2012 WL 8170763 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Ernest H. BLACKBURN, Personal Representative of the Estate of Billie Jo Blackburn, on behalf of the Estate of Billie Jo Blackburn, Plaintiff,

v.

ENSIGN SABINO, L.L.C., a Nevada limited liability company doing business as Sabino Canyon Rehabilitation and Care Center; Bandera Healthcare, Inc., California corporation; the Ensign Group, Inc., a Delaware corporation; Ensign Facility Services, Inc., a Nevada corporation; Christine Jones, Administrator; Cornerstone Hospital of Southeast Arizona, L.L.C., a Delaware limited liability company; Healthcare Arizona, L.L.C., a Delaware limited liability company; Cornerstone Healthcare Group Holding, Inc., a Delaware corporation, Christine Hansen, Chief Executive Officer/Administrator and John Does 1-250;, Defendants.

No. C20101401.
June 1, 2012.

(Oral Argument Requested)
(Court Reporter Requested)

Plaintiff's Response to Defendants Cornerstone Hospital of Southeast Arizona, L.L.C., CS Healthcare Arizona, L.L.C, Cornerstone Healthcare Group Holding, Inc. And Christine Hansen's [1] Motions for Summary Judgment

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(Assigned to the Honorable Scott Rash).

Plaintiff, by and through undersigned counsel, hereby submits his response to Defendants Cornerstone Hospital of Southeast Arizona, L.L.C, CS Healthcare Arizona, L.L.C., Cornerston Healthcare Group Holding, Inc., and Christine Hansen's motions for summary judgment Plaintiff's response is supported by the following memorandum of points and authorities, as well as by Plaintiffs concurrently filed response to statement of facts (“RSOF”) and Plaintiff separate statement of facts (“PSOF”). Pursuant to the summary judgment standards articulated in *Orme School v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990), and for all the reasons discussed herein the court should deny Defendants' motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

On April 17, 2008, Billie Jo Blackburn was discharged from Tucson Medical Center and admitted to Cornerstone Hospital for continued nursing services and rehabilitation. During her admission to Cornerstone Hospital, Ms. Blackburn suffered from physical and mental impairments that rendered her unable to protect herself from the **abuse**, neglect and exploitation of others. As such, throughout her admission to Cornerstone Hospital, Ms. Blackburn was a vulnerable adult as defined by A.R.S. § 46-451 (A)(10). PSOF ¶¶ 4,6,7.

Ms. Blackburn was 68 years old and had a history of hypertension, peripheral vascular disease and chronic obstructive pulmonary disease. Ms. Blackburn was unable to ambulate and was non-verbal. She was noted to be dependent upon the facility staff for all of her activities of daily living. She was able to consume small amounts of food orally but received nutrition primarily through a percutaneous endoscopic gastrostomy (PEG) tube. Upon admission, Ms. Blackburn was also noted to have a Stage II pressure sore (1.7cm x 1.5cm) to her coccyx. PSOF ¶¶ 1, 5, 10.

Thus, throughout her admission to Cornerstone Hospital, the nursing staff was well aware of Ms. Blackburn's risk for the development and worsening of pressure sores. Nursing staff was also aware of Ms. Blackburn's presenting medical conditions, as well as her compromised physical state. They knew or should have known that Ms. Blackburn was dependent on the nursing staff for her activities of daily living as well as for her overall health, safety and wellbeing. Accordingly, Cornerstone Hospital had the duty to provide adequate and appropriate nursing services to Ms. Blackburn, including relating to pressure sores. PSOF ¶¶ 8, 75, 84, 85. Nevertheless, Defendants failed to comply with their duties and obligations and, as a result, by the time Ms. Blackburn was discharged from Cornerstone Hospital just two short months later, on July 2, 2008, the coccyx pressure sore had become a horrific Stage IV pressure sore (with possible osteomyelitis) that measured 6 cm x 9.4 cm x 1.7 cm (depth). Cornerstone's own chief clinical officer admitted that this as a significant wound. PSOF ¶¶11, 89, 90.

In order to prevent the worsening of the pressure, Defendants had to provide Ms. Blackburn with a number of interventions. For example, basic nursing care interventions such as, at a minimum, turning and repositioning a patient such as Ms. Blackburn every two hours must be done to provide appropriate pressure relief. Based on the numerous omissions that were found in Cornerstone Hospital's records, this intervention was not consistently provided to Ms. Blackburn. Rather, it appears that Ms. Blackburn was turned and repositioned only a handful of times. In fact, Ms. Blackburn's daughter testified that nine times out of ten, the family would have to go find someone and then wait for them to come to turn Ms. Blackburn. Ms. Blackburn's husband became so frustrated and concerned with the lack of turning and repositioning provided to his wife that, later during her admission, he made a schedule so the family could see exactly when things were being done, PSOF ¶¶ 16, 126 - 143.

The nursing staff at Cornerstone Hospital also failed to consistently follow physicians' orders with respect to treatments for the pressure ulcer to Ms. Blackburn's coccyx. For instance, on April 17, 2008, Ms. Blackburn's physician ordered that duoderm be applied to her sacrum every Monday, Thursday and PRN (as needed). On April 28, 2008, Ms. Blackburn's physician ordered that xerofoam be applied to her pressure ulcer with the dressing changed daily. However, there are multiple instances where the nursing staff failed to comply with the treatment orders and by April 29, 2008, the wound was 6.5 centimeters by 5.5 centimeters. PSOF ¶¶ 97 - 112.

