

2011 WL 7768063 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Plaintiff GEROLD, et. al, Plaintiff,
v.
Frances GRIMWOOD and Raymond Grimwood, husband and wife, Defendants.

No. CV2009053629.
June 27, 2011.

Motion for Summary Judgment

Mark E. House, Esq. - 020187, Allison E. Evans, Esq. - 027965, Becker & House, PLLC, 7047 E. Greenway Parkway, Suite 370, Scottsdale, Arizona 85254, 480.240.4020, mark@beckerandhouse.com, Attorney for Plaintiff.

Plaintiff Dolores Gerold, et. al ("*Plaintiff*"), by and through her attorneys of record, Becker & House, PLLC, hereby moves the Court, pursuant to the provisions of [Rule 56\(b\)](#), [Ariz.R.Civ.P.](#), for the entry of summary judgment in favor of Plaintiff and against Defendants Frances Grimwood and Raymond Grimwood (the "*Defendants*"), on the grounds and for the reason that there is no genuine issue as to any material fact and Plaintiff is entitled to the entry of judgment as a matter of law.

This Motion is supported by the Separate Statement of Facts in Support of Motion for Summary Judgment submitted herewith, pursuant to Rule 56(c)(2), [Ariz.R.Civ.P.](#), the accompanying Memorandum of Points and Authorities, and all the pleadings of record currently on file with the Court, which are incorporated herein by this reference.

DATED this 23rd day of *June*, 2011.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action is before the Court on Plaintiffs Complaint against Defendants, alleging claims of **abuse** of power of attorney (Count I), **financial** exploitation of a vulnerable adult, pursuant to A.R.S. § 46-456 (Count II), and fraud (Count III). Following the death of her husband in 1996, Plaintiff, an **elderly** woman in poor health, fell victim to various wrongful actions undertaken by her longtime neighbors, Frances Grimwood (“*Defendant Frances*”) and Raymond Grimwood (“*Defendant Raymond*”), which give rise to the underlying cause of action.

The Plaintiff brings this Motion for Summary Judgment on Counts II and III of the Complaint. However, if the Court should grant summary judgment in favor of the Plaintiff, Count I, **abuse** of power of attorney, may properly be subsumed into Count II, leaving no claims remaining. This Motion, therefore, potentially can resolve the action in its entirety, excepting possible issues with respect to a determination of damages.

II. STATEMENT OF FACTS

When this action was commenced, Plaintiff was an **elderly** woman, age 94, who resided in an assisted care facility and was suffering from **dementia**, **glaucoma**, and **hypertension**.

Plaintiff was born on XX/XX/1914. She married her husband, John Gerold (“*Mr. Gerold*”), but never had children. Plaintiff and Mr. Gerold spent the majority of their lives residing in a home located at 65 W. Vernon Avenue, Phoenix, Arizona, 85003, which they purchased in 1950. Plaintiff held a long-time job with the Salt River Project utility company, and was passionate about community service. She dedicated herself to volunteer work through the local division of the Salvation Army in Phoenix, and was active with the organization throughout her life. At some point in the 1980s, Plaintiff met Carol Albin (“*Carol*”) during the Salvation Army's annual Christmas Angel's Program, and the two became friends. The Plaintiff and Carol thereafter served together as members of the Women's Auxiliary Board, and maintained a close friendship.

Mr. Gerold died in 1996. At the time of his passing, the couple had been living in the Residence together for approximately fifty-five (55) years. Thereafter, the Plaintiff, age 82, continued to reside in the Residence alone.

The Defendants are a married couple who were longtime neighbors of the Plaintiff and Mr. Gerold, living at 38 West Vernon Avenue, Phoenix, Arizona 85003. On or around the time of Mr. Gerold's death, the nature of the relationship between the Defendants and Plaintiff noticeably changed, especially with respect to Defendant Frances. Simply put, Defendant Frances began to take an active interest in the Plaintiff. Defendant Frances started frequently visiting the Plaintiff at home, and the two women appeared to become close friends.

