

2013 WL 6973188 (Nev.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Nevada.
Clark County

Ryan Kirby HUPPERT, Plaintiff,

v.

HEALTHSOUTH REHABILITATION HOSPITAL OF DESERT CANYON, LLC dba Healthsouth
Desert Canyon Rehabilitation Hospital; Thi of Nevada at Las Vegas I. LLC dba Harmon Medical
and Rehabilitation Hospital; Thi of Nevada at Henderson Convalescent, LLC dba Henderson
Healthcare Center; Andrea Elizabeth Pernel, MD; Aleksandr Krivonovskiy, MD; Roland Jayson F.
Pua, MD; Does 1 through 20. inclusive; and Roe Corporations 1 through 20 inclusive., Defendants.

No. 12A666641.
July 5, 2013.

**Defendant Aleksandr Krivonovskiy, M.D.'s Motion to Dismiss the Vulnerable Person
Abuse Claim and Punitive Damages Claim in Plaintiff's Second Amended Complaint**

MDSM, [V. Andrew Cass](#), Nevada Bar No. 5246, [Keith A. Weaver](#), Nevada Bar No. 10271, Nausheen Kazalbasch, Nevada Bar No. 12984, Lewis Brisbois Bisgaard & Smith LLP, 6385 S. Rainbow Boulevard, Suite 600, Las Vegas, Nevada 89118, PH.: 702.893.3383, Fax: 702.893.3789, E-Mail: drew.cass@lewisbrisbois.com, E-Mail: keith.weaver@lewisbrisbois.com, E-Mail: nausheen.kazalbasch@lewisbrisbois.com, Attorneys for Defendant Aleksandr Krivonovskiy, M.D.

CASE NO.: A-12-666641-C

DEPT. NO.: XXXI

Defendant ALEKSANDR KRIVONOVSKIY, M.D., by and through his attorneys. Lewis Brisbois Bisgaard & Smith, LLP, moves for dismissal, or alternatively, for judgment on the pleadings, pursuant to [N.R.C.P. 12\(b\)\(6\)](#) or [12\(c\)](#).

DATED this 5th day of July, 2013.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By <<signature>>

V. ANDREW CASS

Nevada Bar No. 5246

KEITH A. WEAVER

Nevada Bar No. 10271

NAUSHEEN KAZALBASCH

Nevada Bar No. 12984

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Defendant Aleksandr Krivonovskiy, M.D.

NOTICE OF MOTION

PLEASE FAKE NOTICE that the undersigned will bring this motion on for hearing in Department 31 of this Court ____ on the 6th day of August, 2013, at 9:30AM ____m, or as soon thereafter as counsel may be heard.

DATED this th day of July, 2013.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By <<signature>>

V. ANDREW CASS

Nevada Bar No. 5246

KEITH A. WEAVER

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6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Defendant Aleksandr Krivonovskiy, M.D.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Thin is a medical malpractice case about Plaintiff's [pressure ulcer](#)--plain and simple. At bottom, Plaintiff's claim is that Dr. Krivonovskiy failed to heal and cure the [pressure ulcer](#) during the roughly one week that Dr. Krivonovskiy treated him daily. ¹

Plaintiff docs not allege that he was abandoned, denied food or shelter, a victim of theft or embezzlement, a victim of physical [abuse](#), or anything else required to state an [abuse](#) of a vulnerable person claim. Despite this, Plaintiff is trying (for the second time) to turn this straightforward medical malpractice action into an [abuse](#) of a vulnerable person and punitive damages case

by claiming that the alleged *inadequate* medical care provided by Dr. Krivonovskiy is identical to a failure to provide *any* medical care, i.e. neglect.²

