2012 WL 6812209 (Pa.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Pennsylvania.
Dauphin County

Linda F. LAFF, Executor of the Estate of Lillian Glass, deceased, Plaintiff,
v.
JEWISH HOME OF GREATER HARRISBURG, d/b/a the
Residenceand Jewish Home of Greater Harrisburg, Defendants.

No. 2009CV10920.
May 9, 2012.

Plaintiff's Memorandum of Law in Opposition to Defendants', Jewish Home of Greater Harrisburg, d/b/a the Residence and Jewish Home of Greater Harrisburg, Motion for Judgment on the Pleadings

Ruben J. Krisztal, Esquire, Attorney Identification No. 202716, Wilkes & McHugh, P.A., Three Parkway, 1601 Cherry Street, Suite 1300, Philadelphia, PA 19102, 215-972-0811, 215-972-0580 (fax), Email: rkrisztal@wilkesmchugh.com, This is not an Arbitration Matter. an Assessment of Damages Hearing is Required. Jury Trial Demanded., Attorney for Plaintiff, Linda F. Laff, Executor of the Estate of Lillian Glass, deceased.

Plaintiff, Linda Laff, Executor of the Estate of Lillian Glass, deceased, by and through counsel, Wilkes & McHugh, P.A., hereby files the within Memorandum of Law in Opposition to Defendants' Jewish Home of Greater Harrisburg, d/b/a The Residence and Jewish Home of Greater Harrisburg ("Defendants") Motion for Judgment on the Pleadings, as follows:

I. PROCEDURAL AND FACTUAL HISTORY

This case involves the **neglect** and abuse suffered by Lillian Glass as a result of Defendants' action and/or inactions. Ms. Glass was a resident at Defendants' Jewish Home of Greater Harrisburg, d/b/a "The Residence," an assisted living facility (hereinafter "the residence") from about June 6, 2005, through August 24, 2008. Ms. Glass was transferred to the Jewish Home of Greater Harrisburg nursing home unit (hereinafter "nursing home") on August 29, 2008, where she remained until October 2, 2008. Plaintiff has alleged that Defendants **neglected** and abused Ms. Glass at various times during her residency at the facilities. Specifically, Plaintiff has alleged, *inter alia*, that Defendants failed to provide the necessary staffing and resources at these facilities to meet the needs of their residents, including Ms. Glass, in order to maximize revenues, and that these acts and/or omissions caused Ms. Glass to suffer abuse and **neglect**.

Plaintiff initiated this nursing home abuse and **neglect** case against all Defendants on September 8, 2009. [1] Plaintiff's Amended Complaint sets forth several theories of liability and damages that remain in this case, including corporate negligence, negligence, professional negligence, negligence *per se*, and punitive damages.

On March 14, 2012, Defendants filed a Motion for Summary Judgment to dismiss Plaintiffs claims for punitive damages, negligence, corporate negligence and statutory claims, and to dismiss due to lack of subject matter jurisdiction over certain claims. [2] Plaintiff filed her response on April 20, 2012. [3]

On April 20, 2012, before the latest motion was ruled on, Defendants filed a Motion for Judgment on the Pleadings to **yet again** have this Court consider their same arguments to dismiss Plaintiffs claims for punitive damages, negligence, corporate negligence and statutory claims, and to dismiss due to lack of subject matter jurisdiction over certain claims.

As this Court is aware, on May 3, 2012, Defendants' Motion for Summary Judgment was **denied in its entirety.** *See* 5/3/12 Order (attached hereto as **Exhibit "G"**).

II. INTRODUCTION

As can be seen from the above procedural history, Defendants have presented the **same arguments** to this Court time and time again. With regard to Defendants' most recent filing, the Motion for Judgment on the Pleadings, Plaintiff sent a letter to defense counsel urging them to reconsider this motion in light of this fact and withdraw their motion. [4] Defendants responded on May 2, 2012, declining to do so, but admitting that "certain arguments are being restated" and suggesting that Plaintiff simply file a response incorporating her "currently pending response" [5] to Defendants' Motion for Summary Judgment. Because Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings are evaluated under the **same legal standard** (with the summary judgment motion allowing for consideration of documents other than just the Pa.R.C.P. 1017 Pleadings), Plaintiff respectfully requests that this Court deny the Motion for Judgment on the Pleadings, as the Motion for Summary Judgment was recently denied in its entirety by this Court.

III. STATEMENT OF THE QUESTIONS PRESENTED

1. Should Plaintiffs claim for punitive damages be dismissed?

Answer: No. There is no basis in law or fact for dismissing Plaintiffs claim for punitive damages.

2. Should Plaintiffs claim for corporate negligence be dismissed for either the personal care home or the skilled nursing facility?
Answer: No. There is no basis in law or fact for dismissing Plaintiffs claim for corporate negligence.

3. Should Plaintiffs claim for negligence per se, for Defendants' violation of the **Neglect** of Care-Dependent Person Statute, 18 Pa.C.S.A. § 2713, be dismissed?
Answer: No. There is no basis in law or fact for dismissing Plaintiffs claim for negligence per se.

4. Should Plaintiffs claim for negligence *per se,* for Defendants' violation of of the Health Care Facilities Act be dismissed?
Answer: Plaintiff has made no such negligence per se claims.

5. Does this Court lack subject matter jurisdiction of the Health Care Facilities Act?
Answer: Again, Plaintiff has made no such claims under this act, thus jurisdiction is proper in this Court.

Again, this Court has already ruled on each of these issues, except for the issue of corporate liability.

IV. UNDERLYING FACTS

This nursing home **neglect** and abuse case concerns the responsibilities and duties of those who care for the **elderly** and disabled, and the legal consequences that should be imposed upon those who disregard their obligations. Defendants' recklessness and **neglect** caused this unfortunate chain of events. Defendants' practice of understaffing their facilities, failing to implement and

enforce proper procedures, and failing to provide Ms. Glass adequate supervision, nutrition, hydration, and wound care resulted in needless harm to Ms. Glass.

Ms. Glass was admitted to the Residence for Senior Living ("the Residence") on June 6, 2005. She fell several times during her residency here. [6] She fell twice in August 2008, the second fall resulted in her fracturing her hip. Consequently, Ms. Glass suffered needles harm and pain, and developed care issues which she would have for the rest of her life.

After undergoing surgical intervention for her broken hip she sustained at the Residence, Ms. Glass was admitted to the Jewish Home of Greater Harrisburg nursing home unit (hereinafter "the Facility" or "nursing home") on August 29, 2008 and remained there until October 2, 2008. [7] During this approximately seven week stay, Ms. Glass was "subjected to woefully substandard monitoring, assessment, care and treatment." [8] She suffered pain, injuries including the development/worsening of pressure ulcers, multiple urinary tract infections, worsening of her left great toe wound leading to osteomyelitis with systemic features, dehydration, and weight loss. [9] As demonstrated by the pleadings, Corporate Defendants were aware of the problems at the Facility and failed to prevent their continuation. [10]

The Facility was issued a Provisional License after the revisit survey of 1/23/09, when surveyors found deficiencies identified in the 10/6/08 survey (in which the Facility received three (3) G deficiencies and one (1) D deficiency for care failure with respect to Ms. Glass) had not been adequately corrected. [11] Again, the Board of Directors (governing body) including Mr. Levy was made aware by him of the 10/16/08 survey deficiencies. The failure of this Board to make certain these failures of care were corrected showed that the Board was not doing its duty to protect its residents, and Mr. Levy whose job it was, to protect residents, like Ms. Glass, failed in his job and thereby allowed other residents to suffer harm from care issues similar to those endured by Ms. Glass.