As the Plaintiffs age progressed, her ability to live independently became increasingly challenging. Defendant Frances began to assume the role of a de facto caregiver, offering the Plaintiff assistance in managing various aspects of her life. In this capacity, Defendant Frances would run errands for the Plaintiff, schedule appointments, and drive Plaintiff to places she needed to go. Defendant Frances also began to help the Plaintiff with her **financial** matters, including banking and the payment of bills. Plaintiff, **elderly** and alone, trusted the seemingly well-intentioned Defendant Frances, and understandably allowed and welcomed the assistance.

Plaintiff also battled various health problems, which only intensified with her age. She was a chronic sufferer of eyesight problems, including **glaucoma**, cataracts and corneal scarring. In 2002, Plaintiff was treated by Dr. Leslie Kanda, an ophthalmologist (“*Dr. Kanda*”). According to Dr. Kanda, by at least April 19, 2002, Plaintiff was legally blind in one eye and had limited vision in the other. Plaintiffs mental state was also declining with time, while Defendant Frances' involvement in her life continued increasing. She became anxious and fearful as the years progressed, and began having frequent falls inside of the Residence.

On July 10, 2004, Plaintiff went to the emergency room at St. Joseph's Hospital, where she remained for a few days. An initial CT scan evidenced generalized brain atrophy and small vessel ischemic disease. Medical staff and personnel documented Plaintiff's confusion and other impressions of her mental state throughout her stay. For example, a note dated July 12, 2004, provides: "? Early dementia." The cardiologist who treated Plaintiff describes how she did not remember meeting him just one day before, causing him to notate "memory deficit resulting." The formal discharge summary from the hospitalization diagnoses Plaintiff with memory loss and recommends a future in-home safety evaluation.

At some point during the summer of 2004, Defendant Frances helped remove Plaintiff from her Residence and admitted her into Eastern Star (now "Arizona Grand"), an assisted living and retirement facility. Many of Plaintiff's personal items, including her home furnishings, were not moved with her, and remained in the Residence. The Defendants assured Plaintiff they would after these belongings, and eventually bring them to her at Arizona Grand.

On XX/XX/2004, the Plaintiff's ninetieth (90th) birthday, a durable general power of attorney and healthcare power of attorney were executed, designating Defendant Frances as agent to act on the Plaintiff's behalf. On the same date, Plaintiff additionally signed a Second Amendment to the Gerold Family Trust (the "Trust"), which she and her late husband had established in 1995. At the time of the Trust's creation, the Plaintiff and Mr. Gerold had simultaneously executed a deed conveying the Residence into the Trust. The Amendment modified the initial successor trustee nomination provisions by naming Defendant Frances to serve as successor trustee of the Trust in the event of Plaintiff's incapacity. The Amendment further added a provision which gave Defendant Frances the option to buy the Residence at ten thousand dollars (\$10,000.00) below fair market value.

On November 6, 2004, Defendant Frances informed Plaintiff she needed her signature and presented her with a document. Defendant Frances misinformed the Plaintiff about the true nature of the document, stating it would simply grant her permission to enter and check in on the Residence. In actuality, Defendant Frances presented the Plaintiff with a Quit Claim Deed (the "Deed"), which had the legal effect of conveying title to the Residence, which Plaintiff had owned for more than sixty (60) years, to Defendant Frances. Plaintiff, unable to see, in reliance on the honesty of her fiduciary, signed the instrument.

Just over one month later, AZCentral.com, affiliated with the Arizona Republic, in a listing of recent home sales, reported that the Residence had been sold for \$100,000.00. However, the fair market value of the Residence at the time was estimated to be at least \$325,000.00. Defendant Frances would, in fact, later sell the Residence for \$425,000.00, discussed in more detail below.

The notary who acknowledged the Deed is Carolyn LeSueur, also Defendant Raymond's biological sister. Carolyn LeSueur was only commissioned as a notary for a few years, during which time she only acknowledged a handful of instruments and never kept a notary log.

Around the same time that the Deed was executed, in November 2004, a joint checking account between Plaintiff and Defendant Frances was opened at Compass Bank, account no. XXXXXXXXXXXX (the "Compass Account"). The initial statement, dated November 23, 2006 shows a balance of \$100,035.36, purportedly representing the proceeds Plaintiff received from Defendants' purchase of the Residence. The initial statement was mailed to Plaintiff at Arizona Grand, but Defendant Frances had all of the following statements mailed solely to the Defendants' address, so Plaintiff never thereafter received any information regarding the Compass Account's activity.