The reason Plaintiff alleges Dr. Krivonovskiy **abused** him is in order to do an end-run around the will of the people of Nevada, when as part of a state-wide initiative, the citizens determined there should be a \$350,000 on non-economic damages and other provisions relating to medical malpractice cases. Plaintiff simply does not want to be treated like all other medical malpractice Plaintiffs because it limits the amount of money he wants. So, he's willing to allege (without facts) the parade of horrors against Dr. Krivonovskiy by invoking a statute that was not enacted to protect plaintiffs in straight-forward medical malpractice cases.³

Worse, in order to claim punitive damages against Dr. Krivonovskiy in this straight-forward medical malpractice case, Plaintiff maligns Dr. Krivonovskiy as (among other slurs) despicable and intent on harming Plaintiff. Thus, Dr. Krivonovskiy deserves to be punished and made an example of according to Plaintiff. Plaintiff and his counsel do this undoubtedly knowing full well that in claiming punitive damages he is aiming at Dr. Krivonovskiy's personal assets and his license to practice medicine. In other words, Plaintiff's declared war against Dr. Krivonovskiy's livelihood. Dr. Krivonovskiy intends to fight back.

Plaintiff Ryan Kirby Huppert's ("Huppert") filed a First Amended Complaint ("FAC") alleging medical malpractice, **abuse** of a vulnerable person, and punitive damages. This Court granted Dr. Alexandr Krivonovskiy's Motion to Dismiss Plaintiffs **abuse** of a vulnerable person. The parties then stipulated that a ruling on the punitive damages claim was moot.

The Court gave Huppert the chance to re-plead these claims, should he have a factual basis to do. Huppert's SAC was filed alleging a claim for **abuse** of a vulnerable person and for punitive damages. Huppert's SAC, however, contains *no new facts*. Huppert's SAC only adds boilerplate and sham allegations to try to squeeze his straight-forward medical malpractice claims into an **abuse** of a vulnerable person shell.

In the SAC, Huppert continues to allege that Dr. Krivonovskiy's care fell below the standard of care (i.e., medical malpractice) and that this "fail[ure] to provide care and services [...] necessary to maintain the physical health of Plaintiff..." (SAC, at ¶74), meets the criteria for "neglect" under the **abuse** of vulnerable person cause of action. We have already been there and done that. Huppert's attempt to couch his medical malpractice claim as an **abuse** of a vulnerable person claim flouts the law on the mutual exclusivity of the two claims and would allow him to escape the statutory damages restrictions of NRS 41A. Huppert's claim for **abuse** of a vulnerable person and for punitive damages must be dismissed,

II. FACTUAL BACKGROUND

On July 29, 2011, Huppert became paralyzed as a result of an ATV accident. SAC, ¶17. Huppert was hospitalized and transferred to various healthcare facilities, eventually ending up at Harmon Medical and Rehabilitation Center ("Harmon"). SAC, ¶27. Dr. Aleksandr Krivonovskiy was Huppert's attending physician at Harmon. *Id.* Dr. Krivonovskiy treated Huppert every day for roughly a week. Huppert developed a **pressure ulcer** before being admitted to Harmon and before being seen by Dr. Krivonovskiy. SAC, ¶25. When he was discharged from Harmon, a medical rehabilitation facility, to a step-down rehabilitation facility, the **pressure ulcer** had not been cured. Hence, this lawsuit against Dr. Krivonovskiy.

This Court gave Huppert the opportunity to amend his FAC with specific facts that would constitute **abuse** of a vulnerable person and that may give rise to punitive damages. The specific facts alleged against Dr. Krivonovskiy in the SAC, however, are *unchanged* from Plaintiff's FAC. The SAC alleges:

- Dr. Krivonovskiy documented in his history and physical examination, dated August 31, 2011, that Plaintiff had acquired a stage III ulcer while in rehabilitation, SAC, ¶27 (emph. added).