To make matters even worse, the wound care nurse, Rachel Robitaille, was on vacation approximately two weeks during May, 2008. While Ms. Robitaille or the management of Cornerstone should have made some plan for wound care coverage during her time away from the facility, it appears that was not done. As a result, during this time period, Defendants provided little, if any, wound care to Ms. Blackburn. There is no dressing change documented for May 1, 2, or 4, 2008 per physician's order dated April 28, 2008 for xerofoam change daily. Ms. Blackburn is also not documented to have received wound care treatment or dressing change on May 7, 2008. PSOF ¶¶ 113-119.

On May 8, 2008, there was a new physician's order for Accuzyme to sacrum, decubitus, BID, which means twice per day. Dr. Schilling expected the nursing staff caring for the patient to carry out the May 2008 order and apply Accuzyme twice per day to Ms. Blackburn's wound. However, again, staff failed to follow through with ordered care and treatment. There is no dressing change documented in Ms. Blackburn's clinical chart for the a.m. shift on May 11, 2008 per physician's order dated May 8, 2008 for Accuzyme to sacrum, decubitus, BID. And on May 12, 2008, Ms. Blackburn' wound had clearly progressed. The wound measured 8 cm x 9 cm; there was a moderate amount of exudates; there was a foul odor; and the wound bed was black and yellow. This pattern of not providing physician ordered treatments (as well as failing to keep her physician advised of the wound's deterioration) continued throughout Ms. Blackburn's admission which obviously had extreme consequences for her. PSOF ¶¶ 120 - 125.

As stated, by the time Ms. Blackburn was discharged from Cornerstone Hospital, on July 2, 2008, this wound had become a large, gruesome Stage IV pressure sore (with possible osteomyelitis). The deterioration and worsening of the pressure sore to Billie Jo Blackburn's coccyx was the result of the multiple failures on the part of Cornerstone, including but not limited to: failing to properly assess and track the wound, failing to provide appropriate turning and repositioning for pressure relief, and failing to adequately follow physicians' orders with respect to wound treatments. [2] PSOF ¶¶ 11, 12, 13, 15, 16, 91, 94, 138, 143.

Nutrition and hydration play a very important role in the prevention and treatment of pressure ulcers. However, the staff at Cornerstone Hospital failed to ensure that Ms. Blackburn received adequate nutrition. Such failures are evidenced by various laboratory reports indicating that she suffered from low albumin and total protein. The nurses failed to advise the dietitian that Ms. Blackburn's feeding tube was shut off when she was in her wheelchair and, thus, she was not receiving the nutrition. Indeed, Defendants never documented granulation tissue for Ms. Blackburn which will only occur in patients who have adequate nutrition and adequate offloading. PSOF ¶¶ 144 - 148. Defendants' failure to provide Ms. Blackburn with adequate nutrition clearly had a negative impact on her health and wellbeing.

Not only did Cornerstone Hospital fail to provide Ms. Blackburn with essential care, treatment, and interventions, the staff engaged in a consistently negligent pattern of inconsistent documentation. The standard of care and Cornerstone's own policies call for care, treatments and medications to be documented. Documentation is a way by which to confirm that a task was actually completed. If something is not documented, then the presumption must be that it was not done. PSOF ¶¶ 203 - 233. The presumption here, based on a lack of thorough and accurate documentation, is that Defendants failed to provide Ms. Blackburn with the required care.

Just by way of example, for April 21 through April 27, 2008, on the day shift, there is no documentation by a CNA or patient care tech at Cornerstone Hospital with respect to Ms.

Blackburn. The documentation for the 7:00 p.m. shift on April 25, 26, and 27, 2008 does not indicate what time Ms. Blackburn was turned, what position she was put in, and whether or not she tolerated that activity, PSOF ¶¶ 235, 236. There is no documentation on the ADL form for May 12, 13, and 14 for either the day shift or the night shift. There is no documentation for the day shift on the ADL form on May 15, 16, 17, or 18, 2008. For the night shift on May 15, 16, 17, and 18, 2008, other than initials under “hygiene,” “finger sticking”, “turning and repositioning” and “peri-care”, there is no other documentation on the ADL sheet, including on which side Ms. Blackburn was turned, how she tolerated the turning and what time she was turned. PSOF 11237, 238,239. Documentation is similarly lacking on the ADL form for the night shift on June 20,21, 22, 2008 regarding positioning or timing for turning Ms. Blackburn. PSOF ¶240. There is nothing filled in on the ADL form from June 16 through June 22 for either the day shift or the night shift. PSOF ¶ 241.

Defendants' own expert, Nurse Elizabeth Hiltabidel, confirmed that there are “clea blank spaces on the ADL form for Ms. Blackburn.” PSOF ¶ 32. Defendants' CNA Madeleine Cohen also noticed that other CNAs at Cornerstone were not completing the documentation. PSOF ¶233. And the chief clinical nurse candidly conceded that if she had been aware of the ongoing pattern in Ms. Blackburn's records indicating a lack of turning and repositioning, she would have asked the nursing staff about the omissioins. PSOF ¶ 234.

Cornerstone Hospital also failed to provide Ms. Blackburn with sufficient, and adequately trained, nursing personnel in order to ensure that she received adequate nursing and related services. PSOF 11150, 151. Staffing was an ongoing problem at this long term acute care facility. Importantly, patients at LTAC facilities are typically of a higher acuity which means that they require higher levels of care. Yet rather than staffing based on acuity, Cornerstone staffed based on a set staffing matrix. In addition, as a facility with a history of being cash distressed, the facility was very focused on remaining within budget. As a result, Cornerstone staff felt overworked, overwhelmed, and stressed. PSOF ¶¶158, 167, 170, 175, 177, 182, 261, 314, 316.

