior to her death, she had a severe vaginal infection. When she was in the geriatric chair, she was not “let loose” every two hours, as required by law. Finally, Mrs. Sauer was found to suffer from poor oral hygiene with caked food and debris in her mouth.

Id. at 353-354.

The Arkansas Supreme Court concluded, “There was ample testimony and evidence presented to demonstrate that Mrs. Sauer suffered considerably and was not properly cared for, that Rich Mountain was short-staffed, and that the Appellants' tried to cover this up by ‘false-charting’ and by bringing in additional ‘employees' on State-inspection days.” *Id.* at 354. “All of this serves to support the Sauer estate's case that the nursing home, under the auspices of the Appellants, knew it had staffing problems and committed negligence as to Mrs. Sauer, because it was short-staffed due to cutbacks.” *Ibid.*

The Arkansas Court of Appeals issued another interesting opinion in *Rose Care v. Givens,* 209 S.W.3d 393 (Ark. Ct. App. 2005). In that case, the Court of Appeals affirmed the verdict in favor of the plaintiff, then, relying on the same evidence, reversed the trial court's decision not to allow the jury to determine whether punitive damages should be awarded. That evidence was as follows:

> There was evidence in this case that Rose Care was chronically understaffed and had ignored CNA complaints on the matter; that rewards were offered for facilities that kept within budget constraints; that Rose Care would “pull” a maintenance man onto the floor as staff during inspections; that Mrs. Givens lost a troubling amount of weight in a short time and that her charts did not properly reflect her feeding schedule; that Mrs. Givens was dehydrated three times within a few months and that her fluid-intake/output chart contained readings for days that she was not on the premises; that Mrs. Given's pressure sores increased

> in severity alarmingly over several months even though, according to one expert, they should clearly have been cured at the less severe stages; that Rose Care had been cited for failure to turn and reposition residents every two hours as required; that Mrs. Givens was found on several occasions covered in dried feces, which indicates an appalling level of neglect; and that all of these conditions occurred despite the fact that, in its initial care plan, established that Mrs. Givens was at risk for many of these very conditions. These factors constitute "any substantial evidence" of reckless disregard, such that a directed verdict on punitive damages was improper. We therefore reverse and remand for a new trial on the issue of punitive damages.

Id.

The individuals such as nurses and nurse aides tasked with providing the actual hands-on care to residents can rarely if ever be "faulted" for these failures. Indeed, like the residents, they are victims of a systemic failure to value life over profit. Boards of Director and decision makers create deficient policies for providing care. They squeeze budgets to the point where adequate staff and supplies are never present. Simply put, they fail to provide the individual caregivers with the tools necessary to provide care, all to increase profits. In this environment, caregivers are often victims themselves, faced daily with the inability to perform their assigned tasks, and watching those they are attempting to care for fall ever so irreparably into a state of basic neglect. Such is Plaintiff's theory of liability in this case.

Indeed, the cases and the scholarship consistently reveal a single overarching fact where nursing home cases lead to awards of punitive damages: short staffing in order to increase profits. See Tilghman, *Rethinking Constitutional Limitations on Punitive Damages: Providing Economically Efficient Incentives to Prevent Nursing Home Abuse*, 54 DePaul L.Rev. 1007, 1007-1009, 1013-1016 (2005) (citing cases from California, Tennessee, Texas, and Arkansas); *Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827 (8th Cir. 2004); *Despain v. Avante Group*, 900 So.2d 637 (Fla Ct. App. 2005); *Hackman v. Dandamudi*, 733 S.W.2d 452 (Mo. Ct. App. 1986); *Bremenkamp v. Beverly Enterprises-Kansas*, 762 F. Supp. 884 (D. Kan. 1991). Staffing is the major expense for nursing homes. Lower staffing increases profits, but it also decreases care and causes death and serious injury. *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes - Report to Congress, Ch. 6.; **Elder Abuse** in Residential Long-Term Care Facilities: What is Known About Prevalence, Cause and Prevention: Testimony Before the U. S. Senate Committee on Finance*, Statement of Catherine Hawes, Ph.D. (June 18, 2002). When the bottom line is valued over care by decreasing staffing, punitive damages often follow because that conduct is reckless.

Bremenkamp is an interesting case. There, Judge O'Connor held that short staffing leading to a fall subjected the nursing home to a claim for punitive damages. His recitation of the facts is telling:

Plaintiff contends Bremenkamp is entitled to punitive damages because Beverly Enterprises was reckless in employing an inadequate number of employees to properly care for patients at Lantern Park Manor. Bremenkamp asserts that defendant made business decisions that were predicated upon its economic interests and profit desires rather than the best interests and medical needs of its patients. Mindrup, the employee who discovered Bremenkamp on the floor, resigned two months later because she believed the facility was understaffed and the few staff members on duty were overworked. These same sentiments were expressed by several other employees who voluntarily terminated their employment with defendant, including one whose resignation was accepted on the very day of Bremenkamp's alleged fall. Another employee stated her reason for leaving as follows:

> Quality of care for residents has deteriorated severely and I can't watch the lack of care given to residents.

Teresa Hapke, a nurse at Lantern Park Manor, reported to an investigator from the Kansas Department of Social and Rehabilitation Services that "there was not enough staffing." Hapke added that "the staff was very short for 60 residents, and hav[ing] two or three people taking care of them is not enough."

Given these facts, the court has no trouble holding that plaintiff is entitled to seek West Page punitive damages.

