

2013 WL 8609560 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Carolyn J. FISCHER and Jerry Fischer, wife and husband, Plaintiffs,

v.

Dennis ARMSTRONG, M.D. and Jane Doe Armstrong, husband and wife; Dennis Armstrong, M.D., P.C.; Chuck Mangubat, M.D. and Jane Doe Mangubat, husband and wife; Mitar Vranic, M.D. and Jane Doe Vranic, husband and wife; Western Vascular Institute and Vein Center, a health care business Citadel Care Center, a health care business; Life Care Centers of America, INC., dba Citadel Care Center; Arizona Spine and Joint Hospital, LLC, John Does I-X; Jane Does I-X; ABC Corporations I-X; XYZ Partnerships I-X, Defendants.

No. CV2011-012298.
November 7, 2013.

Oral Argument Requested

Defendants' Vranic and Western Vascular Institute, PLLC'S Motion for Partial Summary Judgment

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The Honorable [Mark Brain](#).

Pursuant to Rule 56, Ariz.R.Civ.P., Defendants Vranic and Western Vascular Institute, P.L.L.C. (collectively “these Defendants”) move for summary judgment against Plaintiffs' claims for **elder abuse** (Count Two of the Complaint) and punitive damages. This Motion is supported by the concurrently filed Statement of Facts (“SOF”).

SUMMARY OF ARGUMENT

In this lawsuit, Plaintiffs allege that Defendants were negligent in their provision of medical treatment during and/or following [total knee replacement](#) surgery. Specifically, Plaintiffs allege that Dr. Armstrong injured the popliteal artery during Carolyn Fischer's December 1, 2009, surgery, and that Defendants, including Dr. Vranic, failed to timely diagnose and/or treat the injury (i.e., a [pseudoaneurysm](#) and resulting [compartment syndrome](#)), causing Mrs. Fischer to require amputation below the knee. [SOF ¶ 2.]

Plaintiffs assert a claim for **elder abuse** pursuant to A.R.S. § 46-551, et seq., known as the Adult Protective Services Act (“APSA”), seeking “damages caused by the **abuse**, neglect and exploitation of Plaintiff Carolyn Fischer.” [SOF ¶ 3.] The Court should grant summary judgment on Plaintiffs' **elder abuse** claim because these Defendants are exempt from liability under APSA, the type of treatment at issue is outside the scope of APSA, and Mrs. Fischer does not fall under the “limited class” of physically or mentally incapacitated or vulnerable adults that APSA was meant to protect. These Defendants are also entitled to summary judgment on Plaintiff's claim for punitive damages because Plaintiffs lack clear and convincing evidence showing Dr. Vranic intended to harm Mrs. Fischer or acted with a conscious disregard that she would be substantially injured. [SOF ¶ 4.]

RELEVANT FACTS

On December 1, 2009, Plaintiff Carolyn Fischer underwent **total knee replacement** surgery on her left leg performed by Dennis Armstrong, M.D. at Arizona Spine and Joint Hospital. [SOF ¶ 5.] On the morning of December 2, 2009, Dr. Armstrong ordered an ultrasound on Mrs. Fischer's left leg to evaluate her circulation. [SOF ¶ 6.] CompuDiagnostics performed the ultrasound study, known as a Lower Extremity Arterial Duplex Examination, of Mrs. Fischer's left knee on the morning of December 2, 2009. [SOF ¶ 7.] CompuDiagnostics indicated in its report that “[t]he popliteal artery suggest [sic] dilatation, likely aneurysmal,” but the report does not list “**pseudoaneurysm**” as an impression, finding, or possible diagnosis. [SOF ¶ 8.]

Dr. Armstrong and the hospitalist, Dr. Mangubat, reviewed and discussed the CompuDiagnostics report and agreed to request a vascular surgery consultation by Dr. Vranic. [SOF ¶ 9.] Dr. Vranic saw Mrs. Fischer on December 2, 2009, at approximately 3:00 pm. [SOF ¶ 10.] During his examination of Mrs. Fischer, Dr. Vranic was able to obtain via Doppler pulses in the left lower extremity, including a “very strong” posterior tibial pulse. He also found Mrs. Fischer to have normal capillary refill with “pink, warm” toes. [SOF ¶ 11.] Dr. Vranic performed an ultrasound study on Mrs. Fischer's left knee, which he found to be consistent with “a **Bakers cyst, hematoma, or thrombosed popliteal aneurysm.**” [SOF ¶ 12.] Dr. Vranic diagnosed Mrs. Fischer with chronic **peripheral vascular disease** in the lower extremities, as well as a “likely thrombosed SFA or popliteal artery on the left with decreased monophasic flow in the posterior tibial arteries consistent with proximal obstruction or occlusion.” [SOF ¶ 14.] Based on his findings, Dr. Vranic did not believe Mrs. Fischer had perfusion or circulatory problems in the left lower extremity that required urgent intervention. [SOF ¶ 15.] Dr. Vranic requested that Mrs. Fischer follow up with him at his office after discharge from Arizona Spine and Joint. [SOF ¶ 16.] Dr. Vranic did not see Mrs. Fischer after December 2, 2009.