Staff voiced concerns that more people were needed to do the job and that it was difficult to complete all of their tasks given the workload. Staff also believed it was difficult to provide the care they wanted. In fact, staff brought their concerns to the

attention of CEO Christine Hansen and chief clinical officer Robin Nandin. Ms. Nandin addressed the matter with Ms. Hansen who, in turn, raised it with the corporate office. PSOF ¶¶ 166 - 188. Obviously the issue was not resolved because inadequate staffing was a factor in the decision of some nurses to resign which, in turn, only compounded the problem. Moreover, a number of the leadership members at the Tucson facility left during the first year or two of Cornerstone's ownership.[3] PSOF ¶¶ 49, 189, 199. Still, Cornerstone Healthcare Group did not put a hold on new admissions as evidenced by the fact that the facility went from 21 residents to 32 residents between April 17 and May 1, 2008. PSOF ¶¶ 201, 202.

In addition to being short staffed, issued related to employees' attendance, attitude, and performance appear to have been rampant. For instance, a number of staff members hadexcessive absences. LPN Robert Ancheta, PCT John Furgason, CNA Michelle Dixon, and Stacy Franklin were all disciplined for excessive absences. Mr. Furgason was terminated on July 1, 2008 due to excessive call offs and Michelle Dixon was terminated in December, 2009 for patient neglect. PSOF ¶¶ 190, 191, 194, 195. Nelsa Frisbie (about whom patients frequently complained) was terminated in November, 2008 when she lied to the RN, including about emptying a patient's colostomy bag which later ruptured. PSOF ¶f 196. Personnel files also contain references to the need for employees to stay positive, not complain to patients, and gain team spirit. PSOF ¶¶ 192, 193, 197. Obviously staff call offs, performance problems, and poor attitude stretched Cornerstone's understaffed Tucson facility to the brink and impeded the care and services provided to its acutely ill patients.

Cornerstone was certainly aware of problems at the Tucson facility. Findings of a survey conducted by the Joint Commission (JCAHO) between February 5, 2008 and February 7, 2008 included that “there was no documentation by the nursing staff of the treatment planning update. In the second record reviewed, nursing had documented on only three of the four updates. PSOF I¶ 244. In addition, the Arizona Department of Health Services conducted a survey of Cornerstone Hospital between June 20 and June 23, 2008, which is a period of time when Ms. Blackburn was a patient of the facility which resulted in deficiencies.[4] The findings of the June, 2008 survey include that the nurse executive failed to require that the registered nurses assigned to “patient no. 1” assessed, directed, and monitored the patient's skin care to prevent and treat skin breakdown. The survey indicates that the hospital's policies and procedures were not followed for wound care, assessment, treatment, and documentation for “patient no. 1.” The June, 2008 survey also provides that documentation is lacking that a physical therapist's suggestion that a patient have a pressure-relieving mattress was communicated to the physician or nursing staff or that the patient was actually provided an air mattress. There is also reference that a physician ordered EPC cream to be applied to the patient's perineum and buttocks twice daily but the nursing staff provided a different treatment for which there was no order. Christine Hansen conceded to the surveyors that the hospital's policies and procedures were not followed for wound care assessment, treatment, and documentation with respect to that particular patient and the facility was fined $500.00 PSOF ¶¶ 22-29.

Cornerstone fared no better in connection with a December 19, 2008 which revealed that the chief clinical officer failed to provide the number of necessary nursing personnel to provide nursing care to the patients on multiple days in July as evidenced by patients not being fed, medications not being administered timely, wound care treatments not being done, and call lights not being responded to in a timely manner. Four nurses who were interviewed acknowledged at nurses had been assigned six or seven patients in the past and that it was difficult to provide all patients' needs when there were so many patients assigned with high acuity levels, Eight of ten patients expressed concerns with slow response to call lights, especially on the evening shift and one patient and his wife stated they waited 45 minutes for someone to respond. Two former Cornerstone Hospital employees stated that assignments were heavy on the 100 unit and frequently the nurses were unable to complete all the nursing tasks assigned. DHS determined that the hospital quality management program failed to evaluate the patients' quality of care in wound care, call light response time, and sufficient staffing to meet patient needs. DHS issued a citation related to the nurse executive's failure to acquire an acuity plan that included an accurate assessment of all patients' needs as evidenced by not ensuring that all wound care treatments were performed following physician orders for eight patients with skin breakdown. PSOF ¶¶ 30 - 38, 50.

The December, 2008 survey also referenced a patient who was to be turned and repositioned every two hours and had a sacral wound whose wet to dry dressing was to by changed twice daily. Unfortunately, the dressing was changed only once on 7/17,7/19, not at all on 7/20, and once on 7/27. Furthermore, the patient was turned only three times on 6/29 and not at all on 6/30,7/1 and 7/2/09. The December survey also mentions meetings held at Cornerston which revealed numerous problems. For

example, at a Cornerstone meeting on February 2 2008, the nursing admission assessment at the Tucson facility was determined to be only 83% compliant. The March 13, 2008 meeting minutes indicate that chart audit results were not submitted. No meeting was conducted in April, 2008. A May 16, 2008 meeting revealed that restraint documentation was recorded at only 50% and medication documentation was at 50% Both Mr. Brohm and Ms. Nandin agreed that medication documentation at 50% is concernin. The June, 2008 meeting minutes indicate that medication documentation was 45%. PSOF ¶¶38, 49, 51. Thus, as the survey revealed, Defendants learned of problems at monthly meetings (where monthly meetings were held, that is) but obviously did not take adequate corrective action.