V. LEGAL STANDARDS

A Motion for Judgment on the Pleadings may only be granted where the pleadings demonstrate no genuine issues of fact exist and the moving party is entitled to judgment as a matter of law, the moving party's right to succeed is certain, and the case is so free from doubt that a trial would be a fruitless exercise. *Wilcha v. Nationwide Mut. Fire Ins. Co.,* 87 A.2d 1254, 1258 (Pa. Super. 2005); *Corbett v. Richmond Township,* 975 A.2d 607, 612 (Pa. Cmwlth. 2009). All averments of fact properly pleaded in the non-moving party's pleadings must be taken as true and only the facts that the opposing party has specifically admitted can be construed against her. *Wilcha,* 87 A.2d at 1258. The Court may consider the pleadings themselves **and** the documents or exhibits properly attached to them. *Id.* If the pleadings of any party indicate that there is any disputed or unresolved question relevant to an issue raised by the pleadings, the motion must be denied. *Id.*

VI. LEGAL ARGUMENT

A. THIS COURT HAS PROPER JURISDICTION OVER THIS MATTER

Initially, Plaintiff asserts that this issue is barred by the law-of-the-case doctrine. Previously, on or about November 28, 2011, Defendants filed Preliminary Objections to Plaintiff's Amended Complaint, and moved to dismiss based on lack of subject matter jurisdiction under HCFA. By Order dated March 2, 2012, this Honorable Court concluded that jurisdiction was proper in this Court and overruled Defendants' Preliminary Objections.

Now, Defendants have asked this Court to consider the same legal question again - namely, whether this Court has proper jurisdiction. As such, Plaintiff proposes for this Court to decline Defendants' invitation to reconsider its ruling based on the law-of-the case doctrine and/or the coordinate jurisdiction rule. *See e.g., Samuel Grossi & Sons, Inc. v. U.S. Fidelity & Guar. Co.,* 2006 WL 3307465, at *3 n.5 (C.P. Phila. Nov. 10, 2006) ("Not only is the court's prior holding correct, it is also the law

of this case, and the court will not alter it now."); [12] *In re De Facto Condemnation and Taking of Lands of WBF Associates, L.P.*, 588 Pa. 242, 268, 903 A.2d 1192, 1207 (Pa. 2006) ("It is well established that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions on the same issue.").

Nevertheless, in abundance of caution, Plaintiff will - once again - address this "jurisdictional" argument below.

Plaintiff has clearly delineated the statutory provisions under which she has pled claims for negligence per se, and they do not include the statutes cited by Defendants. [13] Nonetheless, Defendants argue that violations of the HFCA and state regulations applicable to long term care facilities do not create a private right of action in favor of a family or nursing home patient. As evident in Plaintiffs Amended Complaint, Plaintiff does not bring forth a **cause of action** under the provisions of HCFA that Defendants cite, or any other federal or state regulation governing nursing homes. As is obvious, Plaintiff never once cites to 35 P.S. § 448.101 *et seq.* Additionally, any allegations in Plaintiffs Amended Complaint that can be conceived as references to violations of state and federal regulations governing nursing homes are *evidence* of Defendants' negligence in this matter, and are not being alleged as independent causes of action that Plaintiff is attempting to bring a claim under.

Violations of state and federal regulations establish a standard of care which nursing home operators must maintain if they choose to accept Medicaid and Medicare reimbursement. [14] Thus, Defendants' argument that such regulations cannot be used as a basis for civil liability is simply incorrect. In fact, Pennsylvania courts have held that failure to adhere to regulations may be used as evidence that a defendant nursing home was negligent in its treatment of a resident. *See, e.g., Franz v. HCR Manor Care, Inc.*, 64 Pa. D. & C.4th 457 (C.P. Schuylkill 2003). The Franz court held:

That is not to say, however, that the plaintiff shall be precluded from utilizing the principles enunciated in the federal regulations in attempting to prove that the defendant failed to conform to the standard of conduct that would be expected of a nursing home for the protection of its residents against unreasonable risks, and the failure on the defendant's part to conform to this standard under general principles of negligence as opposed to negligence *per se*. **A failure to comply with the aforementioned regulations** even though not negligence *per se* **may constitute some evidence of negligence.**

Id. at 470 (emphasis added). [15] Thus, the state and federal regulations applicable to nursing homes are evidence of the standard of care with which nursing homes are required to comply. Plaintiff seeks to establish that Defendants' violations of these regulations are clear evidence of corporate negligence, which she has pled in this matter. Therefore, Defendants' argument is meritless. Accordingly, the Subject Matter Jurisdiction of this Court is not at issue, and Defendants' request for Judgment on the Pleadings based on jurisdiction should be denied.

B. There Is A Valid Claim for Corporate Negligence [16]

1. The claim of corporate negligence is against corporate Defendants of The Jewish Home of Greater Harrisburg

Defendants' assertion that Plaintiff's claims of corporate negligence do not apply to the assisted living facility, the Residence, is also without merit. The assisted living portion of the Jewish Home is not a completely separate entity from the skilled living facility ("Facility"), against which Plaintiff brought separate claims of corporate negligence. The Jewish Home operates akin to a single entity. In fact, both facilities are located on the same campus, at the same address. Therefore, Plaintiffs claims of corporate negligence are against the Jewish Home of Greater Harrisburg corporate entity as a whole, and cannot be partitioned among the different facilities on the Jewish Home's campus.

2. Scampone is controlling authority in this case

Despite Defendants' assertion that *Scampone v. Grane Healthcare Co.,* [17] is on appeal, and their crystal-ball prediction that *Scampone* **"will be overturned,"** [18] Plaintiff is without Defendants' ability to see into the future, and (as defense counsel should be aware) this Court is bound to follow *Scampone. Baker v. Aetna Cas. & Sur. Co.*, 309 Pa. Super. 81, 92, 454 A.2d 1092, 1098 (1982) ("Until a decision of the Superior Court is overruled by the Supreme Court, that decision is the law of this Commonwealth.").

In the recent landmark decision, Scampone, the Superior Court held that nursing homes and their related corporate entities can be held directly liable for a resident's injuries under a theory of corporate negligence. [19] In *Scampone,* the corporate defendants operated the defendant nursing facility, controlled the facility's budget, and hired as well as trained all of the registered nurses at the facility. *Id.* at 979-987. The plaintiff in *Scampone* sought to hold the facility and its corporate operator directly liable for their failure to provide sufficient staff "such that employees were incapable of providing appropriate care to the nursing home residents, including [the plaintiffs decedent]" *Id.* at 971. In *Scampone,* the decedent's injuries included urinary tract infection, dehydration, and malnutrition, among others -- many of the same injuries Ms. Glass sustained in the case at bar. Id. As explained more fully below, the Pennsylvania Superior Court found that both corporate entities could be found liable under a theory of corporate negligence.

This Court is bound to follow *Scampone. Baker*, 309 Pa. Super. at 92, 454 A.2d at 1098. As the Superior Court observed:

> It has long been the law of this Commonwealth that: a lower court has no right to ignore the latest decision of the Superior Court of this Commonwealth on an issue which has been squarely decided. Until that decision should be overruled by the Superior Court itself or overruled by the Supreme Court, it is still the law of this Commonwealth, regardless of the decisions of any other court in the country, including the Federal courts.