The Defendants thereafter vastly depleted the funds in the account, for their personal use and benefit, from November 23, 2004 through July 24, 2007. On July 24, 2007, the account balance was only \$9,217.92. Copies of checks drawn on the account by Defendant Frances were often made payable to Sunray Paving, the Defendants' paving contractor business. Between March 17, 2005, and November 21, 2005, no less than \$68,000.00 was transferred to Sunray Paving from the Compass Account by Defendant Frances. Numerous other Compass Account checks written by Defendant Frances were made payable to the Defendants' accounts held at Chase Bank and Bank of America, neither of which Plaintiff was a party to, nor had any interest in.

On or about September 14, 2005, a correction to the Deed (“*Corrective Deed*”) was recorded. The Corrective Deed simply added language and an additional signature line to clarify that Plaintiff had executed the earlier conveyance in her capacity as trustee of the Trust, as the Residence was Trust property at the time it was transferred to Defendant Frances. The acknowledgment on the Corrective Deed, certifying that Plaintiff, as trustee of the Trust, personally appeared before the notary is dated November 6, 2004, the date appearing on the original Deed. A second notary stamp appears below the back-dated acknowledgement form, and is again signed by Carolyn LeSueur, Defendant Raymond's sister, and simply dated “9/14/05”.

On February 26, 2006, over two years after procuring the Plaintiffs signature on the Deed, Defendant Frances listed the property for sale with an asking price of \$525,000.00. A few months later, the asking price for the Residence was lowered to \$460,000.00. Defendant Frances, unable to sell, again lowered the price in August, 2006, to \$435,000.00. Shortly thereafter, on September 12, 2006, the Residence successfully sold for a final sales price of \$425,000.00, Thus, a gain of no less than \$325,000.00 was received by Defendant Frances from the transaction.

Further, between the period of time when Plaintiff was moved into Arizona Grand and the time that the Residence was sold, Defendants kept, sold, or otherwise disposed, of the vast majority of Plaintiffs furnishings and personal belongings that were left behind at the Residence.

As part of her supposed duties while purportedly helping care for Plaintiff, Defendant Frances was to regularly make payments on Plaintiffs long term health care insurance policy with Genworth **Financial** (“*GE Policy*”), which had been in effect since 1996. Defendant Frances neglected to make a premium payment that was due on November 15, 2006, causing a lapse of the policy and, ultimately, a loss of coverage. By the time the error was discovered, it was too late, and the GE Policy could not be reinstated. The GE Policy would have provided coverage for Plaintiffs monthly Arizona Grand housing costs, which, on average, ran \$3,000 per month. Plaintiff also was forced to incur substantial out-of-pocket expenses to pay for medical care and services as a consequence of Defendant Frances' neglect.

Defendant began taking fraudulent action against Plaintiffs Altier Credit Union Account, account no. XX7-9 (“*Altier Account*”) following her exhaustion of available funds in the Compass Account. Neither Defendant was ever made a party to the Altier Account. Between March, 2007, and July, 2007, Defendant Frances forged checks on the Altier Account which totaled at least \$7,378.14. The forged checks again were used to make payments on the Defendants' separate and unrelated accounts and obligations,

In the summer of 2007, evidence of the Defendants actions began to unravel. Arizona Grand staff and personnel had grown concerned about the relationship between Defendants and Plaintiff, and started restricting their efforts to visit and gain access to the Plaintiff. Arizona Adult Protective Services (“*APS*”) also become involved, and began an investigation into the events described herein in August, 2007. Carol had also reconnected with Plaintiff, and was beginning to confirm some suspicions that Defendants' had taken advantage of and exploited her.

In late August, 2007, Frances' power of attorney was revoked, and Carol was designated to replace her as the Plaintiffs agent and attorney-in-fact. Shortly thereafter, Defendant Frances wrote to the Plaintiff, and sent her a check in the amount of \$80,700.00. Defendant Frances alleged that this amount was in repayment of Plaintiffs purported “loan” to her, stemming from the draining of the Compass Account. Defendant Frances, however, has not provided any evidence or documentation in support of her “loan” allegation.