Mrs. Fischer was discharged from Arizona Spine and Joint Hospital and admitted to Citadel on December 4, 2009. [SOF ¶ 17.] Dr. Vranic did not order Mrs. Fischer's discharge and was not consulted regarding Mrs. Fischer's discharge.

On December 7, 2009, the Citadel staff noted that Mrs. Fischer's left foot was purple or blackish in color, cool to the touch, had blisters, and lacked a pedal pulse. [SOF ¶ 18.] Mrs. Fischer was transported to Banner Desert Medical Center Emergency Room on December 7, 2009, at approximately 11:30 am where she underwent amputation of the left lower extremity below the knee. [SOF ¶ 19.]

The undisputed facts of this case do not support a claim against these Defendants for violation of APSA or punitive damages.

LEGAL ARGUMENT

1. Plaintiffs' **Elder Abuse Claim Is Improper.**

The undisputed facts of this case do not support a claim against Dr. Vranic or Western Vascular Institute, P.L.L.C. for **elder abuse** under [A.R.S. § 46-451, et seq.](#)

A. *APSA Does Not Apply to Dr. Vranic or Western Vascular Institute, P.L.L.C.*

[A.R.S. § 46-455](#) provides in pertinent part as follows:

B. A physician licensed pursuant to title 32, chapter 13 or 17 ... is not subject to civil liability for damages under this section unless either:

1. At the time of the events giving rise to a cause of action under this section, the person was employed or retained by the facility or designated by the facility, with the consent of the person, to serve the function of medical director

2. At the time of the events giving rise to a cause of action under this section, all of the following applied:

(a) The person was a physician licensed pursuant to title 32, chapter or 17 ... [and]

(b) The person was the primary provider responsible for the medical services to the patient while the patient was at one of the facilities listed in paragraph 1 of this subsection.

D. For the purposes of this section, primary provider does not include a consultant or specialist... who is requested by the primary provider to provide care to the patient for whom the primary provider is responsible, unless that consultant or specialist assumes the primary care of the patient.

A.R.S. § 46-455(B) and (D) (emphasis added).

In *Brunet v. Murphy*, 212 Ariz. 534, 539, 135 P.3d 714, 719 (App. 2006), the Arizona Court of Appeals held that APSA is inapplicable to the type of claim asserted by Plaintiffs against Dr. Vranic. In that case, Mr. Brunet was admitted to John C. Lincoln hospital by Dr. Murphy for pain and impaired circulation in the right foot. *Id.* at 536, 135 P.3d at 716. Mr. Brunet underwent surgery, which was unsuccessful in restoring his circulation, and he subsequently developed **gangrene** that required amputation below the knee. *Id.* Mr. Brunet's estate thereafter asserted an APSA claim against Dr. Murphy and his professional corporation. The *Brunet* Court stated as follows:

[In 2003], the legislature amended the APSA to limit the licensed physicians against whom an APSA claim could be brought to those who were designated in the amendment. Legislative history indicates that the amendment was intended to “provide an exception from civil liability under the Adult Protective Services Act (APSA) for certain health care providers.” Thus, the text of the amendment, confirmed by the legislative history, demonstrates that the legislature intended to eliminate the previously existing right to bring an APSA claim against physicians like Dr. Murphy.

212 Ariz. at 539, 135 P.3d at 719 (internal citations omitted and emphasis added). However, because the estate's claim accrued prior to 2003 amendment, the *Brunet* Court held that the estate could proceed with the claim against Dr. Murphy. *Id.* at 540, 135 P.3d at 720.