Com. v. Ewansik, 360 Pa. Super. 476, 478, 520 A.2d 1189, 1190 (1987); *see also McClung v. Breneman*, 700 A.2d 495, 497 n.3 (Pa. Super. 1997) (a Superior Court opinion is binding precedent unless the Supreme Court overturns it, even when the Supreme Court has granted allocatur but has not yet rendered a decision). Thus, unless *Scampone* is overturned by the Pennsylvania Supreme Court, it is controlling law and must be followed by this Court. [20]

3. The corporate negligence doctrine is applicable to this case to both the Residence and the Facility of Jewish Home of Greater Harrisburg

Under the doctrine of corporate negligence, "a corporation is held directly liable, as opposed to vicariously liable, for its own negligent acts." *Welsh v. Bulger*, 548 Pa. 504, 513, 698 A.2d 581, 585 (Pa. 1997). Our Supreme Court first applied this theory to a healthcare facility in *Thompson v. Nason Hosp.*, 527 Pa. 330, 339, 591 A.2d 703, 707 (Pa. 1991). The doctrine imposes a "non-delegable duty" on an institution to "uphold a proper standard of care for patients." *Rauch v. Mike-Mayer*, 783 A.2d 815, 826 (2001). In short, "[a] cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself." *Welsh*, 698 A.2d at 585.

As noted above, the Superior Court in *Scampone* explicitly extended this doctrine to the corporate owners and operators of a nursing home. Specifically, the Superior Court held that both the nursing home and its corporate operator could be held directly liable under a theory of corporate negligence because they breached their duty to "formulate, adopt, and enforce adequate rules and policies to ensure quality care for patients." *Scampone*, 11 A.3d at 976. [21] Moreover, the court stated that "[i]f a healthcare provider fails to hire adequate staff to perform functions necessary to properly administer to a patient's needs, it has not enforced adequate policies to ensure quality care." *Id.* The record in the case at bar is replete with evidence of such corporate failures. Without question, the corporate negligence doctrine can be applied to nursing homes. [22]

In complete disregard for the evidence, Defendants claim that they cannot be held liable for their own corporate negligence because they (1) did not provide "total" and/or "comprehensive" healthcare "akin to that of a hospital;" (2) there are no specific allegations of system-wide or institutional failures; and (3) there is no evidence to suggest that Defendants knew or should have known about a breach of duty that harmed its residents. These arguments should be rejected for a number of reasons.

While there may be some sort of "total healthcare" requirement in garden variety medical malpractice cases, Defendants have not come forward with any authority to show that this requirement is applicable in cases of **neglect** and abuse. [23] In this case. Defendants were operating and managing the facilities, and were responsible for making sure that the residents of the facilities, including Ms. Glass, were being cared for properly. Unfortunately, Defendants failed miserably in that regard. [24]

To prevail on her corporate negligence claim, Plaintiff need only show that Defendants had "actual or constructive knowledge of the defect or procedures that created the harm" and that its negligence was "a substantial factor in bringing about the harm" to Ms. Glass. *Thompson v. Nason Hosp.*, 527 Pa. 330, 341, 591 A.2d 703, 708 (1991). Given the facts of this case, that task is quite easy.

A defendant is on constructive notice where it "should have known" about a patient's condition and/or fails to adequately supervise those providing patient care. *Brodowski v. Ryave, M.D.*, 885 A.2d 1045, 1057 (Pa. Super. 2005) (citing *Whittington v. Episcopal Hospital*, 768 A.2d 1144, 1154 (Pa. Super. 2001)). For example, the Superior Court found Judgment on the Pleadings inappropriate on the issue of constructive knowledge where a facility failed to implement sufficient procedures to assure that physicians' recommendations were followed. *Brodowski*, 885 A.2d at 1059-60.

As detailed in the pleadings, there is compelling evidence to show that Defendants knowingly failed to (1) properly fund and staff the facilities; (2) hire, retain, train and oversee their nursing staff and personnel; (3) enact and enforce policies and procedures to prevent injuries to the facilities' residents, including Ms. Glass; and (4) promulgate and enforce adequate policies and procedures to prevent injury and harm from occurring to the residents of the facilities, including Ms. Glass. [25] Certainly, under these circumstances, Defendants can be held liable for their own corporate negligence.

In summary, *Scampone* is controlling authority and must be followed. Under *Scampone*, a healthcare facility's related corporate entity can be held directly liable for their negligence resulting in a resident's injuries.

4. Defendants can be held directly liable for their independent acts of negligence, regardless of Scampone's outcome.

The notion that a corporation may be held liable for its independent acts of negligence "is a general rule of substantive law, so frequently applied that it is unnecessary to cite cases in support... *Pryor v. Chambersburg Oil and Gas Co.*, 376 Pa. 521, 528, 103 A.2d 425, 428 (1954). Thus, "where the case is founded on the proposition that the master [corporation] was independently negligent, and no attempt is made to restrict the alleged negligent acts to its servants alone, recovery can be had against the master, irrespective of the servant's liability." *Skalos v. Higgins*, 303 Pa. Super. 107, 113, 449 A.2d 601, 603-04 (1982).

Jewish Home did not just "manage" the Facility and Residence. It completely controlled both and involved itself in **all aspects** relating to resident care, including the decision of whether to appeal Department of Health survey citations. Defendants had constructive notice that the Facility and Residence were grossly and chronically understaffed. Instead of correcting their systemic failures, Defendants allowed them to continue in their attempt to pursue revenues. Clearly, under these circumstances, Defendants can be held directly liable for the harm caused by their corporate conduct. [26] To be clear, Plaintiff is seeking to hold Defendants directly liable for their own actions - for their own corporate wrongdoing.

As demonstrated, there is ample evidence to support Plaintiffs claim of corporate negligence in this case. Therefore, Defendants' Motion for Judgment on the Pleadings as to Corporate Liability should be denied.

C. There is a Valid Claim for Punitive Damages

"Punitive damages are awarded for outrageous conduct; that is, for acts done with a bad motive or with a reckless indifference to the interest of others." 1 Summary OF Pennsylvania Jurisprudence 2d, Torts ("Summ. Pa. Juris. 2d, Torts"), § 9:93, at 399 (2005). [27] For example, punitive damages may be awarded if the actor's conduct was wanton, willful, or exhibited a reckless indifference to the rights of others. *Id.* at 399-400. Wanton misconduct, which is sometimes referred to as reckless indifference to the interests of others, means that the actor has "intentionally done an act of an unreasonable character, in disregard of a risk known to him or her or so obvious that he or she must be taken to have been aware of it and so great as to make it highly probable that harm will follow." *Id.* at 401. Wanton negligence, as distinguished from ordinary negligence, "is characterized by a realization on the part of the tortfeasor of the probability of injury to another, and a reckless disregard of the consequences." 1 P.L.E. Negligence, § 48 (2005); *see also Rossino v. Kovacs*, 553 Pa. 168, 172, 718 A.2d 755, 756 (Pa. 1998); *Ogutu v. Lehigh Valley Apts.*, 2006 U.S. Dist. LEXIS 7251, at *9 (E.D. Pa. Feb. 27, 2006). [28]

Our Superior Court has found that punitive damages are appropriate in nursing home abuse and **neglect** cases where the facts so warrant. *Scampone v. Grane Healthcare Co.*, 11 A.3d 967 (Pa. Super. 2010), reh'g denied, --- A.3d --- (Sept. 24, 2010), appeal granted, 15 A.3d 427 (Mar. 08, 2011) (appeal granted on unrelated issue) (citation omitted) (finding Defendants' practice of understaffing and "deliberately altering records" sufficient to submit question of punitive damages to jury). [29] Punitive damages may be awarded in cases of negligence if the evidence is 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, in conscious disregard of that risk. *Hutchinson v. Luddy*, 582 Pa. 114, 124-25, 870 A.2d 766, 772 (2005). [30] Juries may assess punitive damages where a defendant deliberately acts (or fails to act) with conscious disregard for or indifference to facts that he knows, or has reason to know, create a high risk of physical harm to another. *Continental Grain Co. v. SHV Coal, Inc.*, 526 Pa. 489, 587 A.2d 702, 704-05 (1991) (discussing Restatement (Second) of Torts § 908(2), Comment A, as adopted by *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984)). Here, there is an abundance of evidence that the corporate decision-makers and the facilities' management were aware of understaffing at the facility, yet no corrective action was taken.