- ...Dr. Krivonovskiy mentions the use of an electrical bed with air mattress, but Dr. Krivonovskiy did not document any specific orders or any treatment of Plaintiffs [decubitus ulcer](#). *Id.* (emph. added).
- ...A discharge summary, dated September 8, 2011, by Dr. Krivonovskiy, notes administration of Santyl daily to the necrotic areas on the coccyx and buttocks.
- ...Dr. Krivonovskiy failed to diagnose and record the stage and condition of Plaintiffs [decubitus ulcer](#)...” *Id.* (emph. added).
- ...Dr. Krivonovskiy fell below the standard of care. In his care and treatment of Plaintiff, SAC, ¶28 (emph. added).
- Dr. Krivonovskiy [...] implemented no other measures to treat the decubitus nicer beyond the dally application of Santyl. *Id.* (emph, added).

Huppert's vulnerable person allegations do not state that Dr. Krivonovskiy failed to treat Plaintiff. Rather, that Dr. Krivonovskiy “failed to provide care and services for Plaintiff’s” ulcer “which were necessary to maintain the physical health of Plaintiff...” SAC, ¶74. In other words, Plaintiff does *not* allege that Dr. Krivonovskiy failed to provide medical care and treatment to him. Rather, Plaintiff continues to allege that Dr. Krivonovskiy failed to provide adequate care and treatment. That is a classic straight-forward medical malpractice claim--which is why Plaintiff has pled a classic straight-forward medical malpractice claim as well. medical rehabilitation facility, to a step-down rehabilitation facility, the [pressure ulcer](#) had not been cured. Hence, this lawsuit against Dr. Krivonovskiy.

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- ...Dr. Krivonovskiy fell below the standard of care in his care and treatment of Plaintiff. SAC, ¶28 (emph. added).
- ...Dr. Krivonovskiy [...] implemented no other measures to treat the [decubitus ulcer](#) beyond the daily application of Santyl. *Id.* (emph, added).

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Huppert further alleges that the aforementioned conduct constitutes “malice, express or implied, which was despicable conduct engaged in with a conscious disregard of the rights and safety of Plaintiff” because Defendants acted with “knowledge of the probable consequences of the wrongful act and a willful or deliberate failure to act to avoid those consequences.” SAC, ¶¶65, 66.

These are the entirety of Huppert's allegations against Dr. Krivonovskiy. If these sound like allegations of medical malpractice, it is because they are.

III. LEGAL STANDARD

To plead a claim for relief a “complaint must set forth sufficient facts to establish all necessary elements of a claim for relief ... so that the adverse party has adequate notice of the nature of the claim and relief sought.” *Hay v. Hay*, 100 Nev. 196, 198 (1984). “[A] plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment], to relief requires more than labels and conclusions, and a formulaic, recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (U.S. 2007) (internal citation omitted).⁴ “Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief.” *Stockmeier v. Nev. Dep’t of Corr. Psychological Review Panel*, 183 P.3d 133, 135 (2008) (internal citation omitted),

IV. HUPPERT'S SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM. FOR ABUSE OF A VULNERABLE PERSON

First, Huppert's SAC on its face sounds in medical malpractice, not abuse of a vulnerable person. All the facts alleged by Huppert are allegations of negligent medical care, not a failure to provide care.

Second, well-established law prevents Huppert from bringing an abuse of a vulnerable person claim alongside a professional negligence claim where identical facts form the basis for both claims. Indeed, if this were not the law, plaintiffs could do an end-run around statutory damages caps and nearly every malpractice case would be brought as an abuse of a vulnerable person claim.

Third, even if Huppert could bring both claims, he cannot plead medical malpractice allegations in the first instance, and later make contradictory “sham” allegations in the next instance to strategically plead a cause of action for which he has no basis.

Fourth, Huppert's claim for punitive damages is moot because his abuse of a vulnerable person claim fails as a matter of law. Even if Huppert could bring a punitive damages claim under his medical malpractice claim, which he cannot, Huppert has not alleged sufficient facts here to support punitive damages. This is because there are no facts here which could ever support punitive damages against Dr. Krivonovskiy.