On October 19, 2007, Dr. James Seward (“*Dr. Seward*”), at the request of APS and in connection with its investigation, conducted a psychological examination of the Plaintiff. He submitted a report of his findings, dated October 19, 2007, wherein he formally diagnosed the Plaintiff with **dementia**. The report further stated that Plaintiff was “confused” and had “severe **memory impairments**”, and found her to be at risk of exploitation. Dr. Seward ultimately concluded that Plaintiff was “impaired by a mental disorder” to such an extent that she was “incapacitated”, as defined under [A.R.S § 14-5101](#), and he recommended that a

conservator be appointed on her behalf. At the conclusion of the APS investigation, it was determined that there was sufficient evidence of criminality, and the matter was reported to the Arizona Department of Public Safety's Law Enforcement Division.

The Complaint in the immediate matter was filed on August 5, 2009, and alleges three counts: (I) **Abuse** of general durable power of attorney; (II) **Financial** exploitation of a vulnerable adult; and (III) Fraud. Throughout the entirety of this matter, since the initial filing of their Answer, Defendants have primarily defended by invoking the Fifth Amendment's privilege against self-incrimination arising under the United States Constitution.

Counsel retained expert witness Pamela Willson, Ph.D ABPP/CN (“*Dr. Willson*”) to prepare a neuropsychological opinion regarding the Plaintiff’s **financial** capacity, vulnerability to exploitation, and susceptibility to undue influence throughout the relevant period of time surrounding this case. After months of reviewing pertinent documents and records, Dr. Willson submitted her final report on January 29, 2011. Therein, Dr. Willson makes the following relevant findings:

“In my professional opinion, to a reasonable degree of neuropsychological probability, Dolores Gerold met the usual criteria for Vulnerable Adult status in Arizona on or before July 14, 2004, and continuously until her death. It is also my opinion that she was cognitively incapacitated regarding her **financial** affairs by July 2007; her inability to recognize the draining of her Compass Bank account in 2005, and her inability to oversee an important insurance payment, indicate to me that she was incapable of independent **financial** decision-making due to visual handicap and mild cognitive decline at least by Spring 2005...In my professional opinion, to a reasonable degree of neuropsychological probability, Dolores Gerold was highly susceptible to undue influence due to visual handicap, physical frailty, cognitive decline, anxiety, and extreme dependency on Frances Grimwood for care, comfort, and assistance.”

The Plaintiff died on June 10, 2010, during the pendency of this action. Carol was appointed as Personal Representative of the Plaintiffs Estate, and was substituted as the Plaintiff as a party to this matter.

III. LEGAL ARGUMENT

A. Legal Standard

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [Ariz.R.Civ.Proc. 56\(c\)](#). Plaintiff is seeking summary judgment on Counts II and III of the Complaint, on all issues to establish Defendants' liability, and on the Plaintiffs right to a judgment against Defendants.

B. Impact of Invoking the Privilege Against Self Incrimination

Before proceeding into Plaintiffs legal argument, it must be emphasized that Defendants, in their Answer to Plaintiffs Complaint, and at all material times subsequent throughout this litigation, repeatedly have invoked the Fifth Amendment to the United States Constitution's privilege against self-incrimination. During her deposition, Defendant Frances refused to answer the vast majority of undersigned counsel's questions on the basis of the foregoing constitutional privilege.

Although Plaintiff concedes that this invocation does not have the effect of an admission, assertion of the privilege against self-incrimination in the context of a civil proceeding is not without consequences. Under Arizona law, if a party chooses to assert his or her privilege against self-incrimination in a civil matter, negative inferences can be drawn upon the truth of misconduct being alleged. [Baxter v. Palmigiano](#), 425 U.S. 308 (1976); [State v. Montoya](#), 173 Ariz. 129, 131, 840 P.2d 305, 307 (Ariz. App. 1992); [Buzard v. Griffin](#), 89 Ariz. 42, 48, 358 P.2d 155, 160 (Ariz. 1960). Plaintiff thus respectfully requests the Court be

aware of the negative inference repercussions imposed upon Defendants in making its determination with respect to summary disposition herein.