In sum, during an extremely chaotic time when the chief clinical officer and QA director resigned, the facility was understaffed, the existing staff felt overworked and stressed, and documentation errors were prevalent, the census nevertheless increased by approximately 50% (consistent with Defendants' objective to get beds filled). Defendants' conduct establishes not only their notice and knowledge of serious systemic failures at the Tucson facility, but that they acted to serve their own interests in reckless disregard for the safety and wellbeing of patients, including Billie Jo Blackburn.

II. LEGAL ARGUMENT

A. THE CORPORATE DEFENDANTS CAN BE HELD LIABLE

1. Direct Liability

each of the moving Defendants may be held liable for the injuries and pain and suffering billie Jo Blackburn suffered while a patient at Cornerstone Hospital. The Arizona Adult Protective Services Act, A.R.S. § 46-455 (B), permits “an incapacitated or vulnerable adult whose life or health is being or has been endangered or injured by neglect, **abuse** or exploitatio to file a lawsuit “against any person or enterprise that has been employed to provide care, that has a legal duty to provide care or that has been appointed by a court to provide care...” Ms. Blackburn suffered such **abuse** and neglect at Cornerstone's Tucson facility as evidenced by her coccyx pressure ulcer PSOF ¶¶ 12 - 21. APSA permits Plaintiff to file a lawsuit against the moving Defendants as enterprises which had a duty to provide care to the patients of Cornerstone facilities, including Ms. Blackburn.

In *Corbett v. Manor Care of America*, 213 Ariz. 618, 146 P.2d 1027 (App. 2006), one issue before the court was whether the scope of liability under APSA was limited to employee who had a direct caregiver-patient relationship with the patient. The defendant employees in Corbett argued that A.R.S. § 46-455 requires a direct caregiver-patient relationship for a duty to parise. However, the court found that reliance on the “proposition that APSA requires a direct caregiver-patient relationship is misplaced.” 213 Ariz, at 628, 146 P.2d at 1037. The court further explained that “statutory language controls our interpretation when the language is clear and unequivocal.” 213 Ariz, at 629, 146,P.2d at 1038, (citing *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 98, 887 P.2d 625, 628 (Ct. App. 1994).

The *Corbett* court went on to explain that “[u]nder the plain wording of the statute, incapacitated or vulnerable adult can bring a lawsuit against ‘any person or enterprise’ that ‘has been employed to provide care’ or that ‘has assumed a legal duty to provide care’ if the person or enterprise has ‘caused or permitted’ the incapacitated or vulnerable adult to be **abused**, neglected, or exploited.” 213 Ariz, at 629, 146 P.2d at 1038 (citing A.R.S. § 46-455(B)). Accordingly, the *Corbett* court ultimately held:

> ....that the legislature did not intend to limit liability to those who have a direct caregiver-patient relationship with an incapacitated or vulnerable adult. The statute subjects to liability both persons and enterprises, not just individuals. Furthermore, the statute subjects to liability those who cause or permit the **abuse**, neglect, or exploitation of an incapacitated or vulnerable adult.

213 Ariz, at 629, 146 P.2d at 1038 (emphasis in original). Thus, direct care responsibilities are not required to hold one liable for harm suffered by a patient.

Moreover, because Plaintiffs claim is based on APSA and is not a medical negligenceaction, A.R.S. § 12-563, as well as the cases interpreting and applying this statute, see Defendants' Motion at pp. 9-10, are not applicable. In *Denton v. Superior Court*, 190 Ariz. 152, 157, 945 P.2d 1283 (1997), the Court held that Arizona's survival statute (A.R.S. § 14-477), does not apply to APSA claims. In reaching this conclusion, the Court noted Section O (then listed as M) prohibited the limitation of APSA by any other provision of law. 190 Ariz, at 156, 945 P.2d at 1287. While *Denton* involved the applicability of the survival statute to APSA, the Court's logic follows for the applicability of MMA as well. The legislature enacted APSA out of concern for **elder abuse** due to Arizona's substantial **elderly** population. *Id.*

Nor does the fact that this action has been brought against licensed health care providers automatically bring it within the MMA. In *Estate of McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (2002), the Arizona Supreme Court granted review by special action of a matter involving an action against two doctors and the behavioral health facilities and service providers by the estate of a sixty-four year old woman who died of cardiac arrest due to neurotoxicity and other causes. Plaintiffs brought both MMA and APSA claims against the doctors and the service providers. The trial court granted the defendants' motion for summary judgment and dismissed the APSA claims, leaving only the MMA claims for trial.

However, the Supreme Court in *McGill* reversed, holding that the plaintiffs could proceed to trial on the APSA claim. The Court's reasoning is instructive here. The Court observed that APSA, adopted in 1989, created a statutory civil cause of action with the legislative purpose of protecting Arizona's **elderly** population. *Estate ofMcGill*, 203 Ariz, at 528,57 P.3d at 387. Citing *Denton v. Superior Court*, the *McGill* Court observed that the statute was intended to increase the remedies available to and for **elderly** or vulnerable people harmed by their caregivers. Id. More often than not, these care custodians were providing, or promised to provide, some level of nursing or medical care to those in their care. If MMA governs the ability of vulnerable adults to proceed against care custodians in situations where any medical care or nursing care was provided, virtually no APSA action will survive. As the *McGill* court pointed out, if MMA were the exclusive remedy in a situation such as the instant case "the great majority of caregivers to the incapacitated would be immune from APSA actions and APSA would be a toothless tiger." 203 Ariz. at 530, 57 P.3d at 389.

McGill involved a vulnerable adult placed in the care of the defendants. As a result of the relationship between caregiver and caretaker, the plaintiffs alleged that Ms. McGill was negligently medicated and that this negligence, constituting **abuse** and neglect as those terms are defined in APSA, resulted in her death. Similarly here, Billie Jo Blackburn was a dependent and vulnerable adult who required assistance with her activities of daily living. Defendants were employed to, and undertook the responsibility to, provide her care. Unlike the McGill case, however, Plaintiff here did not also bring a claim under MMA.