A. Huppert's Pleads Medical Malpractice, Not Abuse Of A Vulnerable Person

Through two rounds of pleading, Huppert alleges medical malpractice and abuse of a vulnerable person claims based on the same basic facts. He claims he is entitled to recovery under both. But the criteria are different. In fact, the claims are mutually exclusive. Medical malpractice is “a negligent act or omission to act by a provider of health care in the rendering of professional services...” *NRS 41A.015*, In contrast, a “failure [...] to provide food, shelter, clothing or services...which are necessary to maintain the physical or mental health” constitutes abuse of a vulnerable person. See *NRS 41.1395* (emph. added).

Medical malpractice is a claim that the acts performed were negligent. The crux of an abuse of a vulnerable person claim is an outright failure to provide care. Put simply. Plaintiff cannot claim on the one hand that he received care but that it was inadequate (medical malpractice), and on the other hand that the inadequate care was an outright failure to provide any care (neglect/vulnerable person abuse).

In *Carter v. Prime Healthcare Paradise Valley LLC*, 198 Cal. App. 4th 396, 410 (Cal. App. 4th Dist 2011) (“*Carter*”), a California court recently explained the difference between the two claims.⁵ There, plaintiff-survivors appealed dismissal due to their **elder abuse** claim being insufficiently pled. *Id.* It was alleged that the decedent developed **bedsores** after surgery. *Id.* at 401. The plaintiffs alleged the decedent was “continually neglected,” “was routinely not dried” was left in his wheelchair alone, and was not provided adequate medication. *Id.* The court stated: “**elder abuse** was distinct from professional negligence and involved egregious withholding of medical care, rather than simple or gross negligence.” *Id.* (emph added). The court affirmed dismissal, and reiterated that a plaintiff must plead conduct which “rises to the level of egregiousness sufficient to support an **elder abuse** cause of action.” *Carter*, 198 Cal. App. 4th at 410.⁶

Huppert's allegations against Dr. Krivonovskiy mirror the plaintiffs allegations in *Carter*:

- Dr. Krivonovskiy documented in his history and physical examination, dated August 31, 2011, that Plaintiff had acquired a stage III ulcer while in rehabilitation. SAC, ¶27 (emph. added).
- ...Dr. Krivonovskiy mentions the use of an electrical bed with air mattress, but Dr. Krivonovskiy did not document any specific orders or any treatment of Plaintiff's **decubitus ulcer**. *Id.* (emph. added),
- ...A discharge summary, dated September 8., 2011, fay Dr. Krivonovskiy, notes administration of Santyl daily to the necrotic areas on the coccyx and buttocks. *Id.* (emph. added).
- ...Dr. Krivonovskiy felled to diagnose and record the stage and condition of Plaintiff's **decubitus ulcer**...” *Id.* (emph. added).
- ...Dr. Krivonovskiy fell below the standard of care in his care and treatment of Plaintiff. SAC, ¶28 (emph. added).
- Dr. Krivonovskiy [...] implemented no other measures to treat the **decubitus ulcer** beyond the daily application of Santyl. *Id.* (emph. added).

Both Huppert and the decedent in *Carter* alleged they were treated and care was provided to them. Indeed, Huppert alleges that Dr. Krivonovskiy fell below the standard of care “in his care and treatment of Plaintiff.” SAC ¶28. When Dr. Krivonovskiy allegedly “documented in his history” that Huppert had a **bedsore** and then “mentioned the use of an electrical bed” but later “did not document any specific orders...” these allegations speak to Dr. Krivonovskiy's affirmative treatment of Huppert, albeit negligently. SAC, ¶¶27-28. Like in *Carter* where it was held that “**elder abuse** was distinct from professional negligence” because the former involves “egregious withholding of medical care...” here, Huppert does not allege that Dr. Krivonovskiy withheld any care so his claim must be for professional negligence, i.e., medical malpractice.