"Regardless of the phase of the case (demurrer, Judgment on the Pleadings, compulsory nonsuit, or JNOV), the trial court's standard [for evaluating such motions] is substantially the same;" namely, the court must accept "the plaintiffs evidence and reasonable inferences therefrom as true ...." *Schindler v. Sofamor, Inc.*, 774 A.2d 765, 775 n.11 (Pa. Super.), *appeal denied*, 567 Pa. 727, 786 A.2d 989 (2001). Accordingly, to defeat such a motion, Plaintiff must only present evidence or testimony establishing the facts essential to the cause of action which the motion cites as not having been produced; i.e. facts that evince Defendants' reckless indifference to Ms. Glass's rights. As detailed above, the record is **replete** with such facts, including Defendants' awareness of understaffing. *See* Section 111, *supra.*

While ignoring *Scampone*, the controlling law for this Court, Defendants argue that there is no evidence to award punitive damages; that there is no evidence that the facilities were understaffed and that their agents and employees did not have the required knowledge and intent to justify the imposition of punitive damages. Defendants' arguments have all been made (and overruled) in previous pleadings and motions.

With regard to notice and intent, Plaintiff "need not produce any direct evidence of the [Defendants'] intent, but may rebut [Defendants'] motion ... with **circumstantial evidence** from which a reasonable **jury could infer the [required] intent...."** *Susquehanna Bancshares, Inc. v. National Union Fire Ins. Co.*, 442 Pa. Super. 281, 297, 659 A.2d 991, 999 (1995) (emphasis and underlining added). *See e.g., McCann v. Unemployment Comp. Bd.* 562 Pa. 393,400, 756 A.2d 1, 5 (2000) ("Although Employer offered no direct evidence of McCann's intent, such direct proof of an actors state of mind, often being impossible to obtain, is frequently inferred from the circumstances surrounding the actors conduct."); *Commonwealth v. Sanders*, 426 Pa. Super. 362, 372, 627 A.2d 183, 188 (1993) (Although the defendant testified that he did not have the requisite intent, "it was solely for the jury to determine the credibility of the testimony."). Moreover, if the risk of harm from understaffing and under-

funding a nursing home was "easily perceptible" to Defendants, then knowledge and intent may be inferred by the jury. *Zazzera v. Roche* 54 Pa. D.&C.4 th 225, 236 (C.P. Lacka. 2001) (emphasis added).

The Superior Court illustrated this point in finding that "reckless disregard" exists to justify punitive damages where a nursing facility and its corporate operators ignored and/or hid known staffing problems that resulted in harm to a resident. *Scampone*, 11 A.3d at 991. In finding that the jury should have been given the opportunity to address plaintiff's claim for punitive damages, the Superior Court specifically discussed the types of evidence that can be used to support such a claim:

> The record was replete with evidence that the facility was chronically understaffed and complaints from staff continually went **unheeded.** Grane and Highland employees not only were **aware of the understaffing** that was leading to **improper patient care,** they deliberately altered records to hide that substandard care by altering ADLs that actually established certain care was not rendered. Records concerning the administration of medications were **falsified.** Staffing levels were increased during state inspections and then reduced after the inspection was concluded.

Id. at 991-992 (emphasis added). Moreover, the court stated that **"d]eliberately altering patient records to show care was rendered that was actually not is outrageous and warrants submission of the question of punitive damages to the jury."** *Id* at 992 (emphasis added). Accordingly, the court reversed the trial judge's refusal to submit the issue of punitive damages to the jury and explicitly rejected the defendants' argument that the above evidence did not satisfy Pennsylvania's standard for punitive damages under established case law and/or the MCARE Act. *Id.*

Finally, the *Scampone* court rejected the defendants' assertion that they were not subject to punitive damages because their conduct was unrelated to the decedent's injuries. *Id.* at 992. Rather, the court held that "[t]he evidence [of understaffing and insufficient care] in question related to all residents of Highland [the nursing facility]; [the decedent] was clearly a resident of Highland during the time covered by these witnesses. In addition, as analyzed above, the effects of understaffing was specifically connected to [the decedent's] care." *Id.* Accordingly, the Superior Court reversed the trial court's refusal to submit the question of punitive damages to the jury. *Id.*

Similarly, it would not be unreasonable for a jury to find that Defendants, who own and operate a nursing home, consciously appreciated the risks that come with understaffing and failing to correct known problems with patient care (or the lack thereof) at the facility. Likewise, it would not be unreasonable for a jury to find that Defendants' staff members knew that Ms. Glass depended on them to take seriously and respond appropriately to many incidents of **neglect**. Here, there are **many** incidents of conduct from which the required knowledge and intent may be inferred.

Time and time again, the corporate decision-makers and management were put on notice --by the Pennsylvania DOH, Pennsylvania Department of Welfare, etc. -- that their facilities was chronically ill equipped to provide basic care, and did little (if anything) to correct the problem. If a jury were to credit Plaintiffs arguments and evidence, such could easily support a finding of fact that Defendants' conduct was reckless, thus satisfying the higher burden necessary to allow Plaintiff to recover punitive damages.

The evidence and testimony in this case, when viewed in a light most favorable to Plaintiff (as it must be), establishes much more than simple and/or gross negligence. Defendants' employees/agents did not simply "forget" to provide Ms. Glass with the care required to avoid the injuries she suffered. Defendants knew that their staff and practices were inadequate to meet Ms. Glass' needs which, in turn, increased her risk of harm. Instead of correcting these problems, Defendants knowingly permitted these conditions to continue, causing Ms. Glass additional, preventable, and ultimately, terminal injuries. [31]

As demonstrated by the pleadings, there is ample authority in Pennsylvania to support the imposition of punitive damages in cases like the one at bar. Clearly, Plaintiff has made out a *prima facie* case for punitive damages.

D. There is a Valid Claim for Negligence per se Under the Neglect of Care-Dependent Person Statute

"The concept of negligence *per se* establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm." *Lux v. Gerald E. Ort Trucking, Inc.*, 887 A.2d 1281, 1288, 2005 PA Super 400 (quoting *Cabiroy v. Scipione.*, 767 A.2d 1078, 1079 (Pa. Super. 2001)). To establish a claim based on negligence per se, the plaintiff must show: (1) that the purpose of the statute is at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) that the statute clearly applies to the conduct of the defendant; (3) that the defendant violated the statute; and (4) that the violation was the proximate cause of the plaintiffs injuries. *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574 (Pa. Super. 1996).

State a different way, the purpose of the statute must be: (1) to protect a class of persons which includes Plaintiff; (2) to protect the particular interest which is invaded; (3) to protect that interest against the kind of harm which has resulted; and, (4) to protect that interest against the particular hazard from which the harm results. *Congini by Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515, 517-18 (1983); *see also Restatement (Second)* of Torts § 286 (1965).