Bremenkamp, 762 F. Supp. At 894-895.

Awards of punitive damages for such behavior are not unique to the nursing-home setting. Courts have emphasized that a conscious decision by a corporation to emphasize profit over safety justifies a substantial award of punitive damages. See, *e.g.*, *Union Pacific Railroad Co. v. Barber*, 149 S.W.3d 325 (Ark. 2004) ("the record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety."); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 384 (1981) ("There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety."); *Holmes v. Bridgestone/Firestone*, 891 So.2d 1188, 1191-92 (Fla. Ct. App. 2005) ("the proffer reflected facts from which it could be found that Firestone knew about the tread separation, but delayed warning the public in order to protect its own financial interests. Such a finding would support punitive damages"); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 835-36 (Minn. 1988) (concluding that Goodyear's inadequate distribution of warnings about the danger of exploding rims, based on a corporate policy to restrict advertising dollars for projects that are not promoting product sales, was "willful indifference to the safety of others."); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980) (upholding a punitive damages award against a manufacturer who continued, for profit reasons, to supply flammable nightwear when nonflammable material was available). These cases demonstrate the appropriate kind of evidence needed to support a punitive award. This precise evidence exists in this case. Therefore, it is error for the Court to grant Defendants' motion.

Punitive damages clearly have a moral basis. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L.Rev. 705 (1989) (hereafter *Moral Foundations).* These moral foundations focus on retribution for the wrong done, and deterrence of future, like wrongs. *Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 568; *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19 (1991). See also Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L.Rev. 1257 (1976) (examining retribution and deterrence as justifications for punitive damages generally and in the products-liability context); Galligan, *Disaggregating More-Than-Whole Damages in Personal Injury Law; Deterrence and Punishment*, 71 Tenn. L.Rev. 117 (2003) (advocating a separation or disaggregation of the deterrence and retribution elements of punitive, or more-than-whole, damages) (hereafter *Disaggregating the Whole).* Both goals are morally, ethically and legally appropriate. *Moral Foundations* at 707 (noting that the legal legitimacy of punitive damages is dependent on their moral legitimacy. That moral legitimacy is grounded on ideals of freedom, utility, power, truth and trust).

The value of human life has guided even the United States Supreme Court in the past where benign corporate interests have sought to avoid liability by shielding themselves behind a beneficial interpretation of the due-process clause. Eighty years ago, the Court passed on a corporation's due-process challenge to Alabama's wrongful-death statute that imposed *respondeat superior* liability on an employer whose employee caused a negligent death. Writing for the Court, Mr. Justice Stone held:

> As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only on those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.

Pizitz Co. v. Yeldell, 214 U.S. 112, 116 (1927) (citing *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281 (1908); *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916); *Wilmington Mining Co. v. Fulton*, 205 U.S. 60 (1907)).

That Court did not shy away from the moral mandate before it in 1927. This Court should not do so today. The corporate interests at stake are anything but benign. The value and dignity of human life, and the efficacy of the tort system in protecting it, hang in the balance.

Juries like those in the cases cited above declared that nursing-home defendants' conduct were reprehensible in every respect. The very same conduct exists in this case. The result of that conduct was as damaging as damage can be, the slow death of a human being. It does not stretch credibility to write that the "evil" was much more than "the negligent destruction of human life." Grossly negligent, malicious and reckless, at minimum, are much more apt terms.

Defendants' final argument is the assertion that the intentional reduction of the facility's staffing levels cannot support a claim for punitive damages as the direct liability claims have been dismissed pursuant to Pa.R.Civ.P. 1042.3. Plaintiff is not seeking a claim for corporate negligence. The corporate negligence doctrine is not applicable in this case. In determining "if corporate negligence applies, the Pennsylvania courts examine the role that the institution plays in the healthcare of the individual [...]". *Guernsey v. Country Living Personal Care Home(s), Inc.*, 2005 WL 2787057 *4 (M.D.Pa.). Corporate negligence was extended to hospitals and HMO's based upon their role in the "total healthcare" of the patients/subscribers. *See Thompson v. Nason Hosp.* 591 A.2d 703 (1991) and *Shannon v. McNulty*, 718 A.2d 828 (Pa.Super.Ct. 1998). Highland Park Care Center was not responsible for Mr. Hopkins' total healthcare. When healthcare was needed, a hospital or physician was contacted. Thus, Plaintiffs claims for punitive damages do not rest upon direct liability claims. The corporate negligence doctrine does not apply. Even if the Court were to find corporate negligence applicable, punitive damages may be awarded based upon the remaining vicarious liability claims. Punitive damages are appropriate as Defendants' were not only "negligent but the conduct was also outrageous, and warrants a response in the form of punitive damages." *Hutchison v. Luddy*, 870 A.2d. 766, 772 (Pa. 2005).

C. BREACH OF FIDUCIARY DUTY.

Defendants incorrectly assert that the breach of fiduciary duty is a direct liability claim that was dismissed by this court's order of January 15, 2007. Plaintiff is not seeking a claim for corporate negligence. The corporate negligence doctrine is not applicable in this case. In determining "if corporate negligence applies, the Pennsylvania courts examine the role that the institution plays in the healthcare of the individual [...]". *Guernsey v. Country Living Personal Care Home(s), Inc.*, 2005 WL 2787057 *4 (M.D.Pa.). Corporate negligence was extended to hospitals and HMO's based upon their role in the "total healthcare" of the patients/subscribers. *See Thompson v. Nason Hosp.* 591 A.2d 703 (1991) and *Shannon v. McNulty*, 718 A.2d 828 (Pa.Super.Ct. 1998). Highland Park Care Center was not responsible for Mr. Hopkins' total healthcare. When healthcare was needed, a hospital or physician was contacted. Thus, Plaintiff's action for breach of fiduciary duty is not based upon a direct liability claim against the corporation.