Moreover, under the “neglect of a vulnerable person” heading in Huppert's SAG, he offers nothing more than a cut-and-paste of conclusory language from **NRS 41.1395** that Dr. Krivonovskiy failed to provide the type of care “which [was] necessary to maintain the physical health of Plaintiff...” SAC, ¶74. Notwithstanding this sweeping conclusion, Huppert's factual allegations (quoted *supra*) do not plead a failure to provide care. Huppert's threadbare conclusion that Dr. Krivonovskiy “failed to provide care” does not corroborate Huppert's own allegations that care was provided to Huppert. See SAC, ¶¶27-29.

Lastly, Huppert will no doubt argue that a “failure to diagnose and properly record” the condition of Plaintiff's **pressure ulcer** constitutes **abuse** of a vulnerable person under **NRS 41.1395**. SAC, ¶27. Huppert is wrong. No California case has deemed the occurrence of **pressure ulcers** without “egregious” neglect sufficient to state a claim for **elder abuse**. See *Nelson v. State of California* 139 Cal. App. 3d 72, 81 (1982) (failure of medical practitioner to provide necessary medication or treatment is malpractice); see also *Mack v. Soung*, 80 Cal. App. 4th 966 (2000)(**elder abuse** where a physician concealed the existence of a serious **pressure ulcer**, opposed her hospitalization, and abandoned her).⁷

Huppert may also claim to find support for the notion that his allegations constitute **abuse** under NRS 41.1395 from *Sababin v. Superior Court*, 144 Cal. App. 4th 81 (2006). In *Sababin*, plaintiff was diagnosed with a disease that subjected her to increased risk of skin deterioration. *Id.* at 85. The defendant completely failed to notify the doctor that plaintiff had **lacerations on her toes** and feet, had poor skin condition on her buttocks (dark, red and “felt squishy”), had a pustule with MRSA on her left hand, and had reddened skin on the sacral area. *Id.* The court found triable issues existed on whether there was neglect and reversed summary judgment. *Id.* The *Sababin* court explained that to establish **abuse**, there must be a significant pattern of withholding of care leading to the conclusion that the pattern was the result of choice or deliberate indifference. *Id.*

Unlike in *Sababin*, Huppert's own allegations are that Dr. Krivonovskiy *did* treat Huppert, and *did* document that he had a pressure, and *did* order an air mattress, and *did* recommend the treatment of Santyl daily. SAC, ¶¶27-29, This is far from the significant pattern of repeated withholding of care altogether at issue in *Sababin*. *Sababin*, 144 Cal. App. 4th at 90.

Based on these principles---and common sense--Huppert's SAC for **abuse** of a vulnerable person cannot survive where the face of the SAC demonstrates that treatment was provided, even if allegedly below the standard of care. Huppert has, at best, stated a claim for medical malpractice against Dr. Krivonovskiy.

B. Nevada Should Follow California's Lead: A Medical Malpractice Plaintiff Must Not Be Permitted To Bring An Abuse of A Vulnerable Person Claim Based On The Same Facts Absent Allegations Of Egregious Conduct

California law precludes an **abuse** of a vulnerable person claim to be maintained alongside a professional negligence claim on the same facts. Accordingly, even if Huppert adequately pled a claim for **abuse** of a vulnerable person (he has not), he *still* should not be able to bring both claims here, To allow both claims here would put Nevada at odds with applicable California law and would tilt tort law on its head by giving a plaintiff the option to avoid statutory limitations on damages.

California has placed a \$250,000 statutory cap on the recovery of non-economic damages in medical malpractice actions under “MICRA,” the Medical Injury Compensation Reform Act (Cal. Civ. Code §3333.2). An **elder abuse** claim has no such limitation, and in fact, allows for double recovery and attorney's fees. See Cal. Wel. & Inst. Code § 15657. Due to this, California courts have gone on to acknowledge the anomalous result that would occur if plaintiffs were permitted to plead both medical malpractice and **elder abuse** on the same facts: “a problem that sometimes arises is when a plaintiff hoping to evade the restrictions of MICRA, will choose to assert intentional torts, seemingly non-MICRA causes of action.” *Unruh-Haxton v. Regents of California*, 162 Cal. App. 4th 343, 353 (2008).