C. COUNT II - FINANCIAL EXPLOITATION OF A VULNERABLE ADULT

Plaintiff is entitled to summary judgment on all issues concerning Defendants' liability under A.R.S. § 46-456 for **financially** exploiting Plaintiff, a vulnerable adult. Arizona law provides civil and criminal penalties for persons who occupy a position of trust and confidence and **financially** exploit a vulnerable adult. *In re Estate of Wyttenbach*, 219 Ariz. 120, 123, 193 P.3d 813, 827 (App. Div. 1, 2008). To prevail on a **financial** exploitation claim, it must be established that: (1) Plaintiff was, at all material times stated herein, a vulnerable adult as defined by Arizona law; (2) that Defendant Frances occupied a position of trust and confidence to the Plaintiff; and (3) that Defendant Frances failed to act solely in the best interests of the Plaintiff by using the Plaintiff's assets for the benefit and gain of herself and/or her marital community.

1. Plaintiff was a vulnerable adult as defined by Arizona law.

A.R.S. § 46-451(A)(9) defines a vulnerable adult as follows: "Vulnerable adult" means 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 § 14-1501." In interpreting this definition, the Arizona Court of Appeals first considered the meaning and existence of "impairment", using the ordinary meaning of the word, and next made a determination as to whether the impairment resulted in the inability to protect oneself from **abuse**, neglect or exploitation. *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (Ariz.Ct.App. 2005).

Plaintiff suffered from both physical and mental impairments during the relevant period of time.¹ Plaintiff was ninety (90) years old when the alleged exploitative acts began occurring in the fall of 2004. In fact, it was on her ninetieth birthday, XX/XX/2004, that Plaintiff signed power of attorney documents which effectively gave Defendant Frances complete access and control of her assets and **finances**. Plaintiff had a complete loss of vision in one eye, and impaired vision in the other, by at least April, 2002, as a result of **glaucoma**, cataracts and corneal scarring. Because of her vision impairments, Plaintiff could not independently read, write, or manage her papers, documents and correspondence, and thus she greatly depended on Defendant Frances, and her honesty, in this respect. Although Plaintiff had not driven for decades, her vision impairment also necessitated total reliance on Defendant Frances to drive and assist her with transportation whenever it was needed. Plaintiff's near-blindness was a serious physical impairment.

In July, 2004, evidence that Plaintiff was also suffering from a **mental impairment** surfaced during a hospitalization caused by near-fainting. During the few days Plaintiff was kept at St. Joseph's hospital, various treating physicians and medical personnel documented signs of **dementia** and commented on Plaintiff's **memory loss**. Shortly thereafter, she was placed into Arizona Grand.

Plaintiff's age, loss of eyesight, and mental state unquestionably lessened her ability to function independently and to care for her person and **finances**. These are among the exact factors that were considered in making the ultimate determination of vulnerable adult status in *Zlatos*. *Id.* Plaintiff's impairments caused her to trust and depend on Defendant Frances, beginning with the death of her husband in 1996, which left her lonely, **elderly** and declining in physical and mental health. The final resulting damage to Plaintiff, including the loss of thousands of dollars, personal property, and the Residence, establishes a clear inability to defend herself from harm. Plaintiff was a vulnerable adult as defined by Arizona law.

The above conclusion of Plaintiff's vulnerable adult status additionally finds compelling support in Dr. Willson's expert report: "In my professional opinion, to a reasonable degree of neuropsychological probability, Dolores Gerold met the usual criteria for Vulnerable Adult status in Arizona on or before July 14, 2004, and continuously until her death."

2. Defendant occupied a statutory position of trust and confidence to act solely in the best interests of the Plaintiff.

A “position of trust and confidence” is statutorily defined by A.R.S. § 46-456(1)(4) to include:

- (a) A person who has assumed a duty to provide care to the vulnerable adult;
- (b) A joint tenant or a tenant in common with a vulnerable adult;
- (c) A person who is in a fiduciary relationship with a vulnerable adult including a de facto guardian or a de factor conservator.

It is undisputable that Defendant Frances satisfies all of the foregoing definitions, and that therefore, as a matter of fact and law, she was in a position of trust and confidence to the Plaintiff.