Dr. Vranic is a physician licensed pursuant to Title 32, Chapter 13 of the Arizona Revised Statutes. [SOF ¶ 21.] Western Vascular Institute, P.L.L.C. is a professional limited liability company. [SOF ¶ 24.] Plaintiff asserts no direct claims against Western Vascular Institute, P.L.L.C. Plaintiffs' claims against Western Vascular Institute, P.L.L.C. are solely based on the vicarious liability of Dr. Vranic. [SOF ¶ 25.] At no time was Dr. Vranic employed or retained by Arizona Spine and Joint or Citadel to serve as the medical director for either facility. Additionally, Dr. Vranic was not the primary provider responsible for Mrs. Fischer's care. Dr. Armstrong was, at all times that Mrs. Fischer was at Arizona Spine and Joint, the attending physician “in charge” of Mrs. Fischer's treatment [SOF ¶ 23.] Dr. Vranic's involvement with Mrs. Fischer's care was as a consulting specialist, and he saw Mrs. Fischer only one time. [SOF ¶ 22.] Therefore, Dr. Vranic and Western Vascular Institute, P.L.L.C. are expressly exempt from liability under APSA, and summary judgment is therefore proper against Plaintiffs' APSA claims against these Defendants.

B. APSA Does Not Cover the Type of Treatment at Issue.

APSA was not intended to and does not cover the type of incident alleged in this lawsuit. Specifically, APSA does not apply to acts of negligence or injuries that “can afflict anyone, not just the incapacitated, and is completely separate from the unique role of caregiver and incapacitated recipient.” *McGill v. Albrecht*, 203 Ariz. 525, 529-30, 57 P.3d 384, 388-89 (2002). APSA does not, as a matter of law, apply to every act of negligence, even those involving **elderly** or incapacitated adults:

We do not believe interpreting APSA so as to apply to any and every single act of medical malpractice would be consistent with the legislature's obvious intent to protect a class of mostly **elderly** or mentally ill citizens

from harm caused by those who have undertaken to give them the care they cannot provide for themselves. Consider for a moment the situation of a surgeon who, while operating on a patient, negligently fails to remove an instrument or discover a perforation in the viscera. Such negligence and the resulting injury can afflict anyone, not just the incapacitated, and is *completely separate* from the unique role of caregiver and incapacitated recipient. Thus, it would fall only within [the Medical Malpractice Act], not APSA.

Id. (emphasis added); see also *Matter of Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157, 945 P.2d 1283, 1288 (1997) (“The **elder abuse** statute covers a limited class (incapacitated or vulnerable adults) and limited causes of action (**abuse**, neglect, or exploitation).”). This quote from Arizona’s Supreme Court makes it very clear that the injury incurred cannot be the type that could afflict any person under the circumstances.

The *McGill* court also provided guidelines for the application of APSA:

[T]o be actionable **abuse** under APSA, the negligent act or acts (1) must arise from the relationship of caregiver and recipient, (2) must be closely connected to that relationship, (3) must be linked to the service the caregiver undertook because of the recipient’s incapacity, and (4) must be related to the problem or problems that caused the incapacity.

203 Ariz. at 530, 57 P.3d at 389 (emphasis added).

APSA was not meant to apply to every claim of negligence that involves an **elderly** or incapacitated adult. The accident at issue in this lawsuit is the precise type of case described by the *McGill* Court as outside the scope of APSA. Plaintiffs allege that during surgery, Dr. Armstrong injured Mrs. Fischer’s popliteal artery, and the healthcare providers, including Dr. Vranic, failed to timely diagnose and treat the alleged injury. The negligence and injury alleged by Plaintiffs can afflict anyone, not just the incapacitated or vulnerable. In fact, **arterial injuries** are known complications of knee surgery. [SOF ¶ 20.]

Plaintiffs’ APSA claim fails to meet the stringent *McGill* test. Dr. Vranic did not undertake any role of “caregiver” to provide any care for Mrs. Fischer because of a physical or mental incapacity. To the contrary, Dr. Vranic provided a vascular consultation for Mrs. Fischer as he would for any other patient. Plaintiffs’ APSA claim therefore does not meet the first two elements of the *McGill* test. Further, the alleged act of **abuse** or neglect was not “linked to the service the caregiver undertook *because of the recipients incapacity*.” *McGill*, 203 Ariz. at 530, 57 P.3d at 389 (emphasis added). Mrs. Fischer was a patient at Arizona Spine and Joint because of a voluntary **knee replacement** surgery. She received treatment from Dr. Vranic because of an alleged vascular problem following surgery - not because she was **elderly** or mentally or physically unable to care for herself. *Anyone*, including any otherwise healthy, young individual, could receive an **arterial injury** during knee surgery that is not “timely” diagnosed and treated. Thus, Plaintiff cannot establish the fourth element of liability necessary under *McGill’s* APSA test.