Other courts concur that not all actions against a medical or healthcare provider constitute medical malpractice. As the Arkansas Supreme Court has explained, "[al]though in a general sense, a doctor furnishes medical care to patients, clearly, not every act of negligence toward a patient constitutes medical malpractice." *McQuay v. Gunharp*, 336 Ark. 534, 540, 986 S.W.2d 850, 852-53 (1999) (citations omitted). *See also Gunter v. Laboratory Corp. of America*, 121 S.W.3d 636, 640 (Tenn. 2003) (a medical malpractice claim is not triggered simply because a party to an action is a health or medical entity.); *Draper v. Westerfield*, 181 S.W.3d 283, 290-91 (Tenn. 2005) (same); *Estate of French v. Stratford*, 333 S.W.3d 546 (Tenn. 2011) (CNAs' failure to comply with care plans due to lack of training, understaffing, or other causes, constitute claims of ordinary negligence). Likewise here, Plaintiff's APSA claim does not trigger the rules, statutes and/or standards applicable to medical malpractice actions.

Rather, through their corporate structure and interrelationship, the various corporate entities are subject to imposition of liability for causing and/or permitting Ms. Blackburn to be **abused**/neglected and/or exploited in violation of APSA. Cornerstone Healthcare Group, which is the name that everyone uses for Cornerstone Healthcare Group Holdings, Incorporated, owns and manages a number of facilities, including Cornerstone Hospital of Southeast Arizona in Tucson, Arizona. Cornerstone Healthcare Group is the licensees or license holder of the Tucson hospital. CS Healthcare Arizona is a member of Cornerstone Hospital Southeast Arizona and Cornerstone Healthcare Group is a member of CS Healthcare Arizona. PSOF ¶¶257 - 266, 376, 379 -384.

Cornerstone Healthcare Group president and CEO Michael Brohm was involved in the operations of all the Cornerstone facilities and was the director/manager of Cornerstone Hospital of Southeast Arizona. PSOF ¶¶ 258, 267, 279. Cornerstone Healthcare Group Holding Incorporated, through Mr. Brohm and the other managing boards, oversaw all hospital operations of the Arizona facility which included working with the local management team to ensure it was providing patient care and had quality programs in place. Mr. Brohm was also involved in making changes in the senior leadership team; visiting the facility periodically; looking at the results, including financial results; looking at costs; looking at quality indicators, operating indicators and financial indicators. Process needs to be followed more efficiently...." The corporate director of quality would gather information, including regarding prevalence of pressure sores, prevalence of weight loss, prevalence of falls, from all the hospitals, and assess it from a clinical perspective and work on improving any quality indicators. PSOF ¶ 277.

Kenneth McGee was vice president of operations and of marketing. Mr. McGee'ss responsibilities included "trying to get the company back up and running, getting things organized, trying to get some structure in place, trying to grow the business. Just daily operations, things such as that PSOF ¶ 259. The Tucson facility provided Mr. McGee the census on a daily or weekly basis and he also received HPD reports related to staffing. Mr. McGee kept himself apprised of what was going on at the Cornerstone Tucson facility, including by speaking with the CEO, Christine Hansen. Ms. Hansen, who reported to Ken McGee (who, in turn, reported to Michael Brohm), recalls have nearly daily contact with the Cornerstone corporate office. PSOF ¶¶ 260, 274, 283, 306, 307, 312, 319, 320, 323, 324, 345. And both Mr. Brohm and Mr. McGee frequented the Tucson facility and participated in meetings regarding the facility. PSOF ¶¶ - 289, 290 - 292,-305, 327- 328, 337.

Notably, Cornerstone Healthcare Group's website refers to its patients, including stating that it is "committed to improving the health and well being of the patients we serve...."; "A commitment to providing excellent health care for patients who have experienced debilitating illness and injuries requiring long term acute care." A commitment to our patients which encompasses understanding, compassion, and honesly for them and for their families."; "The involvement of our staff, singularly focused on realizing each patient's full potential and maximum recovery."; and "the integrity of the Cornerstone staff, top to bottom, down every corridor of every hospital, with the people our patients see and speak with, and even with those they don't." PSOF ¶375. And, per documents in Robin Nandin's new hire packet, Cornerstone's ostensible commitment is to provide "its patients the highest level of care and services in a comfortable and secure environment." PSOF¶367. Corporate is so involved in the operation of the Tucson facility that it decides which patients to accept as evidenced by Ms. Aldor's 30 day evaluation which includes "After an admission with a high cost medication, we discussed the *financial clearance process for admission is completed at a corporate level and the face sheets are to be faxed to corporate once we get the referral.* PSOF ¶356. And, the insured entity for the Tucson facility is Cornerstone Healthcare Group Holdings, Incorporated. PSOF ¶354.

Due to their involvement, oversight, control and operation of their facilities, as well as their ultimate decision making role, the corporate entities assumed a legal duty to provide care to facility patients and, in turn, can be liable for causing and/or permitting the **abuse** and neglect of their patients, including Ms. Blackburn.