Defendants argue that Plaintiff cannot support a claim for negligence per se under 18 Pa. C.S. § 2713 (hereinafter "§ 2713") because it is a criminal statute enforceable only by the Attorney General, and because Plaintiff has not demonstrated that Defendants violated the statute. Not only do Defendants mischaracterize Plaintiffs claims in this matter, as Plaintiff is **not** attempting to bring a private cause of action under a criminal statute, but the above-referenced testimony demonstrates that Plaintiff *does* in fact have a basis to bring a negligence *per se* claim.

In fact, the Philadelphia Court of Common Pleas accepted claims for negligence per se under 18 Pa.C.S.A. § 2713(a)(1) and 35 P.S. § 10225.102 as legally viable in *Henderson v. Delanco Healthcare, LLC. See* Order in *Henderson v. Delanco Healthcare*, Denying defendants' Motion for Partial Judgment on the Pleadings (Exhibit "Z" hereto). In Henderson, defendants asserted that claims under these statues were not legally viable, as they did not provide a private right of action. *See* defendant's Motion for Partial Judgment on the Pleadings (Exhibit "aa" hereto). There, the court denied this argument and upheld Plaintiff's claims under these statutes. It is respectfully submitted that the same outcome is warranted here.

1. Defendants' motion to dismiss Plaintiff's claim for negligence per se claim under 18 Pa.C.S.A. § 2713 is barred by the law-of-the-case doctrine

Initially, Plaintiff asserts that this issue is barred by the law-of-the-case doctrine. Previously, on or about November 28, 2011, Defendants filed Preliminary Objections to Plaintiffs Amended Complaint, and moved to dismiss the negligence *per se* claim under 18 Pa.C.S.A. § 2713. By Order dated March 2, 2012, this Honorable Court concluded that Plaintiff had alleged sufficient facts to make out a claim for negligence per se under 18 Pa.C.S.A. § 2713, and overruled Defendants' Preliminary Objections.

Now, Defendants have asked this Court to consider the same legal question again - namely, whether the Plaintiff can state a negligence per se claim under 18 Pa.C.S.A. § 2713. As such, Plaintiff proposes for this Court to decline Defendants' invitation to reconsider its ruling based on the law-of-the case doctrine and/or the coordinate jurisdiction rule. *See e.g.*, *Samuel Grossi Sons, Inc. v. U.S. Fidelity Guar. Co.* 2006 WL 3307465, at *3 n.5 (C.Phila. Nov. 10, 2006) ("Not only is the court's prior holding correct, it is also the law of this case, and the court will not alter it now."); [32] *In re De Facto Condemnation and Taking of Lands of WBF Associates, L.P.*, 588 Pa. 242, 268, 903 A.2d 1192, 1207 (Pa. 2006) ("It is well established that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions on the same issue.").

Nevertheless, in abundance of caution, Plaintiff will address these arguments, once again, below.

2. Plaintiff has a valid claim for negligence per se

1. Under Pennsylvania law, Plaintiff is entitled to bring a negligence per se claim for violation of a criminal statute

A claim based upon negligence per se is not the same as a private cause of action. Contrary to Defendants' assertions, Plaintiff is not asserting a private statutory cause of action under the criminal statute 18 Pa. C.S.A. § 2713. Rather, Plaintiff alleges that Defendants breached the standard of care as proscribed in § 2713, which conveys an actionable tort duty, and therefore Defendants should be held liable for negligence per se. The 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 v. Scipione,* 767 A.2d 1078, 1082 (Pa. Super. 2001). Here, § 2713 establishes the requisite standard of care for the treatment of care-dependent individuals.

Contrary to Defendants' assertions, the absence of a statutory right to a private cause of action does not preclude a claim of negligence *per se* for violation of the statute. *In McCain v. Beverly Health and Rehabilitation Services.* 2002 WL 1565526 (E.D. Pa. 2002), the Court held that a statute which does not provide a private right of action **can still be utilized to establish negligence per se.** Importantly, the Court noted that:
Courts in Pennsylvania have recognized that the "absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm." However, it is **just an indicator** or a factor to consider and **"does not necessarily preclude [the statute's use as the basis of a claim of negligence per se".** [33]

If a plaintiff can prove the defendant's negligence was the proximate cause of the injury in question, then the violation of the applicable statute is negligence per se and liability may be grounded on such negligence. *Cabiroy,* at 1079. A similar situation exists in the present matter. Although § 2713 does not provide a private cause of action, Defendants' conduct, as discussed in Part A.4 infra, breached the standard of care required by the statute, which makes Defendants liable for negligence per se.

Since Plaintiff is not bringing a private cause of action under § 2713, it is inconsequential that the **enforcement** of the **criminal aspect** of this statute lies with either the District Attorney of the county or the Attorney General of this Commonwealth. Plaintiff **does not seek to bring a criminal action** against Defendants under this statute. Plaintiff is therefore not required to plead facts which show that the Pennsylvania Attorney General's Office or the Philadelphia County District Attorney's Office filed charges against, or obtained a conviction of the Defendants, in order to hold Defendants liable for negligence per se. Defendants' argument regarding the same appears to be an attempt to mischaracterize Plaintiff's claims, and to confuse the Court as to the real issues in this case.

b. Pa.C.S.A. § 2713 is designed to protect the interests of care-dependent nursing home residents

As mentioned above, despite the absence of a private cause of action, violation of a criminal statute can constitute negligence *per se* if the plaintiff is within the class of persons the statute was intended to protect. *See Minnich v. Yost,* 817 A.2d 538 (Pa. Super. 2003); *Braxton v. Commonwealth Dep't of Transp.,* 634 A.2d 1150 (Pa. Cmwlth. 1993); *Commonwealth. Dep't of Welfare v. Hickey,* 582 A.2d 734 (Pa. Cmwlth. 1990).

Plaintiff must establish that the purpose of the statute is, **at least in part,** to protect the interest of a particular group of people, as opposed to the public generally. *Wagner v. Anzon,* 453 Pa. Super. 619, 627, 684 A.2d 570, 574 (1996). *See also Cabiroy v. Scipione,* 767 A.2d 1078 (Pa. Super. 2001) (holding that "although no private cause of action [was] set forth in the [Food, Drug and Cosmetic Act], it was certainly designed to protect a particular class of individuals") *Id.* at 1081. In the present matter, Pennsylvania's **elder** care criminal statute was established to protect a certain group of people - those who are care-dependent individuals residing in nursing homes or personal care homes, such as Ms. Glass. The statute states that a caretaker is guilty of **neglect** of a care-dependent person if he:

> Intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing 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.

18 Pa. C.S.A. §2713 (a)(1). [34] This statute was not designed to merely protect the entire public at large - or even the entire **elderly** population, as many **elderly** people are completely self-sufficient. Rather, the statute specifically identifies that particularly vulnerable group of individuals who are unable to independently care for themselves, and therefore need the protection of the statute.