The alleged negligence in failing to diagnose the acute injury is “completely separate from the unique role of caregiver and incapacitated recipient” and therefore “would fall only within [the Medical Malpractice Act], not APSA.” *McGill*, 203 Ariz. at 529-30, 57 P.3d at 388-89. Therefore, these Defendants respectfully requests this Court grants summary judgment against Plaintiff’s APSA claim.

C. Mrs. Fischer Was and Is Not a “Vulnerable Adult.”

A.R.S. § 46-455 imposes liability on specified healthcare providers for neglect, **abuse** or exploitation of a “vulnerable adult.” A.R.S. § 46-455(A)-(B). A.R.S. § 46-451(9) defines “vulnerable adult” as “an individual who is eighteen years of age or older and who is unable to protect himself from **abuse**, neglect or exploitation by others because of a physical or mental impairment. Vulnerable adult includes an incapacitated person as defined in section 14-5101.” A.R.S. § 14-5101(1) defines “incapacitated

person” as “any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.”

The crux of Plaintiffs' **elder abuse** claim is essentially that because Mrs. Fischer is an older woman, Dr. Vranic committed “**elder abuse**” by allegedly failing to timely diagnose and treat an **arterial injury** allegedly caused during knee surgery. This is insufficient to support an APSA claim. Mrs. Fischer does not constitute a “vulnerable” or “incapacitated” adult as defined by APSA. Mrs. Fischer is a mentally competent person able to care for herself and make her own medical decisions. [SOF ¶¶ 26-30.] These Defendants anticipate that Plaintiffs will argue that Mrs. Fischer was “incapacitated” at the time of Dr. Vranic's consultation due to the effects of pain medication. The evidence shows Mrs. Fischer was able to communicate with her husband and physicians at Arizona Spine and Joint. [SOF ¶¶ 30-31.] Further, Dr. Vranic's treatment was limited to a vascular consultation for purposes of evaluation Mrs. Fischer's circulation in the left lower extremity. [SOF ¶¶ 9, 22.] Dr. Vranic was not involved in prescribing or ordering any medication for Mrs. Fischer or and did not undertake any treatment “because of” such medication or its effects. See *McGill*, 203 Ariz. at 530, 57 P.3d at 389.

Therefore, these Defendants request summary judgment on Plaintiffs' APSA claim because Dr. Vranic is exempt from liability under APSA, the type of treatment at issue is outside the scope of APSA, and Mrs. Fischer does not fall under the “limited class” of physically or mentally incapacitated or vulnerable adults that APSA was meant to protect.

2. Summary Judgment Is Proper against Plaintiffs' Punitive Damages Claim.

Plaintiffs lack clear and convincing evidence justifying a claim for punitive damages. This is, at best, a simple negligence case, not a punitive damages case. Punitive damages are an “extraordinary civil remedy,” justified only in “those limited classes of consciously malicious or outrageous acts of misconduct where punishment and deterrence is both paramount and likely to be achieved.” *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 322, 723 P.2d 675, 680 (1980). “To recover punitive damages something more is required over and above the ‘mere commission of a tort.’ ” *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681 (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986)). The plaintiff must show that the defendant acted with an “evil mind” with “intent to injure the plaintiff.” *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680; *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, 24 P.3d 1274, 1277 (Ariz.App. 2001). The Court in *Linthicum* stated:

The wrongdoer must be consciously aware of the wrongfulness or harmfulness of his conduct and yet continue to act in the same manner in deliberate contravention to the rights of the plaintiffs. It is only when the wrongdoer is consciously aware of the evil of his actions or of the spitefulness of his motives, or that his conduct is outrageous, oppressive or intolerable and creates a substantial risk of tremendous harm to others, that the “evil mind” required for the imposition of punitive damages may be found.

Linthicum, 150 Ariz. at 330, 723 P.2d at 679 (emphasis added); *Gurule v. Illinois Mut. Life and Cas. Co.*, 152 Ariz. 600, 601, 734 P.2d 85, 86 (1987). Arizona courts make clear an award of punitive damages cannot be based on mere gross negligence or recklessness. *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680.

To show that Dr. Vranic acted with an “evil mind,” Plaintiffs must prove: (1) Dr. Vranic “intended to cause injury;” (2) Dr. Vranic's “wrongful conduct was motivated by spite or ill will;” or (3) Dr. Vranic “acted to serve his own interest, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injure the rights of others.” *Id.* It is Dr. Vranic's motivation or state of mind that is the crucial consideration. *Gurule*, 734 P.2d at 87. While the element of a tortfeasor's intent may be inferred, “a plaintiff must always prove outwardly aggravated, outrageous, malicious or fraudulent conduct” to obtain punitive damages. *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680 (emphasis added).