2. Vicarious Liability

In addition to direct liability, corporate entities may be vicariously liable for the negligent and/or tortious acts of their employees committed within the course and scope of their employment. *See Baker ex. rel. Hall Brake Supply, Inc. v. Stewart,* 197 Ariz. 535, 540, 5 P.3d 249, 254 (Ct. App. 2000). Thus, Plaintiff must establish that the Cornerstone employees were acting within the course and scope of their employment with respect to their treatment of Ms. Blackburn. An employee's conduct falls within the scope of their employment "if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it." 197 Ariz, at 540,5 P.3d at 254. [5]

Cornerstone Healthcare Group is ultimately the employer of the personnel who staff the Tucson facility and was involved in both the hiring and firing of personnel, including the actual staff which was providing care (or not providing care as the case may be). PSOF ¶¶ 268, 273, 275, 276, 297. Cornerstone Healthcare Group's website even posts available positions at the Tucson facility. PSOF ¶¶ 377, 378. The corporate Defendants' own documentation further bears out their employer status. For example,

the new hire packets include, among other things, Cornerstone Group's smoke-free policy; affirmative action policy, private duty policy, as well as Cornerstone Healthcare Group's employee handbook which employees acknowledge as having received. A wealth of other documents contained in personnel files establish CHG as the employer: forms contain Cornerstone Healthcare Group's letterhead and/or logo; letters offer individuals employment with CHG; letters welcome new employees as part of CHG; documents summarize current Cornerstone Healthcare Group programs, policies and procedures..."; and documents indicate that CHG's commitment requires that "our employees be dedicated to providing patient care and services without regard to employment or compensation from sources other than Cornerstone Healthcare Group." PSOF ¶¶357-372.

Furthermore, the conduct of the Cornerstone staff certainly fell within the scope of their employment since they were hired to provide care and treatment to the Tucson facility's patients, including Ms. Blackburn and the corporate office expected them to comply with the standard of care. PSOF ¶ 310. Yet, during the course of their employment and in connection with their provision of care and supervision lack thereof—Cornerstone personnel negligently failed to provide the care, treatment, and interventions essential to Ms. Blackburn's health and wellbeing. PSOF ¶¶ 12-21. Notwithstanding the standard of care and Cornerstone Healthcare Group's policies and procedures, staff failed to provide Ms. Blackburn with appropriate wound care throughout her admission. PSOF ¶¶ 75-125. In addition, the records indicate that Cornerstone staff failed to turn and reposition Ms. Blackburn every two hours as per the standard of care and company policy. PSOF ¶¶ 126-141, 143. Staff even failed to provide Ms. Blackburn with something as simple as a physician ordered roho cushion. PSOF ¶ 142. Nor did staff provide Ms. Blackburn with appropriate nutrition which was critical to her wound healing capabilities. PSOF ¶¶ 144 - 148. Pursuant to the doctrine of respondeat superior, the corporate Defendants can be held liable for these negligent acts and omissions of Cornerstone's employees at the Tucson facility which caused Ms. Blackburn's injuries and pain and suffering.

3. Piercing the Corporate Veil

Because Plaintiff has established that the Corporate Defendants can be directly vicariously liable for the negligent acts and omissions which led to Ms. Blackburn's injuries pain and suffering, the court does not need to reach the issue of piercing the corporate veil in t case. However, sufficient evidence does exist to warrant piercing the thin corporate veil behind which the Corporate Defendants are attempting to hide.

A parent corporation may, pursuant to an alter ego theory, be held liable for the acts of its subsidiary when the individuality or separateness of the subsidiary corporation has ceased." *See Gatecliffv. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (1991). *See also See Pan Pacific Sash and Door Co., v. Greendale Park, Inc.* 166 Cal.App.2d 652,333 P.2d 802 (1958) ("Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability...Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations."); *Los Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App.3d 1220, 1249, 1 Cal. Rptr. 2d 301 (1991) ("A very numerous and growing class of cases where the corporate entity is disregarded is that wherein it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation... it would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity." [emphasis in original]).

In order to prevail under an alter ego theory, a plaintiff must prove unity of control and that observance of the corporate form would endorse a fraud or result in injustice. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz, at 37, 821 P.2d at 728. Factors which may suggest substantially total control include, among other things:

> Stock ownership by the parent; common officers or directors; financing of subsidiary by the parent; payment of salaries and other expenses of subsidiary by the parent; failure of subsidiary to maintain formalities of separate corporate existence; similarity of logo; and plaintiff's lack of knowledge of subsidiary's separate corporate existence.

170 Ariz. at 37, 821 P.2d at 728. A number of those factors exist here.

Defendants clearly shared control, with Cornerstone Healthcare Group at the helm. PSOF ¶¶257-386. The individuals who participated in the development and approval of Cornerstone Hospital's operating budget for the relevant time period include: Mike Brohm, President, Cornerstone Healthcare Group; Ken McGee, Vice President, Cornerstone Healthcare Group; Shane Wells, CFO, Cornerstone Healthcare Group; Christine Hansen, Chief Executive officer, Cornerstone Hospital Southeast Arizona; and Michael Hall, COO, Cornerstone Hospital Southeast Arizona. PSOF ¶ 335. The hospital was expected to operate within the budget set by the corporate office. PSOF ¶¶ 307, 339.In addition, the Tucson facility's CEO, Christine Hansen, would provide numbers to corporate, including Mr. McGee, and then corporate would report back to her whether she was controlling costs. Monthly financial statements would monitor what was budgeted for costs and what was actually expended for costs. PSOF ¶¶ 283, 333, 334, 336 - 338, 340.