Because Defendant Frances acted as Plaintiffs agent pursuant to a Power of Attorney, a fiduciary relationship was created and Defendant Frances assumed a position of trust and confidence to act solely in the best interests of Plaintiff, and not for her own personal benefit. A.R.S. § 46-456 (1)(4)(c). Defendant Frances also served as Plaintiff’s ‘caregiver’, assisting her in health care and **financial** matters, and thus assumed a role as Plaintiff’s de facto guardian and conservator, also a specific statutory position of trust and confidence. A.R.S. § 46-456 (1)(4)(a),(c). Finally, Defendant Frances was a party to a multi-party bank account held jointly with the Plaintiff, namely, the Compass Account. A.R.S. § 46-456 (1)(4)(b). Defendant Frances unquestionably occupied a position of trust and confidence to the Plaintiff, and she therefore had a duty to act solely in the Plaintiffs best interests.

3. Defendant failed to act solely in the best interests of the Plaintiff and instead acted for her own personal benefit and gain.

The actions taken by Defendant Frances while she occupied a position of trust and confidence to Plaintiff, as a vulnerable adult, were violative of her duty to act solely in Plaintiffs best interests.

By manipulating Plaintiff into signing a QC Deed, transferring title to the Plaintiffs Residence of over fifty-five years to herself, Defendant Frances was not acting in the best interests of the Plaintiff. Further, by wrongfully selling Plaintiffs furnishings and personal belongings contained in the Residence for her sole benefit and gain, Defendants were not acting in the best interests of the Plaintiff. Finally, by allegedly purchasing the Plaintiffs Residence for the price of \$100,000.00, far below fair market value at the time, and then subsequently selling it for \$425,000, generating a \$325,000 self-interested profit, Defendants were not acting in the best interests of the Plaintiff.

By taking fraudulent actions, including forgery, against Plaintiff’s checking and credit accounts to obtain Plaintiff’s funds for her own individual use and benefit, or for the benefit of Defendants’ business, Sun Ray Paving, and depleting tens of thousands of dollars therein, Defendants were not acting in the best interests of the Plaintiff.

By neglecting to make payments on Plaintiffs routine bills and important obligations, and instead using Plaintiffs funds for her own personal benefit, thereby causing Plaintiffs long-term health care policy to lapse and coverage to be lost, Defendant Frances was not acting in the best interests of the Plaintiff.

The repeated self-interested conduct of Defendant Frances ultimately caused Plaintiff a severe **financial** loss totaling hundreds of thousands of dollars. Defendant Frances **abused** her position of trust and confidence, and flagrantly violated her duty to act in the sole best interests of Plaintiff, and therefore she is liable for **financial** exploitation under A.R.S. § 46-456.

As no genuine issue of any material fact exists to dispute the foregoing claim, Plaintiff is entitled to summary judgment on Count I for **financial** exploitation of a vulnerable adult as a matter of law.

D. COUNT III: FRAUD

Plaintiff is entitled to summary judgment on all issues concerning Defendants' liability for fraud. A showing of fraud under Arizona law requires the following: (1) a representation by the Defendant; (2) the representation's falsity; (3) the representation's materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) a consequent and proximate injury. *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 647 P.2d 629 (Ariz. 1982); *Nielson v. Flashberg*, 101 Ariz. 335, 419 P.2d 514 (Ariz. 1966).

1. A representation by the Defendant

Defendant Frances made the following representations to the Plaintiff: (1) that she would care for Plaintiff's Residence and belongings while Plaintiff was in assisted living; (2) that she needed Plaintiff's signature on a document that grant her permission to enter Plaintiff's Residence; (3) that she would be responsible for and manage Plaintiff's **financial** matters and pay Plaintiff's bills.

2. The representation's falsity

The above representations were entirely false. Defendant Frances' representation concerning her care for Plaintiff's Residence and belongings were false, as she did not care for Plaintiff's Residence and belongings after and during the time Defendant Frances had Plaintiff placed in assisted living, as she instead sold the Residence and personal belongings for a substantial personal profit,

Defendant Frances' representation concerning the QC Deed was false, as she did not have Plaintiff sign a document granting her permission to enter the Residence, as the Plaintiff was told and believed, and in actuality had Plaintiff instead sign a Quit Claim Deed which transferred ownership and title into her own name,

Defendant Frances' representation that she would be responsible for and manage Plaintiff's **financial** affairs was false, as she failed to pay bills, causing a loss of health insurance coverage, and depleted Plaintiff's funds for her own personal use and benefit.