In a negligence action for injuries arising out of the implantation of a pedicle screw device in the plaintiffs spine, the Court concluded that "...despite the absence of a private right of action, the [Federal Food, Drug and Cosmetic Act] and [Medical Device Amendments] were enacted to protect the interest of a group of individuals. Indeed, they were enacted 'to provide for the safety and effectiveness of medical devices intended for human use. Thus, their purpose was, at least in part, to protect the interests of those individuals who require use or implantation of medical devices."' Sharp v. Artifex, Ltd., 110 F.Supp. 2d 388, 393 (W.D. Pa. 1999) (internal citations omitted). Likewise, the purpose of § 2713 is to protect the interests of those individuals who require the use of nursing home facilities and the assistance of the staff at those facilities for their day-to-day living. Ms. Glass is one such individual, who was unable to independently care for herself, and therefore required the use of a facility such as Defendants' facilities. Sadly, she relied, to her own detriment, on Defendants' assurance that they could properly provide the services she required. Ms. Glass clearly is a member of the group of people the statute was designed to protect, and therefore Plaintiff has satisfied the first requirement for a claim for negligence per se.

c. Plaintiff's claim for negligence per se furthers the policy of § 2713

Pennsylvania courts have held that "[a] statute may still be used as the basis for a negligence per se claim when it is clear that, **despite the absence of a private right of action, the policy of the statute will be furthered by such a claim** because its purpose is to protect a particular group of individuals." *McCain* at *1, *citing Fallowfield Development Corp. v. Strunk*, 1990 WL 52745, at *19 (E.D. Pa. 1990)(emphasis added). As the Third Circuit for the United States Court of Appeals noted, in the absence of a statutory private cause of action, it is up to the court to determine whether the policy of the statute will be furthered by allowing a claim for negligence *per se:*

> Most formulations of the standards for implying a private cause of action center on the presence or absence of a legislative intent to impose civil liability. **In theory, at least, application of the negligence per se doctrine represents a judicial policy judgment independent of legislative intent with respect to the imposition of civil liability.** Both, however, address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability.

Frederick L. v. Thomas, 578 F.2d 513, 517 n. 8 (C.A. Pa. 1978). In the present matter, the policy of § 2713 is to protect care-dependent individuals in a healthcare provider context. Sadly, Ms. Glass was not afforded the full protection under § 2713 that she deserved. Defendants violated their duty under § 2713, as described in the pleadings, by failing to provide adequate care to Ms. Glass, which caused her to suffer severe pain and injury. Holding Defendants liable for their **neglectful** care of Ms. Glass would properly further the policy of § 2713, so that future residents of Defendants' facilities can be spared the same indignities and injuries suffered by Ms. Glass.

d. Defendants' conduct was negligent under 18 Pa. C.S.A. §2713

"In analyzing a claim based on negligence per se...the statute must clearly apply to the conduct of the defendant." *Frantz v. HCR Manor Care, Inc.,* 64 Pa. D.&C. 4th, 457, 462, *citing Braxton v. PennDot,* 160 Pa. Cmwlth. 32, 45, 634 A.2d 1150, 1157 (1993). As noted in Part A.2 *supra,* § 2713 holds that a caretaker is negligent for "intentionally, knowingly or recklessly" causing bodily injury to the care-dependent person for whom he is responsible to provide care. 18 Pa. C.S.A. § 2713 (a)(1). The above-referenced deposition testimony demonstrates Defendants' negligence in **knowingly** understaffing the facilities, which created recklessly high nurse/resident ratios. Defendants knew that the personnel on duty would not be able to properly attend to the medical needs of the facilities' residents.[35] Even worse, Defendants routinely increased the staffing levels during state surveys, and then reduced the staffing back to prior insufficient levels after the inspections were completed. This conduct not only demonstrates Defendants' knowledge that the facilities were understaffed, but their *intent to deceive* state inspection officials as to their staffing policies.

Neglect is defined by the Pennsylvania Health and Safety Code for Long-Term Care Nursing Facilities as the "deprivation **by a caretaker** of goods or services which are necessary to maintain physical or mental health." 28 Pa. Code § 201.3(vi) (emphasis added). Defendants had knowledge of the many problems at the facilities, including understaffing, incomplete documentation, failures in medication administration, failures to follow plans of care, failure to maintain an accident free environment, lack of food quality, and failure to provide necessary foot care. Defendants' intentional refusal to act on their knowledge of the deplorable conditions at the facilities constitutes an egregious violation of the standard of care.

e. Defendants' conduct was the proximate cause of Ms. Glass's injuries

In the present matter, Defendants' **neglect** and breach of the standard of care under 18 Pa.C.S.A. § 2713 clearly were the proximate cause of Ms. Glass's injuries, including the pain until her death. In deciding whether a plaintiff can bring a claim for negligence per se under a specific statute, the court must find "...a direct connection between the harm sought to be prevented by the statute and the injury." *Wager v. Anzon Inc.,* 453 Pa. Super. 619, 627. 684 A.2d 570, 574 (1996). The above-referenced testimony demonstrates Defendants' severe breaches in the standard of care during Ms. Glass's residency at the facility. Defendants' intentional and reckless conduct in severely under-staffing the facility led to inadequate supervision of Ms. Glass, thereby causing her to suffer from falls, right hip fracture, two fractured metatarsals, dehydration, weight loss, skin breakdown, urinary tract infections, malnutrition, pressure ulcers, osteomyelitis, poor hygiene and severe pain. Defendants' **neglect**, as revealed through the pleadings, had a severely negative impact on the care afforded to Ms. Glass.

Accordingly, there is sufficient evidence to make out a claim for negligence per se against Defendants. Plaintiff has established that Defendants breached the duty of care as proscribed by 18 Pa.C.S.A. § 2713, regarding the duty to not **neglect** or abuse a care-dependent person. Further, Ms. Glass suffered actual and serious bodily injuries, and Defendants' said breach was the proximate cause of those injuries.[36] Plaintiff has therefore, made out a claim for negligence *per se* and it is respectfully submitted that Defendants' Motion for Judgment on the Pleadings should be denied.

VII. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Defendants' Motion for Judgment on the Pleadings should be denied in its entirety, and for any other relief that this Court deems appropriate, including Attorneys fees and costs.

Dated: *5/9/2012*

Respectfully submitted,

WILKES & McHUGH, P.A.

By:

Ruben J. Krisztal, Esquire

Attorney for Plaintiff

Footnotes

1 On November 23, 2009, Plaintiffs claims for punitive damages were dismissed without prejudice. *See* Order (attached hereto as Exhibit "A"). Following some discovery, on April 18, 2011, Plaintiff filed a motion to amend her Complaint to reinstate punitive damages, oral argument was held, and the motion was granted on August 12, 2011. *See* Motion and Order (attached hereto as Exhibit "B"). Plaintiff then filed an Amended Complaint. *See* Plaintiff's Amended Complaint (attached hereto as Exhibit "C").

2 On or about November 28, 2011, Defendants made their **first of now three attempts** to win dismissal of Plaintiff's punitive damages claims, negligence per se claims, and dismissal based on subject matter jurisdiction, when they filed Preliminary Objections to Plaintiffs Amended Complaint. *See* Preliminary Objections (attached hereto as **Exhibit "D"**). Plaintiff answered the Preliminary Objections on December 19, 2011. See Response to Preliminary Objections (attached hereto as **Exhibit "E"**). The Court denied Defendants' Preliminary Objections on March 2, 2012 See Order (attached hereto as **Exhibit "F"**). Thus, as this Court has **already overruled** all of Defendants' arguments, with the exception of the corporate negligence issue, in the preliminary objection stage, a denial of Defendants' Motion for Judgment on the Pleadings in warranted. As stated by this Commonwealth's Supreme Court, **a motion for judgment on the pleadings "is in effect a [preliminary objection in the nature of a] demurrer..."** *Keil v. Good,* 467 Pa. 317, 321, 356 A.2d 768, 770 (1976) (internal quotations omitted) (emphasis added). Moreover, both preliminary objections in the nature of a demurrer and the motion for judgment on the pleadings require the trial judge to accept as true all facts properly pleaded by the opposing party. *Id.* Accordingly, this Court had already decided all of these issues raised by Defendants (except for the issue of corporate negligence, which was recently denied in the Court's 5/3/12 Order on Motion for Summary Judgment, as discussed below. As such, Plaintiff incorporates her response and Memorandum of Law to Defendants' Preliminary Objections by reference (**Exhibit "E,"** *supra*).