Moreover, Cornerstone used a centralized banking system which was handled by the management team and Cornerstone corporate provided the salaries and benefits to the employees of the Tucson facility. PSOF ¶ 272, 352, 367. Letters offering employment to applicants for the Tucson facility expressly state that "Cornerstone Healthcare is pleased to offer you the position" and that CHG looks "forward to having you become a part of the Cornerstone Healthcare Group." PSOF ¶¶ 355 - 359, 362, 363, 367, 370, 371. The corporate headquarters also had a hand in completing and submitting the licensing application for the Tucson facility; hiring and firing staff; the imposition of requirements regarding facility census; involvement in marketing and quality control; and implementation of policies and procedures. Moreover, the websites of the local Tucson facility and the corporate entity contain identical information and post identical open positions. The website for Cornerstone Hospital of SE Arizona adds that it "is a part of the Cornerstone Healthcare Group, which operates 11 hospitals across the country." In addition, the local and corporate entities share the same logo, including on a multitude of personnel documents. PSOF ¶¶ 280 291 - 293, 296, 297, 299, 300 - 302, 376, 383, 384.

In sum, the Corporate Defendants' operational involvement, management, direction and control of Cornerstone Healthcare Group-owned facilities, including the Tucson facility, is indisputable. Furthermore, injustice will occur if injured patients, including Billie Jo Blackburn, are prevented from holding liable the Cornerstone corporate entities which are insured for the facilities and which are intimately involved in operating, managing, and directing, as well as profiting from, such facilities. As such, liability under an alter ego theory is appropriate.

B. PLAINTIFF HAS SUFFICIENT EVIDENCE FOR PUNITIVE DAMAGES

Plaintiff has set forth the requisite pattern of fact's to demonstrate that, in Defendants' failure to properly care for Billie Jo Blackburn, they consciously disregarded a substantial risk that their violations of the applicable standard of care created a substantial risk of significant injury to her. Punitive damages are available where Defendants acted to serve their own interests, having reason to know and consciously disregarding a substantial risk that their conduct might significantly injure the rights of others or upon proof that a defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others. *See* RAJI (Civil) 4th, Personal Injury Damages 4; *Gurule v. Illinois Mut. Life & Cas. Co.*, 152 Ariz.

600, 602, 734 P.2d 85, 87 (1987); *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 157 Ariz. 411, 422, 758 P.2d 1313, 1324 (1988). Moreover, a single event, or a combination of circumstantial evidence, may establish that a defendant acted with sufficient recklessness for punitive damages. *See Quintero v. Rodgers*, 221 Ariz. 536, 542-543, 212 P.3d 874, 880-881 (Ct. App. 2009) (summary judgment on punitive damages reversed where the defendant had exceeded the speed limit by going between 70 and 80 miles per hour in a 45 miles per hour zone and had weaved in and out of traffic). In addition, the *Gurule* court discussed instances where the wrongful conduct was not a single instance but was part of a pattern or practice. 152 Ariz. at 602, 734 P.2d at 87. While a single piece of evidence alone, may not be clear and convincing evidence of an "evil mind," "several pieces of such evidence, taken together, might clear the evidentiary hurdle." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).

The facts presented in the instant case demonstrate an egregious pattern of acts and omissions by the Defendants which justify punitive damages. Defendants placed their desire for profits over the needs of their acutely ill patients, including Billie Jo Blackburn. In fact, staff understood that "LTAC, whether you like it or not, is considered a business. Long-term acute care, skilled nursing facilities, they're businesses, they're for-profit businesses..." PSOF ¶¶ 287, 341 -343. Defendants' profit-driven philosophy had devastating consequences for Ms. Blackburn who was a vulnerable adult with increased risk for injury/illness and numerous medical needds.

Defendants were fully aware of Ms. Blackburn's risks, including her risk for skin breakdown and they consciously disregarded those risks. Defendants' neglectful and negligent acts and omissions include failing to consistently turn and reposition Ms. Blackburn; failing to follow physicians orders and provide essential wound treatments; and failing to provide adequate nutrition, all of which caused and/or contributed to the development of a stage IV pressure ulcer on her coccyx, as well as unnecessary pain and suffering. Moreover, Defendants were well aware of, and ignored, problems at the Tucson facility, including related to medication/treatment errors/omissions; short staffing; poor morale; and documentation issues—many of which were corroborated by DHS. Yet during these troubled times, Defendants actually increased the patient population. Ms. Blackburn's injuries and pain and suffering were the product of Defendants' greed and their continual, conscious disregard for her medical needs and her wellbeing. PSOF ¶¶ 4-8, 12-21-51, 82, 84, 89-91, 94,144-148,150-152, 156-202.

While no Arizona cases discuss punitive damages under Arizona's Adult Protective Services Act, other jurisdictions have allowed punitive damages against nursing homes, including for conduct which is similar to that at issue here. In *NME Props., Inc. v. Rudich,* 840 So.2d 309 (Fla. Ct. App. 2003) the court affirmed the punitive damages award against the Defendant following the death of a nursing home resident. There, the **elderly** resident suffered from stage IV bedsores. The medical chart showed that the decedent was not bathed or showered regularly, that her pressure sores went untreated for days, and that no pain medication was administered. The court stated: "Here, the evidence suggests that First Healthcare's own administrators were negligent in supervising the staff, including permitting the facility to be short on staff during the holiday periods (when the ulcers on Revitz developed). There was also a pattern of record keeping irregularities which resulted in inaccurate and non-existent records. That is sufficient to support vicarious liability for punitive damages when combined with the willful conduct of the nursing employees." 840 So.2d at 315.