3. The representation's materiality

A representation is considered material if a reasonable person in the same situation would attach importance to its existence or nonexistence in acting when faced with the representation, or the maker of the representation knows or has reason to know the hearer would attach importance to the representation in acting when faced with the representation. The [Restatement \(SECOND\) of Torts, § 538](#). The representations made by Defendant Frances were material, as a reasonable person in a similar situation would attach importance to statements regarding care of their homes, belongings, health and **finances**, and how to best proceed in managing these necessary aspects of life. As Plaintiff was **elderly**, suffering from health problems and struggling to effectively manage her life, representations made by a trusted neighbor, offering help and assistance in these important areas, undoubtedly amounted to a material representation.

4. The speaker's knowledge of its falsity or ignorance of its truth

Defendant Frances had knowledge of the falsity of her representations to Plaintiff because she knew the matters were not actually how she presented them to be to the Plaintiff. Defendant Frances did not intend to care for Plaintiff's Residence or belongings, evidenced by the fact that she had Plaintiff placed in assisted living where she would have no knowledge of Defendant Frances'

sale of her personal and real property which she eventually effectively disposed of. Defendant Frances knew the falsity of her representation regarding the purpose and nature of the document she presented to Plaintiff to sign. Defendant Frances informed Plaintiff the document was necessary to grant her permission to enter and, in turn, to look after Plaintiff's Residence. In actuality, Defendant had Plaintiff sign the QC Deed, transferring title to herself so that she could sell the Residence for a profit. Defendant Frances knew that Plaintiff could not read or see to verify the nature and contents of writings, and she purposely took advantage of Plaintiff's trust and dependence on her in this regard.

Finally, Defendant Frances knew of the falsity of her representations regarding her well-intended management of Plaintiff's **financial** assets responsibilities, as she immediately began drawing checks from Plaintiff's account for her own personal use and benefit, and failed to pay Plaintiff's health insurance bill. All of the above representations made by Defendant Frances to Plaintiff were false in fact and known to be false when they were made to Plaintiff.

5. The speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated

The totality of the circumstances in this case conclusively establish that Defendant Frances intended Plaintiff to act in the manner in which she did in light of her false representations. Defendant represented she had Plaintiff's best interests in mind, and wanted to assist her in managing her life as she was **elderly**, ill and struggling to live independently. She intended for Plaintiff to accept her help and assumption of the "caregiver" role so that she could **abuse** those positions and defraud the Plaintiff. The presentation of the QC Deed was a calculated act, after trust had been misleadingly established, to wrongfully procure the Plaintiff's signature on a legal document which she did not understand. Defendant Frances, acting as agent under power of attorney, and knowing of Plaintiff's reliance on her because of her inability to see, intended for Plaintiff to voluntarily and ignorantly sign the QC Deed, which is exactly what occurred.

6. The hearer's ignorance of its falsity

Plaintiff, as the hearer, had no way of knowing that Defendants' representations regarding her Residence, belongings, and **finances** were false, nor would she have agreed to allow Defendant Frances to involve herself as she did in Plaintiff's life, had she known and/or had the capacity to understand, that the representations were false. Further, Plaintiff was a vulnerable adult as defined by Arizona law, and was unable to protect herself from harm. [A.R.S. § 46-451\(A\)\(10\)](#). Plaintiff had lived with her husband for over fifty years in the same Residence until his death in 1996, when she was left to live alone. Plaintiff was **elderly** and suffered from **dementia** and **glaucoma**. These facts give further support to the Plaintiff's inability to understand and recognize the falsity of the representations made to her.

At the time Plaintiff was presented with the QC Deed, she had been dependent upon Defendant Frances for sometime, specifically with respect to writings and papers because of her visual handicap. Plaintiff was ignorant to the true nature of the QC Deed, the status of her personal property, the use and management of her funds, and the care being taken with her bills and **financial** obligations.