A preliminary objection in the nature of demurrer tests the legal sufficiency of the complaint. *Smith v. Wagner*, 588 A.2d 1308, 1310 (1991). Here, Defendant is arguing that Plaintiff cannot sustain a cause of action for breach of fiduciary duty against it. However, Pennsylvania law is clear that in order for Defendant's motion to be granted, "it is essential that plaintiffs complaint indicate on its face that his claim cannot be sustained, and the law will not permit recovery." *Id.* at 1311. Any doubts must be resolved in favor of overruling the motion. *Id.* Further, when reviewing preliminary objections in the nature of a demurer, all material facts set forth in the Complaint, as well as inferences reasonably deducible therefrom, must be acted as true. *See Wurth v. City of Philadelphia*, 584 A.2d 404, 407 (Pa. 1990).

Plaintiff entered into a confidential relationship with the Defendants involving matters of trust and confidence. This confidential relationship created a fiduciary duty. *Basile v. H&R* Block, 777 A.2d 95 (Pa. Super. 2001) provides the following distinct summary of the required confidential relationship necessary to establish a fiduciary duty under Pennsylvania law:
Our Supreme Court has acknowledged that "[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line." *In re Estate of Scott*, 455 Pa. 429, 316 A.2d 883, 885 (1974). The Court has recognized, nonetheless, that "[t]he essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." *Id.* Accordingly, "[a confidential

relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, *or*, on the other, weakness, dependence or trust, justifiably reposed [.]" *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416-17 (1981) (emphasis added). The Supreme Court's use in *Frowen* of the disjunctive "or" to separate the cognizable characteristics of confidential relation is critical. Contrary to the trial court's determination in this case, our law does not require both "over [mastering] influence *and*, weakness, dependence or trust." See Memorandum Opinion and Order (Trial Court Opinion), 12/31/01, at 6 (emphasis added). Indeed, both elements need not appear together as "in both an unfair advantage is possible." *Frowen*, 425 A.2d at 417.

[...]

Although the language used to define such advisor/advisee relationships has varied over time and in response to the circumstances established by the record, the Pennsylvania Supreme Court has focused, consistently, on the disparity in position between the parties to determine whether their relationship is, in fact, confidential. *See Weir by Gasper v. Ciao*, 521 Pa. 491, 556 A.2d 819, 825 (1989) (stating that a confidential relationship "is created between two persons when it is established that one occupies a superior position over the other; intellectually, physically, governmentally, or morally, with the opportunity to use the superiority to the other's disadvantage"). *See also Frowen*, 425 A.2d at 418 (quoting Restatement of Trusts 2d, § 2(b)) ("[a] confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind").

The court in *Zaborowski v. Hospitality Care Center of Hermitage, Inc.*, 60 Pa. D & C4th 474 (Ct. Cmn. Pleas, Mercer Cty. Pa. 2002), found that a plaintiff's claims against the defendant nursing home for breach of fiduciary duty arising from the defendants' alleged provision of substandard care survived the defendant's preliminary objections. While the court ruled that the fiduciary nature of such a relationship must be determined on a case by case basis, its analysis is instructive.

> Many if not most nursing home residents are in a vulnerable physical and/or mental state. Placing a loved one in such a facility necessarily entails trust on the part of the family as well as the resident. Since the residents reside in the home, the family has comparatively limited access and opportunity to learn if the resident is neglected or otherwise mistreated. If entrusting one's money to a receiver or conservator created a business relationship, one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities. *Zaborowski*, 60 Pa. D & C4th at 489, citing *Schenk v. Living Centers-East, Inc.*, 917 F. Supp. 432, 438 (E.D. La. 1996).

The United States District Court for the Eastern District of Louisiana squarely addressed whether those providing long-term care stand in a confidential relationship to residents such that fiduciary duties arise. In *Petre v. Living Centers-East, Inc.*, 935 F. Supp. 808 (E.D.La. 1996), Judge Fallon wrote:
A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

One is said to act in a "fiduciary capacity" when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. *Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.*, 623 So.2d 37, 40 (La.App. 1st Cir. 1993).

[T]he Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the Schenck court, "one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities" as those created by a business relationship. Schenck v. Living Centers-East Inc., et al, 917 F. Supp. 432, 437-38 (E.D.La. 1996).