3 The parties and the Court agreed to an extension for Plaintiff to file her response.

4 *See* 4/26/12 Letter, attached hereto as Exhibit "H."

5 *See* Defendants' 5/2/12 Letter, attached hereto as Exhibit "I"

6 **Amended Complaint** ¶¶ 78-83.

7 *Amended Complaint* ¶ 83.

8 *Amended Complaint* ¶¶ 83-130.

9 *Amended Complaint* ¶¶ 83-130.

10 see Plaintiff's Response to Defendants' Preliminary Objections and Depositions Exhibits, attached hereto as **Exhibit "E."**

11 *See* Plaintiff's Response to Defendants' Preliminary Objections and Depositions Exhibits, attached hereto as **Exhibit "E."**

12 The court also noted that "[t]he various rules which make up the law of the case doctrine serve not only to promote the goal of judicial economy... but also operate (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." *Id.* (quoting *Commonwealth v. Starr,* 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995)).

13 *See* arguments, *infra.*

14 *See* 42 CFR § 483.1(a)-(b); 28 Pa. Code §§ 201.1, 201.2.

15 *See also McCain v. Beverly Health and Rehabilitation Services, Inc.*, 2002 U.S. Dist. LEXIS 12984 at *2 (E.D. Pa. 2002) ("the lack of a private cause of action is not enough to preclude the use of the relevant policies expressed in the statutes and regulations").

16 *See* Plaintiff's Response to Defendants' Preliminary Objections and Depositions Exhibits, which, although not presented by Defendants for consideration in the Preliminary Objection stage, the arguments made also support Plaintiff's corporate negligence claims, attached hereto as Exhibit "E."

17 2010 Pa. Super. 124, 11 A.3d 967 (2010), *reh'g denied,* --- A.2d---(Sept. 24, 2010), *appeal granted,* 15 A.3d 427 (Pa. March 8,2011).

18 *See* Defendants' Motion for Judgment on the Pleadings Memorandum of Law, p. 26.

19 Plaintiff acknowledges that the Thompson theory of corporate negligence has not yet been extended to personal care homes. But here, the corporate Defendants are one in the same for both facilities, and the claims or corporate negligence are against the corporate entity, not the individual facilities. As such, it is immaterial that this theory has not been explicitly extended to assisted living facilities/ personal care homes.

20 Even if the Pennsylvania Supreme Court ultimately concludes that a nursing home cannot be held corporately liable via the *Thompson* factors, Plaintiff has made out a *prima facie* case, as detailed above, to maintain her claims of direct liability against Defendants. Defendants try to constrain the notion of direct/corporate liability to the comprehensive healthcare "requirements" articulated in *Thompson v. Nason* 527 Pa. 330, 591 A.2d 703 (Pa. 1991); however, the notion that a corporation may be held liable for its independent acts of negligence "is a general rule of substantive law, so frequently applied that it is unnecessary to cite cases in support..." *Pryor v. Chambersburg Oil and Gas Co.*, 376 Pa. 521, 528, 103 A.2d 425, 428 (1954); *see also* J.P.M., Doctrine of Ultra Vires as Applied to Torts of Private Corporation, 57 A.L.R. 302 (originally published in 1928; updated weekly) ("At the present time it is universally recognized that ordinary private corporations may commit almost every kind of a tort, and be held liable therefore, and this liability may be enforced in the same manner as if the wrong complained of had been committed by an individual."). Thus, "where the case is founded on the proposition that the master [corporation] was independently negligent, and no attempt is made to restrict the alleged negligent acts to its servants alone, recovery can be had against the master, irrespective of the servant's liability." *Skalos v. Higgins*, 303 Pa. Super. 107, 113, 449 A.2d 601, 603-04 (1982). Moreover, other jurisdictions have found in similar cases that regardless of whether the doctrine of corporate negligence is applicable, evidence of "negligent hiring, retention, training, and supervision" supports a claim against the corporate entity under an ordinary negligence theory. *See e.g.*, *Harris v. Extendicare Homes, Inc., et at.*, 2011 WL 5299602, at *5 (W.D. Wash. Nov. 4, 2011).

21 Similarly, the Superior Court has also applied this doctrine to the corporate operators of an independent rehabilitation unit located within a hospital. *Hyrcza v. West Penn Allegheny Health Svs.*, 978 A.2d 961, 982 (Pa. Super. 2009). In that case, the corporate defendant, ChoiceCare, was under agreement to provide care to patients admitted to a hospital's rehabilitation unit. *Id.* at 967. The plaintiff in Hyrcza sought to hold ChoiceCare directly liable for its failure to provide proper care. The Superior Court held that ChoiceCare could be held directly liable under a theory of corporate negligence because "ChoiceCare was responsible for the coordination and management of all patients in the rehabilitation unit ... which it [CoiceCare] independently operated, and ChoiceCare failed to deliver the comprehensive care it was contractually obligated to provide." Id. at 984.

22 Moreover, other lower state courts and federal courts have extended corporate liability to healthcare facilities other than hospitals. *See Perry v. Manor Care, Inc.*, 2006 WL 1997480, at *5 (E.D. Pa. July 14, 2006) (noting "Some health care facilities and providers to which the corporate negligence doctrine has been extended include health maintenance organizations (HMOs), medical professional corporations, and nursing homes."). *For example, in Capriotti v. Beverly Enters. Pa. Inc.*, 72 Pa. D.C.4th 564 (CP. Fayette 2004), a nursing home **neglect** and abuse case, the court considered similar allegations of abuse and **neglect**, including the following:

> that the corporate defendants knowingly, and with reckless disregard for the health and well-being of the facility residents, grossly understaffed and under-funded the facility; failed to appropriately train the staff; and knowingly permitted Ms. Capriotti to be **neglected**. Plaintiffs aver that Ms. Capriotti's injuries were caused by the poor treatment that she received at the facility and by the acts and omissions of the corporate [defendants]....

Id. at 572. The court had no trouble finding that these allegations, "if believed, would entitle the plaintiff to relief under the corporate negligence theory." *Id.; see also Frantz v. HCR Manor Care, Inc.*, 64 Pa. D.& C.4th 457 (C.P. Schuylkill 2003) (dismissing a defendant's preliminary objection to a corporate negligence claim against a nursing home after finding that the plaintiff had pled sufficient facts that would entitle him to relief); *Aptekman v. City of Philadelphia*, 2001 WL 1486350 (E.D. Pa. Nov. 21, 2001) (recognizing that corporate negligence doctrine can be applied to nursing homes); *Dontonville v. Jefferson Health s.* 2002 WL 59318, at *4 (E.D. Pa. Jan. 14, 2002) (because "[c]orporate negligence is an evolving doctrine under Pennsylvania law," it was very possible "that a state court would find that the complaint states a cause of action against the Jefferson entities for corporate negligence."); *Fox v. Horn*, 2000 WL 49374 (E.D. Pa. Jan. 21,2000) (extending corporate negligence liability to a medical professional corporation).