In *Rose Care Inc., v. Ross,* 91 Ark. App. 187, 209 S.W.3d 393 (2005), the trial court's decision to not permit the jury to consider the issue of punitive damages was reversed. The court observed that when Eula Givens entered Rose Care, a long term care facility, on October 1, 1999, she was not in a completely deteriorated condition. She was 90 years old, weighed 118 pounds, and had no pressure sores. She did, however, suffer from diabetes, arthritis, hypertension, bladder incontinence, dementia, and a recent urinary-tract infection. 91 Ark. App. at 194, 209 S.W.2d at 397. By January 12, 2000, Ms. Givens weighed only 92 pounds and by May, 2000, she weighed a mere 76 pounds. The pressure sores had also increased in severity. 91 Ark. App. at 195, 209 S.W.3d at 397. Evidence of inadequate staffing, incomplete charting of fluid intake, the worsening of pressure sores, prior citations concerning relevant care issues, and Ms. Givens' conditions and suffering of which the facility was aware, constituted substantial evidence of reckless disregard, making a directed verdict on punitive damages improper. 91 Ark at 210, 209 S.W.3d at 407-08. *See also Estate of Youngblood v. Halifax Convalescent Ctr., Ltd,* 874 So.2d 596 (Fla. Ct. App. 2004) (appellate court reversed a directed verdict and ordered a new trial based on the testimony of **abuse** consisting of a new stage III pressure sore, an eye injury and a contusion that became infected, and further noted that there was testimony that this conduct was both outrageously deficient and linked to a conscious decision to keep the facility chronically understaffed due to budget problems); *Beverly Enters. v. Spilman,* 661 So.2d 867 (Fla. Ct. App. 1995) (jury award of punitive damages upheld where the decedent's health declined during his admission to the facility, he lost 32 pounds, his bedsores became necrotic, and he became unable to eat and swallow); *Advocat, Inc. v. Sauer,* 353 Ark. 29,111 S.W.3d 356 (2003) (punitive damages appropriate where the resident died from malnutrition and dehydration and where the nursing home knew that it was short-staffed, but took no measures to rectify the situation, and even attempted to disguise this fact).

Like the residents in the above cases, Billie Jo Blackburn depended on the staff at Cornerstone Hospital for her needs and health and wellbeing. The staff, however, failed to provide Ms. Blackburn with the most basic and humane of services, which resulted in injuries and needless pain and suffering. Due to Defendants' intense desire for profits at the expense of the wellbeing of their patients, including Ms. Blackburn, punitive damages are warranted.

III. CONCLUSION

As established, the corporate entities are subject to liability pursuant to theories of direct liability, vicarious liability, and under an alter ego theory. In addition, the evidence establishes a sufficient basis to permit punitive damages to go to the jury. Accordingly, Plaintiffrespectfully requests that the court deny the Cornerstone Defendants' motion for summary judgment.

Dated: May 31, 2012.

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By

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Footnotes

1 The parties have stipulated to the dismissal of Ms. Hansen and, thus, her motion is moot.

2 Importantly, Ms. Blackburn did have the recuperative abilities to completely heal the Stage IV wound. Thus, while there would be challenges to Ms. Blackburn's coccyx wound healing, she ultimately did heal with appropriate care at home so those challenges were overcome. PSOF ¶¶ 95, 96.

3 During the time period of turnover in management, the agency usage at the Tucson facility was up to 40% which is something with which Defendants were concerned. PSOF ¶200.

4 In determining the appropriateness of punitive damages, the Arkansas Supreme Court in *Advocat, , Inc. v. Sauer, 353* Ark. 29, 111 S.W.3d 346 (2003) relied on OLTC records, which are the equivalent of the DHS records in Arizona.

We believe that the surveys completed by the OLTC in January 1997 and May 1998 were relevant to the instant case. The Sauer Estate put on substantial evidence of ways in which Mrs. Sauer suffered while a resident at Rich Mountain much of which centeed on inadequate staff and nursing care available to Mrs. Sauer. Any evidence having a tendency to make these allegations more or less probable would be relevant. Clearly, the OLTC's findings that Rich Mountain was not meeting OLTC's requirements regarding adequate nursing staff were relevant as to whether the Sauer Estate's allegations of lack of patient care were true.

353 Ark. at 59, 111 S.W.3d at 363. The court further stated:

Each OLTC survey notified appellants of examples of the manner in which Rich Mountain failed to meet the needs of its patients due to inadequate staffing. Whether the patients at Rich Mountain suffered from inadequate nurse staffing pertaining to personal hygiene, feeding, and treatment would certainly have a bearing on whether the allegations made by the Sauer Estate about the lack of quality care afforded to Mrs. Sauer were more or less probable. Moreover, the surveys are probative of the fact that the appellants were on notice of dangerous conditions in the nursing home due to understaffing. Because the OLTC surveys were relevant, they were admissible unless their probative value was substaintially outweighed by the danger of unfair prejudice or they would mislead the jury. 353 Ark. at 60,111 S.W.3d at 364 (internal citations omitted). The Arkansas Court of Appeals in Rose Care, Inc. Ross, 91 Ark. App. 187, 209 S.W.3d 393 (2005) also upheld the admissibility of surveys. The defendants the claimed that the trial court's admission of a survey was erroneous because the survey was conducted before the resident was admitted to defendants' facility and involved issues relating to residents other than Mrs. Givens. Citing Sauer, the Court of Appeals held:

Likewise, in the present case, the 1999 survey, which was completed just as Mrs. Givens was admitted to Rose Care, showed evidence of a problem with failure to turn and reposition residents in a timely fashion, one of the exact allegations that appellee made against

Rose Care in this case. It also showed that, at the time of Mrs. Givens' admission, Rose Care was on notice that it had a problem in complint with turning and repositioning requirements.
91 Ark. App. at 208, 209 S.W.3d at 406.

5 Defendants are also liable for the negligence of agency nurses. *See, e.g., Ruelas v. Staff Builders Personnel Servs., Inc., 199* Ariz. 344, 18 P.3d 138 (Ct. App. 2001).

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