This holding is consistent with cases uniformly affirming the notion that those who provide medical care stand in a confidential relationship with and fiduciaries to those to whom the care is provided. *Alexander v. Knight*, 197 Pa.Super. 79, 177 A.2d 142 (1962). [1]

Thirdly, Defendants argue that Plaintiffs claim for breach of a fiduciary duty is barred by the "gist of the action" doctrine. The law in Pennsylvania provides that where a valid contract claim is plead, it survives Defendants' preliminary objection.
"[I]t is premature to dismiss a contract claim as being redundant to a tort claim at the pleading stage. Lebish v. Whitehall Manor Inc., 57 Pa. D. & C.4th 247, 251 (2002); see Zaborowski v. Hospitality Care Center of Hermitage Inc., 60 Pa. D. & C.4th 474, 483-84 (Mercer Cty. 2002). In these cases, the defendants contracted to provide care to the plaintiffs. In Zaborowski, the plaintiff alleged that defendant "breached an admissions agreement ... to provide her 'with safe and reasonable care in a safe environment .....' " *Id.* at 483. The defendant filed a preliminary objection, in the nature of a demurrer, contending that plaintiffs claim is one sounding in tort rather than contract. *Id.* The court refused to sustain the objection. The court reasoned that the plaintiff "has pled the existence of a contract .. ," id. at 484, and its "language ... as set forth in the complaint, imposes a duty to provide 'safe and reasonable care in a safe environment,' as well as 'services which would ... maintain the highest practicable, physical, mental and psychosocial [sic] well being.' " *Id.* at 484-85. The court then concluded, "If the complaint is to be believed, [defendant] failed to meet these requirements and therefore breached the contract." *Id.* at 485.

Similarly, in Lebish, the defendant contended that the case sounded primarily in tort and that Pennsylvania law required an associated contract claim to be dismissed, referring to the contract claim as redundant. Lebish, 57 Pa. D. & C.4th at 250. The court stated that "[b]ased upon the averments in the complaint, there are allegations of wrongdoing that may be exclusively contract matters and other allegations that may be exclusively tort matters." *Id.* The court recognized that the alleged tortious misconduct was identical to the contractual misconduct. *Id.* This factor, however, did not prohibit the plaintiffs from proceeding under both theories. *Id.* The court refused to dismiss the contract count, and allowed discovery to refine the many allegations stated by the plaintiffs against the defendant. Id.

Cruz v. Roberts, 2005 WL 1349615 *229, Pa.Com.PI. 2005. Plaintiff may plead both an action in tort and in contract. Defendants' preliminary objection to Plaintiff's breach of fiduciary duty claim should be denied.

D. NEGLIGENT MISREPRESENTATION

Plaintiff has sufficiently plead a claim for negligent misrepresentation. A "negligent" misrepresentation is a misrepresentation which arises from want of reasonable care or competence in obtaining or communicating information, *Woodward v. Dietrich, 378 Pa.Super. 111, 548 A.2d 301 (1998).* Negligent misrepresentation differs from intentional misrepresentation in that to commit the former "the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth." *Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994).*

Negligent misrepresentation requires proof of: (1) a misrepresentation of material fact; (2) representor must either know of the misrepresentation, must make misrepresentation without knowledge as to it truth or falsity, or must make the misrepresentation under the circumstances in which he ought to have known of its falsity; (3) representor must intend representation to induce another to act on it; and (4) injury must result to party acting upon reasonable reliance on the misrepresentation. *Bortz v. Noon, 556 Pa. 489, 729 A.2d 555 (1999).*

Defendants negligently misrepresented that they could and would meet the medical and health care needs of Richard Hopkins. The Defendants represented that they would provide him with the following:
a. Individualized medical plan of care and necessary physician treatment orders, and that said plan and orders would actually be followed at all times;

b. Ancillary services, including inpatient and outpatient medical services to be available on an emergent basis, and that said services would actually be available for Mr. Hopkins;

c. Nursing services to attain or maintain the highest physical, mental and psycho-social well-being of each resident through assessment and individual plans of care, and that said services would actually be available for Richard Hopkins regardless of his verbal and cognitive ability to confirm whether said services were administered;

d. Continuing nursing education to ensure clinical competencies consistent with accepted standards of nursing practice, and that said education would actually be to the benefit of Richard Hopkins; and,

e. Food services and the need to ensure that Richard Hopkins did not miss a meal due to staff shortages or neglect.

Paragraph 98 of Plaintiffs Complaint.

Defendants made the representations under circumstance and at a time when they ought to have known the falsity of these representations. The representations were made with the intent to induce Mr. Hopkins and his family to act on the representations and admit him to Highland Park Care Center. Mr. Hopkins and his family justifiable relied on Defendants misrepresentations. This reliance on Defendants' misrepresentations resulted directly in injury to Richard Hopkins.

Defendants assert that Plaintiffs claim for negligent misrepresentation should be dismissed under the “gist of the action” doctrine. Plaintiffs claim for negligent misrepresentation should not be dismissed under this doctrine by preliminary objections. As stated previously, a claim should not be dismissed under the doctrine at this point in the proceedings.
“[I]t is premature to dismiss a contract claim as being redundant to a tort claim at the pleading stage. Lebish v. Whitehall Manor Inc., 57 Pa. D. & C.4th 247, 251 (2002); see Zaborowski v. Hospitality Care Center of

Hermitage Inc., 60 Pa. D. & C.4th 474, 483-84 (Mercer Cty. 2002). In these cases, the defendants contracted to provide care to the plaintiffs. In Zaborowski, the plaintiff alleged that defendant “breached an admissions agreement ... to provide her ‘with safe and reasonable care in a safe environment ....’ ” *Id.* at 483. The defendant filed a preliminary objection, in the nature of a demurrer, contending that plaintiffs claim is one sounding in tort rather than contract. *Id.* The court refused to sustain the objection. The court reasoned that the plaintiff “has pled the existence of a contract ...,” id. at 484, and its “language ... as set forth in the complaint, imposes a duty to provide ‘safe and reasonable care in a safe environment,’ as well as ‘services which would ... maintain the highest practicable, physical, mental and psychosocial [sic] well being.’ ” *Id.* at 484-85. The court then concluded, “If the complaint is to be believed, [defendant] failed to meet these requirements and therefore breached the contract.” *Id.* at 485.