23 Even if there was such a requirement, it would not be necessary to show that Defendants provided comprehensive healthcare akin to that of a hospital but, rather, to that of a nursing home. See Frantz and Capriotti, supra. Additionally, under Pennsylvania and federal law, nursing homes are responsible for the total healthcare of their residents.

For example, nursing homes have a duty to conduct full and complete medical assessments of residents upon admission, and when significant changes occur to their condition (42 C.F.R. § 483.20; 28 Pa. Code §§ 211.2, 211.5); complete a comprehensive medical care plan for each resident, and update it accordingly (42 C.F.R. § 483.20; 28 Pa. Code § 211.11); attain and maintain the highest practicable physical, mental, medical, and psychosocial well-being of each resident (42 C.F.R. §§ 483.25, 483.15; 28 Pa. Code § 211.10); provide appropriate nutrition and hydration to each resident (42 C.F.R. §§ 483.25, 483.34; 28 Pa. Code §§ 211.6, 211.10); provide dental, vision, and hearing services (42 C.F.R. §§ 483.25, 483.55; 28 Pa. Code §§ 211.15,211.2); meet each resident's behavioral health needs (42 C.F.R. § 483.25; 28 Pa. Code § 311.16), provide medication administration and pharmaceutical consultants (42 C.F.R. § 483.60; 28 Pa. Code § 211.9); notify a physician when a significant change occurs to a resident's condition (42 C.F.R. § 483.1; 28 Pa. Code § 201.2); and provide a nursing staff sufficient to meet residents' needs (42 C.F.R. § 483.30; 28 Pa. Code § 211.12). Additionally, nursing homes are required to provide a safe environment for all residents to protect them from accidents and injuries

(42 C.F.R. §§ 483.25,483.15; 28 Pa. Code § 211.10); provide adequate equipment and supplies (42 C.F.R. § 483.15); and provide therapy for residents (42 C.F.R. § 483.45).

24 *See generally Amended Complaint.* Ms. Glass was dependent on the staff for care. Despite Defendants' knowledge that Ms. Glass was at risk for falls, while at the Residence, Defendants permitted her to fall several times. Defendants also failed to ensure Facility staff were properly implementing fall preventions and monitoring, causing Ms. Glass to fall again. Plaintiff avers that Defendants also received both Facility injury reports and citations from the Department of Public Welfare. The Defendants' also failed to provide proper care to Ms. Glass while she was at the Facility, and she suffered pressure ulcers and the worsening of her toe injury. Plaintiff averred that complaints about substandard care were made known to Defendants through staff, residents' family members, and the Department of Health survey citations.

25 These are classic corporate negligence principles under *Thompson* and its progeny.

26 In *U.S. v. Bestfoods*, 524 U.S. 51, 64-65 (1998), the Supreme Court explained that "a parent corporation is itself responsible for the wrongs committed by its agents in the course of its business." Quoting a 1929 article written by Justice (then Professor) Douglas, the court distinguished derivative liability cases "from those in which the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management, and the parent is **directly a participant in the wrong complained of."** *Esmark Inc. v. N.L.R.B.*, 887 F.2d 739, 755 (7th Cir. 1989) (citing Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 207 (1929)) (emphasis added). In such instances, explained the court, "the parent is directly liable for its own actions." *Id.*

27 Outrageous conduct is an "act done with a bad motive or with reckless indifference to the interests of others." *Focht v. Rabada*, 217 Pa. Super. 35, 38, 268 A.2d 157, 159 (1970). The punitive damage provisions of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.101 et seq., also utilizes the same standard. The Act, which includes "nursing home" within the definition of healthcare provider, provides:

(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 P.S. § 1303.505.

28 Willful misconduct, on the other hand, "means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue." *Arnold v. Leamy*, 67 Pa. D.&C.4th 370, 376-77 (C.P. Lancaster 2004) (citing *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440 (1965)). Simply put, "[i]t is a step beyond 'wanton misconduct." *Pursel v. Parkland Sch. Dist.*, 70 Pa. D.&C.4th 129, 136 (C.P. Lehigh 2005).

29 Although the Pennsylvania Supreme Court has granted allocatur in *Scampone*, punitive damages are **not** on appeal.

30 Our Supreme Court has noted that neither law nor logic "prevent[s] 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." *Hutchinson*, 582 Pa. at 124-25.

31 The type of conduct that will support a claim for punitive damages is exemplified in *McCain v. Beverly Health and Rehabilitation Services, Inc.*, 2002 WL 1565526 (E.D. Pa. July 15, 2002), another nursing home **neglect** and abuse case. There, the court held that under Pennsylvania law, allegations that a nursing home transported a resident in an ill-fitting wheelchair that caused pressure sores, despite the resident's high risk for developing pressure sores, was sufficient to allege willful or wanton conduct or reckless indifference to meet the standard for seeking punitive damages. *Id.* at *2. Likewise, in *Capriotti v. Beverly Enterprises Pennsylvania Inc.*, 72 Pa. D.&C.4th 564 (C.P. Fayette 2004), another nursing home **neglect** and abuse case, the court considered similar allegations of abuse and **neglect**, including "that the corporate defendants knowingly, and with reckless disregard for the health and well-being of the facility residents, grossly understaffed and under-funded the facility; failed to appropriately train the staff; and knowingly permitted Ms. Capriotti to be **neglected**." *Id.* at 572. After considering these allegations, the court had no trouble finding that these allegations, "if believed, would entitle the plaintiff to punitive damages." *Id.* at 576. *See also Hoffman v. Mem'l Osteopathic Hosp.*, 342 Pa. Super. 375, 383, 492 A.2d 1382, 1386 (1985) (reversing the trial court and holding that evidence that a physician allowed a patient to remain crying and immobile for no more than two hours was sufficient to establish prima facie reckless indifference); *Wimer v. Macielak*, 47 Pa. D. & C.4th 364, 368-69 (C.P. Crawford 2000) (holding that "a material issue of fact remains to be determined as to whether the defendant [doctor] acted with reckless indifference to the medical condition of the plaintiff in failing to respond to the messages sent to the defendant's beeper."); *Medvecz v. Choi*, 569 F.2d 1221, 1227-30 (3d Cir. 1987) (anesthesiologist who left the operating room for a lunch break without securing a suitable replacement could be liable for exemplary damages to a patient who suffered complications during his absence).

32 The court also noted that "[t]he various rules which make up the law of the case doctrine serve not only to promote the goal of judicial economy ... but also operate (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." *Id.* (quoting *Commonwealth v. Starr*, 541 Pa. 564,574,664 A.2d 1326,1331 (1995)).

33 Id. at *1 (citing *Fallowfield Development Corp. v. Strunk*, 1990 WL 52745, at *19 (E.D. Pa. 1990)) (emphasis added).

34 Under § 2713, a caretaker is defined as "an owner, operator, manager or employee of a nursing home, personal care home" and a care-dependent person is defined as "any adult who, due to physical or cognitive disability or impairment, requires assistance to meet his needs for food, shelter, clothing, personal care or health care." Defendants and Ms. Glass clearly fall under the respective definitions of caretaker and care-dependent person.

35 *See* **Elder**, pp. 85-89; Rolon, pp. 25-49; Weikel, p. 17-24.

36 *Reilly v. Tiergarten. Inc.*, 633 A.2d 208, 210, 430 Pa.Super. 10 (1993) (stating the four elements a party must prove in order to recover in an action for negligence).

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