As a result, California courts have determined that:

[T]he term ‘professional negligence.’ at least within the meaning of [California's Welfare and Institutions Code] section 15657,2, is mutually exclusive of the **abuse** and neglect specified in section 15657, ‘Professional negligence’ is one type of negligence, to which general negligence principles apply. However, ‘in order to obtain the remedies available in [Welfare and Institutions Code] section 15657, a. plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct.’ Section 15657.2 can therefore be read as making clear that the acts proscribed by section 15657 do not include acts of simple professional negligence, but refer to forms of **abuse** or neglect performed with some state of culpability greater than mere negligence.

Smith v. Ben Bennett, Inc., 133 Cal. App. 4th 1507, 1518-1519 (2005)(citing *Delany v. Baker*, 20 Cal. 4th 23, 33 (1999)(emph. added) (internal citations omitted). Specifically, “the **Elder Abuse** Act's goal was to provide heightened remedies for ... ‘acts of egregious **abuse**’ against **elder** and dependent adults, while allowing acts of negligence in the rendition of medical services to **elder** and dependent adults to be governed by laws specifically applicable to such negligence.” *Id.* at 1519. (emph. added).

As this Court is aware, Nevada has a similar statutory damages cap of \$350,000 for non-economic damages in medical malpractice cases. See NRS 41A.035. Likewise, **abuse** of a vulnerable person under NRS 41,1395 is the Nevada-equivalent

of California's **elder abuse** statute. Accordingly, Nevada too should recognize that its own "**Elder Abuse** Act's goal was to provide heightened remedies for ... 'acts of egregious **abuse**' " and Nevada should find acts of "negligence in the rendition of medical services to **elder** and dependent adults to be governed by laws specifically applicable to such negligence." *Smith*, 133 Cal. App, 4th at 1519.

Were Nevada to ignore California's sound pronouncements, every Nevada plaintiff that was also coincidentally a "vulnerable adult" under NRS 41.1395 would plead his medical malpractice case as an **abuse** of a vulnerable person to avoid the statutory damages restrictions of NRS 41A.035. Rather, in line with the California Supreme Court in *Covenant Care v. Superior Court*, 32 Cal. 4th 771 (2004), this Court should require Huppert to plead "egregious acts of misconduct distinct from professional negligence ..." in order to state a claim for **abuse** of a vulnerable person, *Id.* at 784. Because Huppert has not done so here after two rounds of pleading, his claim for **abuse** of a vulnerable person must be dismissed.

C. Huppert Should Not Be Allowed To Strategically Plead Contradictory Allegations From One Complaint To The Next

Huppert should not be allowed to circumvent the statutory damages cap of NRS 41,035 by making contradictory allegations in various iterations of his complaint. "[T]he policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations," *Owens v. Kings Supermarket*, 198 Cal. App. 3d 379, 384 (1988). This concept essentially does not allow a plaintiff to simultaneously blow hot and cold.

Here, Huppert's prior allegations are conclusive admissions that are destructive of the SAC, Huppert's prior pleading stated only that Dr. Krivonovskiy "failed to care for Plaintiff in such a way to maintain his physical and/or mental health." FAC, ¶71. Huppert is bound by this judicial admission that Dr. Krivonovskiy provided allegedly inadequate care to Huppert. Now, ever-so-conveniently, Huppert has also inserted conclusory language in his SAC that Dr. Krivonovskiy "*failed to provide care and services...necessary to maintain the physical health*" of Huppert SAC, ¶74. (emph. added). Huppert cannot steer so far away from his original allegations that did not state Dr. Krivonovskiy failed to provide care to Huppert, Never mind the facts alleged by Huppert's SAC show the direct opposite, namely, that Dr. Krivonovskiy *did* provide care to Huppert and it was purportedly inadequate, *See* SAC, ¶¶27-29,