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Cruz v. Roberts, 2005 WL 1349615 *229, Pa.Com.PI. 2005. Plaintiffs claim for negligent misrepresentation should not be struck based upon the “gist of the action” doctrine.

Defendants incorrectly characterize Plaintiffs negligent misrepresentation claim as a direct liability claim. As previously stated, Plaintiff is not seeking a claim for corporate negligence. The corporate negligence doctrine is not applicable in this case. In determining "if corporate negligence applies, the Pennsylvania courts examine the role that the institution plays in the healthcare of the individual [...]". *Guernsey v. Country Living Personal Care Home(s), Inc.*, 2005 WL 2787057 *4 (M.D.Pa.). Corporate negligence was extended to hospitals and HMO's based upon their role in the "total healthcare" of the patients/subscribers. See *Thompson v. Nason Hosp.* 591 A.2d 703 (1991) and *Shannon v. McNulty*, 718 A.2d 828 (Pa.Super.Ct. 1998). Highland Park Care Center was not responsible for Mr. Hopkins' total healthcare. When healthcare was needed, a hospital or physician was contacted. Thus, Plaintiffs action for negligent misrepresentation is not based upon a direct liability claim against the corporation. Defendants' preliminary objection to Plaintiffs claim for negligent misrepresentation should be denied.

E. Neglect of Care of Dependant Person Statute ("NCDPS")

It is well settled in Pennsylvania that "[t]he 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 ...." *Braxton v. Penn DOT, 160 Pa. Commw. 32, 45, 634 A.2d 1150, 1157 (1993). See Lutheran Distributors v. Weilersbacher, 437 Pa. Super. 391, 650 A.2d 83 (1994).* 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. There must be a direct connection between the harm sought to be prevented by the statute and the injury. *Wagner v. Anzon Inc., 453 Pa. Super. 619, 627, 684 A.2d 570, 574 (1996).* The Superior Court held that Wagner and other individuals in the class action were not entitled to maintain a cause of action for negligence per se based upon the defendant's violation of the Philadelphia Air Management Code of 1969, because the purpose of the code was to protect the atmosphere of the City of Philadelphia and the general public as opposed to a particular class of individuals such as the plaintiffs.

The Superior Court in *Cabiroy v. Scipione, 767 A.2d 1078 (Pa. Super. 2001)*, discussed the concept of negligence per se and held that it is the plaintiffs burden to establish that the purpose of the particular statute is to protect the interest of a group of individuals as opposed to the general public, and whether the statute clearly applies to the conduct of the defendant, citing *Wagner, supra. Cabiroy* sought to enforce the federal standards of the Food and Drug Administration against a defendant physician arising out of that physician's treatment of the plaintiff by injection of liquid silicone. In analyzing the claim on appeal and remanding to the trial court for a new trial on the issue of negligence per se, the court reiterated the principles set forth in *Wagner* and other cases holding "[t]he 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, supra* at 1082.

The NCDPS is designed to protect a very specific group of persons - dependent persons. 18 PA. C.S.A. § 2713. In fact, it is entitled "Neglect of Care Dependent Persons", and the act is violated when a caretaker fails 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. *Id.* (emphasis added). This act was clearly not intended to protect every member of society.

In *Congini v. Portersville Valve Co.*, the Pennsylvania Supreme Court held that serving alcohol to a person less than twenty-one (21) years of age in violation of a criminal statute, 18 PA. C.S.A. § 6308, was negligence per se. 504 Pa. 157, 161-163 (Pa. 1983). Section 6308 of the Crimes Code represents an obvious legislative decision to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons less than twenty-one years of age. Thus, we find that defendants were negligent per se in serving alcohol to the point of intoxication to a person less than twenty-one years of age, and that they can be held liable for injuries proximately resulting from the minor's intoxication. The court sets the General Assembly's intent apart from other criminal statutes stating,

> "[H]ere we are not dealing with ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects of alcohol."

Id. at 161.

Likewise, Richard Hopkins and other care - dependent persons are not able bodied individuals. They are persons who require help with the basic necessities of life, such as ambulating and eating. The General Assembly intended to take care of our young, those who are incompetent to handle alcohol's effects just as it intended to take care of our elderly, those who are dependent on others to care for them. These statutes are very similar in purpose and should be evaluated similarly to allow negligence per se actions.

F. UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ("UTPCPL")

Under Pennsylvania law, Plaintiffs claim for non-medical services under the UTPCPL is well founded. Plaintiffs claims against Defendants under the UTPCPL are for the non-medical services as opposed to the medical services provided by the nursing home. "[A] plaintiff can maintain a private cause of action against a nursing home under the UTPCPL based only upon the non-medical services provided by the nursing home." *Zaborowski v. Hospitality Care Center of Hermitage, Inc.*, 60 PA. D. & C. 4th 474, 493-494 (Ct. Cmn. Pleas, Mercer Cty., PA. 2002).

The courts have recognized that nursing homes are not "typical" healthcare providers in that they provide a combination of services to their residents. All of the holdings in the cases cited by Defendants apply to the provision of medical services, but do not address the issue of when a medical provider also provides non-medical services. As noted by the court in *Zaborowski* nursing homes provide more than medical services. "Nursing homes are not one-dimensional business enterprises, but instead they are hybrid organizations, offering both medical and non-medical services." *Id.* 493.