7. The hearer's reliance on its truth

Plaintiff, as hearer, relied on Defendants' representations, and, due to her mental impairments and visual handicap, was dependent upon Defendant Frances' honesty and attentiveness to her affairs. She agreed to allow Defendant Frances to care for her Residence and belongings while she was residing at Arizona Grand, and this is evidenced by the fact that she willingly signed a document which she thought had the effect of granting Defendant Frances permission to access and enter her Residence for this exact purpose. She further signed the power of attorney willingly, allowing Defendant Frances to act as her agent on her behalf and assist her **financially**. Plaintiff's willingness to allow deep involvement in important areas of her life, including access to funds and assets, shows the high level of faith and trust Plaintiff had in Defendant Frances. All of these actions taken by Plaintiff demonstrate her reliance on the honesty of Defendant's representations.

8. The right to rely on it

Plaintiff had a right to rely on the representations made by Defendant Frances in the course of her role as Plaintiff's caregiver and agent under a power of attorney. Defendant Frances assumed a position of trust and confidence to Plaintiff, and further was in a fiduciary relationship with Plaintiff by virtue of her position as Plaintiff's agent. Implicit in such relationships are duties of confidence and trust, especially given the impairments, both mental and physical, suffered by the Plaintiff. Plaintiff's reliance on Defendant Frances' representations therefore were entirely justified.

9. A consequent and proximate injury

Plaintiff suffered severe harm and **financial** loss because of Defendant Frances' actions, and but for Defendant Frances' actions and false representations, these harms would not have occurred. Because of her representations and actions taken regarding the Residence, Defendant Frances caused Plaintiff to lose title to the Residence she had occupied for over fifty years, and deprived Plaintiff of any profit closely resembling the fair market value of the Residence resulting from her sale thereof. Because of her actions in disposing of the items contained in the Residence, Defendant Frances caused Plaintiff to forever lose irreplaceable personal property and household furnishings which contained sentimental value to Plaintiff, and received no compensation resulting from the sale of said items, depriving Plaintiff of a profit she was entitled to. Because of Defendant Frances' representations and inconsistent actions taken against Plaintiff's checking and credit accounts, she caused Plaintiff to lose approximately \$97,000.00. Because of Defendant Frances' representations to pay Plaintiff's bills and subsequent failure to do so, Plaintiff lost coverage under her long term health insurance plan, which would have continued to cover Plaintiff's monthly assisted living expenses had it been timely paid.

E. Damages

As a direct result of the Defendants' exploitive and fraudulent acts, Plaintiff sustained estimated actual damages in the amount of \$425,000.00. This amount is arrived at by adding together the value Plaintiff was deprived of in her Residence, \$325,000.00, and the amount of Plaintiff's money spent by Defendant Frances from Plaintiff's Compass Account and Altier Account, approximately \$100,000.00 ($\$325,000.00 + \$100,000.00 = \$425,000.00$).

In accordance with the relief sought in the Complaint, Plaintiff is also entitled to an award of treble damages, pursuant to [A.R.S. § 46-456 \(B\)](#), for "additional damages for an amount up to two times the amount of the actual damages." Thus, the estimated amount of Plaintiff's treble damages are \$1,275,000.00 ($\$425,000.00 \times 3 = \$1,275,000.00$). Further, the Complaint asks the Court for an award of punitive damages on the fraud claim, a determination and/or award of which would likely require a separate hearing.

The Plaintiff acknowledges that a final determination of her damages is subject to an offset of \$80,700.00, representing a portion of the money returned, after-the-fact, by Defendant Frances. Therefore, in sum, Plaintiff quantifies her damages, actual and treble, to be \$1,194,300.00 ($\$1,275,000.00 - \$80,700.00 = \$1,194,300.00$).

IV. CONCLUSION

Based on the foregoing, there is no genuine issue of material fact precluding the Court from entering summary judgment in Plaintiff's favor on the counts of **financial** exploitation of a vulnerable adult and fraud. Plaintiff respectfully requests that the Court grant summary judgment as a matter of law against Defendants on Counts II and III of the Complaint, and award her actual and treble damages against the Defendants in the amount of \$1,194,300.00.

DATED this 23rd day of June, 2011.

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Footnotes

- 1 In the Zlatos case, the Court drew upon various sources in defining impairment as something that causes a decrease in strength, value, amount or quality. The Court further defined ‘impairment’ In terms of injury, deterioration, or lessening.

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