It is clear that having failed to comply with the pleading requirements to state a vulnerable person claim, Huppert has simply cut-and-pasted statutory language in his SAC to squeeze a square peg in a round hole. Huppert must only add allegations for which he has a factual basis. With the factual allegations as to Dr. Krivonovskiy unchanged from the PAC to SAC, Huppert has no basis-- factual or otherwise--to allege **abuse** of a vulnerable person and this claim must be dismissed.

V. HUPPERT CANNOT MAINTAIN A CLAIM FOR PUNITIVE DAMAGES

A. Where Huppert's **Abuse** Of A Vulnerable Person Claim Fails, His Attendant Request For Punitive Damages Likewise Fails

For the reasons discussed herein, Huppert's claim For **abuse** of a vulnerable person must be dismissed as a matter of law. Because Huppert bases his claim for punitive damages on his claim for **abuse** of a vulnerable person, his punitive damages allegations must be dismissed as moot.

B. Punitive Damages Are Not Well-Pled In The First Instance

Even assuming *arguendo* that Huppert was entitled to bring a claim for punitive damages separate and apart from his **abuse** of a vulnerable person claim, Huppert has not properly pled his claim for punitive damages against Dr. Krivonovskiy.

Pursuant to NRS §42,005, in order to assert a claim for punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. NRS §42,005(1). A Plaintiff is not entitled to punitive damages as a matter of right. *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372 (1999). To recover punitive damages, a plaintiff must plead facts to show how a defendant “has been guilty of oppression, fraud or malice, express or implied,” NRS § 42,005. The Nevada Supreme Court has held that a plaintiff cannot recover punitive damages even when a defendant has acted with unconscionable irresponsibility. *Maduik v. Agency Rent-A-Car*, 114 Nev. 1, 5 (2008). A “plaintiff’s “conclusory characterization of defendant’s conduct as intentional, willful and fraudulent is a patently insufficient statement of “oppression, fraud, or malice, express or implied,” within the meaning of a punitive damages statute. *Brousseau v. Jarrett*, 73 Cal. App. 3d 864, 872 (Ct. App. 1977).⁸

Here, Huppert has failed to allege *any* new facts in his SAC to support punitive damages. Once again, the factual portion discussing Dr. Krivonovskiy is unchanged from the FAC to the SAC. See SAC, ¶¶27-29. However, Huppert added boilerplate and regurgitated language from the punitive damages statute believing that these naked conclusions support his claim. They do not, Huppert alleges that “[Defendants] ...had knowledge of Plaintiffs medical condition...” and “[Defendants] undertook to treat Plaintiff,” and that because Huppert developed an ulcer that worsened, somehow punitive damages are warranted. He further alleges that “Defendants acted with the knowledge of the probable consequences of the wrongful, act and a willful or deliberate failure to act to avoid those consequences.” SAC, ¶66. There are *no* facts that indicate Dr. Krivonovskiy committed any “wrongful act” or committed a “willful or deliberate failure to act” because Huppert only alleges that Dr. Krivonovskiy failed to document his care and treatment of Huppert’s ulcer. SAC, ¶¶27-29. Merely calling Dr. Krivonovskiy’s conduct willful or in conscious disregard does not make it so. Huppert has not--and cannot--state a claim for punitive damages based on the conduct alleged in his SAC.