The *Zaborowski* court referred to the decision in *Chalfin v. Beverly Enterprises Inc.*, 741 F.Supp. 1162 (E.D.Pa. 1989). Holding that the UTPCPL applied to non-medical services, the *Chalfin* Court reasoned as followed:

> It is clear that the legislature intended to give the Consumer Protection Act the broadest scope possible. *See [Culbreth v. Lawrence J. Miller, Inc., 328 Pa.Super. at 382, 477 A.2d at 495.* To facilitate this, the legislature specifically utilized broad terms, merely restricting the scope of the Act to goods and services purchased for "personal, family or household services." Clearly, Mrs. Chalfin purchased health care "services" from the defendant, and did so for her own personal benefit. It is uncontroverted that the legislature's paramount goal was to provide a remedy for those individuals who are the victims of fraudulent conduct. Certainly, such protection is no less compelling in the context of a provider of health care services to the elderly and infirm than to a consumer who, in reliance upon a salesperson's misrepresentation, purchases a defective product in a traditional sales transaction. To find otherwise would allow unscrupulous institutions the upper hand, leaving individuals like Mrs. Chalfin vulnerable to fraudulent practices, a burden the legislature clearly did not intend to place on the consumer. Accordingly, I find that the health care services provided by the Rosemont facility provided a "personal" benefit to Mrs. Chalfin, as that term is used in *Section 201-9.2*, and thus falls within the broad scope of the Act.

Id. at 1175-1176 (citations and footnotes omitted).

The court in *Goda v. White Cliff Leasing Partnership*, 2003 WL 22841695, 62 Pa.D. &C.4th 476 provides guidance in distinguishing between nursing home medical and non-medical services. "[F]or purposes of determining the applicability of the UTPCPL, medical services are those evaluative, diagnostic, preventative, therapeutic and supervisory services that are customarily provided by or at the direction of a physician or health care worker in order to treat a patient." *Id.* at 489. The Court directed the Plaintiff to file an amended complaint and in footnote 6 provided the following: "For example, nutrition could refer to the development of a proper dietary plan, which would be a medical service, or it could refer to physically delivering plaintiff decedent meals on a timely basis, which would be a non-medical service." *Id.* at 491.

Plaintiff's Complaint asserts that Defendants failed in violation of the UTPCPL to:
• Sufficiently staff so that necessary nutrition was delivered to Mr. Hopkins as described in Paragraph 44 and 45;

• Sufficiently staff so that topical ointments were delivered and applied as described in Paragraph 46;

• Sufficiently staff so that Mr. Hopkins received assistance with repositioning as described in Paragraph 47;

• Sufficiently staff so that supplies were ordered in a timely manner as described in Paragraph 48;

• Sufficiently staff so that surfaces in Mr. Hopkins wheelchair causing him injury were not removed as described in Paragraphs 52 and 53;

• Sufficiently staff so that care plans were updated in a timely manner as described in Paragraph 54.

Defendants fraudulent conduct was its actions in holding themselves out to the public as being able to provide care to cover all of the needs of its residents. The Defendants represented their ability to care for all of the residents needs in spite of their awareness of survey results and governmental unit citations indicating failures in providing adequate and appropriate care to their residents as indicated in Paragraphs 65 through 66. The pleadings clearly set out facts such as the level of staffing from which fraud could be inferred. The level of staffing was so low what it was enormously unreasonable for Defendants to honestly believe that adequate care was being provided.

These failures deprived Mr. Hopkins of the most basic items of care every human being needs. People need to be given liquids when they are thirsty. People need to be washed when they are dirty. People need to be delivered their medicine and transported with care. These actions are not professional medical care. They are items of human dignity every mother knows to perform for a newborn child. Most importantly, people and resources are needed to do them. Depriving a nursing home of those people and resources is a violation of the UTPCPL. Defendants' objections to this point are without merit and should be overruled. Plaintiffs Complaint is sufficiently specific in accordance with Pa.R.Civ.P. 1019.

“Allegations will withstand challenge under §1019(a) if (1) they contain averments of all of the facts the plaintiff will eventually have to prove in order to recover [...] and (2) they are ‘sufficiently specific so as to enable defendant to prepare his defense,’ [...]” *Smith v. Wagner*, 403 Pa.super.316, 319, 588 A.2d 1308, 1310 (1991) (citations omitted); *Yacoub v. Lehigh Valley Medical Associates*, 805 A.2d 579, 588 (Pa. Super. 2002). “[T]he complaint must not only apprise the defendant of the claim being asserted, but it must also summarize the essential facts to support the claim.” *Krajsa v. Keypunch*, 424 Pa.Super. 230, 235, 622 A.2d 355, 357 (Pa. Super. 1993). “[I]n determining whether a particular paragraph in a complaint has been stated with the necessary specificity, such paragraph must be read in context with all other allegations in that complaint. Only then can the court determine whether the defendant has been put upon adequate notice of the claim against which he must defend.” *Yacoub* at 589.

Records necessary to further differentiate between the medical and non-medical services that were provided may be obtained through discovery. If discovery provides such additional facts, Plaintiff will file a Motion to Amend the Complaint in accordance with Pa.R.C.P. 1033. Finally, Plaintiff is not seeking to recover from Dependants under the corporate negligence doctrine. As previously discussed, this is not a direct liability claim under the UTPCPL. Defendants' preliminary objections to the UTPCPL claim should be denied.