The Court must view the evidence “through the prism of the substantive evidentiary burden.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The substantive evidentiary burden under Arizona law for punitive damages is “clear and convincing evidence.” *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681. Clear and convincing evidence is the highest burden of proof in a civil case. *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 171 Ariz. 550, 557-58, 832 P.2d 203, 210-11 (1992) (clear and convincing evidence is “more onerous than a simple preponderance of the evidence”). Clear and convincing evidence is evidence that makes the truth of the contention “highly probable.” *State v. King*, 158 Ariz. 419, 422, 763 P.2d 239, 242 (1988).

Without such clear and convincing evidence, Plaintiffs may not present a punitive damages claim to the jury. *Id.* Summary judgment on a claim for punitive damages does not deny Plaintiffs of their right for full compensation as punitive damages are intended to deter future conduct and not compensate Plaintiffs. *Gurule v. Illinois Mut. Life and Cas. Co.*, 152 Ariz. at 601, 734 P.2d 85, 86 (1987) (stating that the objective of punitive damages is to “deter [] similar future misconduct” and that “[i]f defendant did not act with an ‘evil mind,’ however, compensatory damages usually provide the optimum level of deterrence.”); see also *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 557-58, 832 P.2d 203, 210-11 (1992) (stating that summary judgment dismissing a punitive damages claim is appropriate in the plaintiff fails to meet his burden to present facts sufficient to show by clear and convincing evidence that the defendant acted with the requisite evil mind.).

In this case, Plaintiffs cannot establish a *prima facie* case for punitive damages. There is no evidence, let alone clear and convincing evidence, that Dr. Vranic acted with the intent to injure, out of spite or with ill will, or to further some self-serving interest while disregarding a known substantial risk. Even if the Court assumes, for purposes of this Motion only, Dr. Vranic negligently failed to diagnose and treat the alleged **vascular injury**, which Dr. Vranic denies, that is, at worst, simple negligence. There is absolutely no evidence Dr. Vranic was deliberately indifferent to the alleged risk that Mrs. Fischer may have a **vascular injury**. In fact, the evidence shows Dr. Vranic timely examined Mrs. Fischer and performed an ultrasound on her knee to evaluate any vascular abnormalities. [SOF ¶¶ 10-12.] Based upon his examination, ultrasound interpretation and training and experience, Dr. Vranic diagnosed Mrs. Fischer with chronic **peripheral vascular disease** in the lower extremities, as well as a “likely thrombosed SFA or popliteal artery on the left with decreased monophasic flow in the posterior tibial arteries consistent with proximal obstruction or occlusion.” [SOF ¶ 14.]

Dr. Vranic did not believe Mrs. Fischer had perfusion or circulatory problems in the left lower extremity that required urgent intervention or that Mrs. Fischer was at serious risk for significant injury. [SOF ¶ 14.] In fact, Plaintiffs admit that Dr. Vranic did not intentionally or consciously disregard a risk of serious injury. Plaintiffs acknowledge that Mrs. Fischer's case presented a “difficult examination” for a vascular surgeon, meaning this is not a clear cut case of conduct so egregious as to warrant punitive damages. [SOF ¶¶ 33-34.] Plaintiffs also recognize that Dr. Vranic saw no evidence during his ultrasound of the alleged “tell-tale” sign of a **pseudoaneurysm** - “to-and-fro flow.” [SOF ¶¶ 13, 32.] Finally, and most importantly, Plaintiffs admit that Dr. Vranic lacked the requisite mental state to support an award of punitive damage. Plaintiffs admit that “Dr. Vranic failed to appreciate the gravity of the situation” and “fail[ed] to recognize and appreciate the significance of the to-and-fro blood flow pattern from the earlier diagnostic study [SOF ¶¶ 35.]

Because Plaintiffs lack clear and convincing evidence that Dr. Vranic acted in a manner that supports a claim for punitive damages, summary judgment is proper against Plaintiffs' claim for punitive damages.

CONCLUSION

Defendants Vranic and Western Vascular Institute, P.L.L.C. respectfully request that the Court grant summary judgment in their favor on Plaintiffs' claims for **elder abuse** (Count Two of the Complaint) and punitive damages.

Dated this 7th day of November, 2013.

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Original of the foregoing filed this 7th day of November, 2013, via the eFiling system and copy delivered via the eFiling system to

Hon. Mark Brain

Maricopa County Superior Court

Copy of the foregoing mailed on this 7th day of November, 2013, to:

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