C. Huppert Brazenly Jeopardizes Dr. Krivonovskiy’s Professional Reputation And Personal Assets By Trying To Transform This Medical Malpractice Case Into A. Punitive Damages Case

A physician, much like a lawyer, puts his or her professional reputation on the line every day, with every patient they treat. A physician, much like a lawyer, has taken an oath to take care of his or her patients with the utmost diligence. Medical malpractice allegations on their own can jeopardize a physician’s reputation but such claims are rightfully brought when treatment falls below the standard of care. By alleging punitive damages, however, as Huppert has done here, Huppert not only jeopardizes Dr. Krivonovskiy’s *professional* reputation but also put Dr. Krivonovskiy and his family’s *personal* assets in jeopardy. By Huppert’s own allegations, Dr. Krivonovskiy provided care and treatment to Plaintiff just not care “he claims was necessary to cure his ulcer in roughly a week, (Dr. Krivonovskiy’s daily evaluations of Mr. Krivonovskiy are each nearly a page long, and he had continuous orders for Huppert. Of course, none of this is admitted to in the SAC. Perhaps it is understandable, however, why Plaintiff’s expert did not want to go out on a limb in his ambiguous claim whether Dr. Krivonovskiy even committed medical malpractice.) The bottom line is that not a single fact alleged in the SAC against Dr. Krivonovskiy supports malice to state a claim for punitive damages.

V. CONCLUSION

Based on the foregoing, this Court should dismiss Huppert’s claims for **abuse** of a vulnerable person to NRS 41,1395 along with his claim for punitive damages,

DATED this th day of July, 2013.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By <<signature>>

V. ANDREW CASS

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KEITH A. WEAVER

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Attorneys for Defendant Aleksandr Krivonovskiy, M.D.

Footnotes

- 1 Interestingly, Plaintiff did not sue the hospital that he had just been even though he went into the hospital with a pressure ulcer and came out with a pressure ulcer.
- 2 Plaintiff now calls his cause of action “neglect” of a vulnerable person where it was previously “**abuse**” of a vulnerable person in the PAC. Plaintiff apparently abandoned his claim that he was intentionally “**abused**” because, of course, he was not. Changing the name of the cause of action to “neglect” only underscores that his claim was then and is now based on allegedly *inadequate* medical care rather than a *failure to provide* care.
- 3 If there were any question about whether this is a straight-forward medical malpractice case, all the Court needs to do is look at the Second Amended Complaint (“SAC”) where Plaintiff, yet again, alleges a cause of action for straight-forward medical malpractice premised on the same “fact” to give to Plaintiff’s **abuse** of a vulnerable person claim.
- 4 This court has held “[f]ederal cases interpreting the Federal Rules of Civil Procedure are ‘strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.’” See *Executive Mgmt., Ltd. v. Tigor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).
- 5 Huppert readily admits “it is appropriate to turn to California authority for guidance.” See Plaintiff’s Opposition to Motion to Dismiss First Amended Complaint at 8:20-22. Indeed, Nevada has yet to rule on the issue of overlap between medical malpractice and **abuse** of a vulnerable person. However, because California and Nevada have parallel medical malpractice damage caps, and parallel **elder abuse**/vulnerable person **abuse** statutes, Nevada should consider California law as persuasive authority here. See *Cal. Welf. & Inst. Code § 15657* (“**elder abuse** exists “[w]here it is proven ... that defendant is liable for physical **abuse** or neglect, and that the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of **abuse**...””).
- 6 The *Carter* court was echoing an earlier ruling by the California Supreme Court that the **elder abuse** act “refers not to the substandard performance of medical services but, rather, to the failure of those responsible for attending to the basic needs and comforts of **elderly** or dependent adults...”” *Covenant Care, Inc. v. Superior Court*, 32 Cal. 4th 771, 783 (2004) (quoting *Delany v. Baker*, 20 Cal. 4th 23, 33 (1999)).
- 7 Here, Plaintiff’s expert, is equivocal on whether Dr. Krivonovskiy even committed medical malpractice.
- 8 It is appropriate to look to California authority as it has a similar punitive damages statute. See *Fed Ins. Co.*, 124 Nev. at 327.