G. Federal Regulations

Defendants confuse the court's holding in *Goda v. White Cliff Leasing Partnership,* 62 Pa. D&C 4th 476 (C.P. Mercer 2003) to hold that a plaintiff may not bring a negligence per se claim under any OBRA provisions except 42 C.F.R. §483.25(j) (each resident must be provided with "sufficient fluid intake to maintain proper hydration and health"). Defendants' use of *Goda* in their preliminary objections is a misrepresentation of the case.

In *Goda,* the court held that the plaintiff could not maintain an action for negligence per se, with the exception of 42 C.F.R. § 483.25, under the provisions and regulations *cited in* plaintiffs amended complaint. *Id.* (emphasis added). The list of provisions and regulations the plaintiff cited is not given in the case. Therefore, it is impossible to know which provisions and regulations of the Ominous Budget and Reconciliation Act ("OBRA") the court looked at and which it did not consider. Furthermore, the court held that the plaintiff could base negligence per se actions upon OBRA, specifically, provisions that deal with violations that proximately cause harm. *Id.* Only those provisions and regulations that deal with the defendant's failure to develop policies and procedures to attain goals set forth in the provisions and regulations would not support actions for negligence per se. *Id.* (Emphasis added).

Each violation of OBRA must be individually addressed in order to determine if a claim for negligence per se can be established. The court applied the test of § 286 of the Restatement (Second) of Torts in *McCain v. Beverly Health and Rehabilitation Services, Inc.*, a nursing home case in which the plaintiff died from pressure sore wounds. 2002 WL 1565526 (E.D. Pa. 2002). In *McCain,* the Eastern District of Pennsylvania, sitting in diversity, held that OBRA could be used as a basis for negligence per se claims on behalf of the plaintiffs estate, holding the absence of a private right of action was not dispositive when the policy of the statute geared to protect a particular group of individuals would be furthered. *Id.* The court held that regulations set forth in 42 C.F.R. § 483 - not specified as to only § 483.25 - fit into this category. In particular, the court held,

> "[T]he lack of a private cause of action is not enough to preclude the use of the relevant policies expressed in the statutes and regulations. The furtherance of those protective policies is a basis for delineating a nursing home's tortious duty in these circumstances."

Id. at *1.

Defendants have misrepresented *Goda* to hold that a plaintiff cannot claim negligence per se for violations of OBRA. This is simply not true. A court must look at each alleged violation individually. Plaintiff has stated a claim for negligence per se because he has demonstrated violations of OBRA, a statute designated to protect an individual group of persons of which Hopkins was a member. Those provisions were designed to protect particular interests of residents to receive adequate and proper care from Highland Park Care Center. These provisions were not merely a goal. They were designed to protect health and well-being. These violations were of regulations and provisions established to protect Richard Hopkins and other residents of nursing homes. When these provisions were violated, Richard Hopkins was injured as a result. The four part of test of § 286 Restatement (Second) of Torts is met, and Plaintiff has properly stated a cause of action for negligence per se.

H. PENNSYLVANIA DEPARTMENT OF HEALTH INVESTIGATIONS

Plaintiff's complaint refers to citations by governmental units for failing to provide adequate and appropriate care to their residents. (Paragraph 65 through 66 of Plaintiffs Complaint.) Plaintiff is simply stating material facts on which the action was based in a concise form as required by Pa.R.C.P. 1019(a). This rule has been interpreted to require that the complaint give notice to the defendant of an asserted claim, and synopsize the essential facts to support it. *Krajsa v. Keypunch, Inc.*, 622 A.2d 335, 357 (Pa. 1993). These deficiencies are material to the proof of the cause of action. *Jubelirer v. Rendell,* 904 A.2d 1030 (Pa. Commw. Ct. 2006), *citing* 710 A.2d 108, 114 (Pa. Commw. Ct. 1998). Whether Defendants were on notice of their deficiencies is a key issue. Therefore, the assertions should not be struck from the complaint.

I. DIRECT LIABILITY

Plaintiff is not proceeding under the corporate negligence doctrine. The corporate negligence doctrine is not applicable in this case. In determining "if corporate negligence applies, the Pennsylvania courts examine the role that the institution plays in the healthcare of the individual [...]". *Guernsey v. Country Living Personal Care Home(s), Inc.*, 2005 WL 2787057 *4 (M.D.Pa.). Corporate negligence was extended to hospitals and HMO's based upon their role in the "total healthcare" of the patients/ subscribers. *See Thompson v. Nason Hosp.* 591 A.2d 703 (1991) and *Shannon v. McNulty*, 718 A.2d 828 (Pa.Super.Ct. 1998). Highland Park Care Center was not responsible for Mr. Hopkins' total healthcare. When healthcare was needed, a hospital or physician was contacted. Thus, Plaintiffs is not seeking direct liability from the corporation.

J. PLAINITIFF IS NOT REQUIRED TO SET FORTH THE ALLEGATIONS AGAINST EACH DEFENDANT IN SEPARATE PARAGRAPHS.

Count I of Plaintiffs Complaint does not assert three separate causes of action.

As previously stated, Plaintiff is not proceeding under the corporate negligence doctrine. The negligence per se claim based upon the violation of the NCDPS is in a separate count. As stated in Count I, the regulations detailed in Paragraph 69 are evidence of Defendants' negligence. The regulations are not listed to support a claim for negligence per se. Plaintiffs Complaint conforms to Pa.R.Civ.P. 1020(a).

K. PLAINTIFF'S COMPLAINT IS SUFFICIENT TO APPRISE DEFENDANTS OF THE ALLEGATIONS AGAINST THEM.

Plaintiff's Complaint provides detailed and specific facts in compliance with the Pennsylvania Rules of Civil Procedure. Each and every Paragraph and/or subParagraph of the Complaint that Defendants are attempting to have stricken state the material facts on which this cause of action is based, and the material facts are stated in a concise and summary form. *See* Pa.R.C.P. 1019(a). All averments of time and place are averred specifically. *See* Pa.R.C.P. 1019(f). Further, as Defendants are aware, any part of a pleading may be incorporated by reference into another part of the same pleading. See Pa.R.C.P. 1019(g). Not every single Paragraph and/or sub-Paragraph needs to repeat each and every factual allegation to support the allegation contained within that individual Paragraph and sub-Paragraph.

In a complaint, a plaintiff is required to state the "material facts on which a cause of action is based ... in a concise and summary form." Pa.R.C.P. 1019(a). This rule has been interpreted to require that the complaint give notice to the defendant of an asserted claim, and synopsize the essential facts to support it. *Krajsa v. Keypunch, Inc.*, 622 A.2d 335, 357 (Pa. 1993). 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* 588 A.2d 1308, 1310 (Pa. Super. 1991); *Milk Marketing Board v. Sunnybrook Dairies, Inc.*, 370 A.2d 765 (Pa. Cmwlth. 1977).

Here, the Complaint is sufficiently specific to apprise Defendants of the claims against them. Defendants' conduct is described, in detail, at Paragraphs 11 through 34. Mr. Hopkins' injuries are stated, in detail, at Paragraphs 35 through 57. Plaintiff's Negligence theories against Defendants are set out in detail in Count I of the Complaint. Plaintiff goes so far as to allege specific violations of federal regulations. For Defendants to now argue that Plaintiffs Complaint fails to apprise them of the allegations against them is incomprehensible.

As required by *Baker v. Rangos*, 324 A.2d 498, 505-06 (Pa. Super. 1974), the Complaint contains averments of all the facts that the plaintiff will eventually have to prove in order to recover... and they are sufficiently specific so as to enable Defendants to prepare a defense. The Complaint describes the neglect and abuse suffered by Mr. Hopkins and the heinous conduct committed

by Defendants for the purpose of placing profits over people. The injuries suffered by Mr. Hopkins are evidence of Defendants' negligence and reckless indifference for the rights of their residents, including Mr. Hopkins.

Further, there is not one "catch-all" allegation in the Complaint. An example of a "catch all" allegation is one that reads "otherwise failing to use due care and caution under the circumstances." *See Connor v. Allegheny General Hospital*, 461 A.2d 600, 601 (Pa. 1983). Not one of the Paragraphs and/or sub-Paragraphs of the Complaint contains the language "otherwise failing to use due care and caution under the circumstances." Thus, *Connor* is inapplicable.

The Paragraphs and Sub-Paragraphs to which Defendants object must be read in context with the entire Complaint, which alleges the conduct of Defendants that caused Mr. Hopkins' injuries and how said conduct was negligent. Every Paragraph and/or Sub-Paragraph of the Complaint contain facts that support the allegations surrounding Mr. Hopkins' injuries, which include severe permanent physical injuries resulting in pain, suffering and disfigurement, mental anguish and humiliation, loss of capacity for enjoyment of life, expense of otherwise unnecessary hospitalizations, and aggravation of his pre-existing medical conditions. An elderly person's environment is as significant to their health and well-being as the treatment they receive from their caretakers.

WHEREFORE, Plaintiff respectfully request that this Honorable Court overrule

Defendants' Preliminary Objections.

Respectfully Submitted,

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Footnotes

1 The fiduciary nature of the physician-patient relationship dates well before the *Alexander* decision. Indeed, the framing of this relationship in a fiduciary fashion was first noted in the eighteenth century. See *e.g., Am.J.Ostet.Gyecol,* Sept. 1996, Vol. 175, p. 523-27 (noting that in the English speaking world, the concept of medicine as a fiduciary profession was the creation of two doctors in the eighteenth century, John Gregory of Scotland and Thomas Percival of England). Such a framework is still recognized by the American Medical Association. "[the doctor-patient] relationship is based on a fiduciary, rather than a financial responsibility." *American Medical Association,* Ending the Patient-Physician Relationship, found at http:// www.ama-assn.org/ ama/pub/category/4609.html, last visited May 9, 2005. Moreover, this relationship has been recognized by courts beyond the Commonwealth. *See e.g., Canterbury v. Spence,* 464 F.2d 772 (D.C. Cir. 1972) (recognizes physician's fiduciary duty to patient); *Moore v. University of California Regents,* 793 P.2d 479 (Cal. 1990) (finding that doctor breached fiduciary duty). *Benton v. Snyder,* 825 S.W.2d 409, 414 (Tenn. 1992); *Shadrick v. Coker,* 963 S.W.2d 726 (Tenn. 1998); *Ison v. McFall,* 400 S.W.2d 243 (Tenn. Ct. App. 1964); *Grubbs v. Barbourville Family Health,* 120 S.W.3d 682 (Ky. 2003).

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