2011 WL 7985194 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Edward James SHELTMIRE, and individual; and Alec Sheltmire, an individual, Plaintiffs,
v.
LIFE DEVELOPMENT INSTITUTE, a non-profit corporation; John and Jane Does I-X; White Corporations I-V; and Black Partnerships I-V, Defendants;
Life Development Institute, a non-profit corporation, Counterclaimants,
v.
Edward James Sheltmire, an individual, and Alec Sheltmire, an individual, Counterdefendants.

No. CV2008-051913.
May 4, 2011.

Ldi's Memorandum of Law re Fiduciary Relationship and Apsa

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Honorable Judge Pro Tem Porter.

Plaintiffs James Edward Sheltmire and Alec Sheltmire have alleged that a special relationship existed between them and Life Development Institute (hereinafter “LDI”). They claim this relationship put LDI in the position of a fiduciary with respect to Plaintiffs, especially Alec. Based on these allegations, Plaintiffs are seeking jury instructions to allow the jury to find that LDI breached not only an alleged fiduciary duty it owed the Plaintiffs, but the Adult Protective Services Act (hereinafter “APSA”) with respect to Alec. Not only is there no support in the record for such conclusions or instructions, but they will greatly confuse the jury.

I. No Fiduciary Relationship Between LDI and Sheltmires

In the case cited by Plaintiffs, *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (App. Div. 1 2005), the Arizona Court of Appeals considered whether the conduct of Mrs. Zlatos' caretaker breached APSA and duties he owed her as her *caretaker*. The Court of Appeals found that Mrs. Zlatos met the definition of “vulnerable adult” because she was at least physically impaired if not mentally impaired by dementia and Alzheimer's. She was entirely dependent upon her caretaker because of her own physical limitations. The evidence demonstrated that the caretaker bathed her, cooked her meals, cleaned her house, rescued her when she fell down and took her everywhere she needed to go. The application *of Davis v. Zlatos* to the facts at hand is entirely inappropriate because LDI was not Alec Sheltmire's “caretaker”, and he was expected to, and capable of, performing these things himself.

In reversing the trial court's findings that the *caretaker* did not violate APSA with respect to Mrs. Zlatos, the Arizona Court of Appeals stated:
The APSA is violated only if it is shown that the person in a position of trust and confidence to the vulnerable adult either (1) failed to the act for the benefit of the vulnerable adult to the same extent of a trustee. A.R.S. § 46-456(A), or (2) by intimidation or deception knowingly took control, title, use or management of the vulnerable adult's property with the intent to permanently deprive the vulnerable adult of the property. A.R.S. § 46-456(B).

Pursuant to §46-456(A), "[a] person who is in a position of trust and confidence to an incapacitated or vulnerable adult shall act for the benefit of that person to the same extent as a trustee pursuant to title 14 chapter 7, article 3." * * * "Under Arizona law, a trustee is required to "observe the standard in dealing with the trust assets that would be observed by a prudent man dealing with property of another." A.R.S. § 14-7302 (Supp. 2004). "The first duty of any trustee is to act with undivided loyalty to the trustor." *Shetter v. Rochelle,* 2 Ariz. App. 358, 366. 409 P.2d 74, 82 (1965), *modified by* 2 Ariz. App. 607, 411 P.2d 45 (1966).

211 Ariz. at 527.

LDI is a *program* which attempts to teach young adults independent living skills such as cooking, shopping, managing a checking account and learning computers. It attempts to teach these young adults how to apply for a job and prepare for a job interview. These students, for the most part, live in a nearby apartment complex in apartments leased by LDI. In addition to LDI's policies, students are required to comply with the apartment complex's rules and regulations. There is no real "campus" and students are left to their own devices and amusements after classes are over in the afternoon. They buy their own groceries and toiletries, clean their apartments and cook their own meals. Students old enough to purchase and consume alcohol may do so (although LDI has a policy that prohibits those of legal drinking age from purchasing or supplying alcohol to those who are not of legal drinking age). LDI will take students to their doctors appointment *for an additional fee.* LDI does not have power of attorney or the authority to make medical decisions for its students, and does not occupy the position of guardian or conservator for any of these students.

Contrary to the impression Plaintiffs seek to create, LDI is not a residential facility which provides *care* to these student. It is not licensed by the State of Arizona, and does not purport to offer services for which such licensing would be required. It has no medical personnel on staff, nor does it provide counseling services. Although it has a program which attempts to track whether a student is taking his/her prescribed medication, participation in the program is voluntary. LDI has no authority to make or require its students to take their medication, and certainly no guardianship or power of attorney over the student. At the time Alec was enrolled in the program, LDI maintained an office in the apartment complex where the students lived, but did not staff the office 24/7 because part of the program is to allow students to be unsupervised and learn adult living skills, including what time to go to bed, when to have parties, who to invite to visit the apartment and what activities take place in the apartment. Mistakes by LDI students in decision making with respect to these issues are addressed by LDI staff, and the student is to learn from these mistakes. The LDI program does not provide the services that are available to vulnerable adults in other facilities to keep them from making mistakes, but tries to teach the students the consequences of such mistakes and how to avoid them in the future.

These students are *adults.* They are required to sign a contract which allows them to enroll in LDI's program. There is nothing in these facts that gives rise to a special relationship between LDI and its students, anymore than students who live in college dorms at Arizona State University or the University of Arizona. It would be ludicrous to suggest that ASU owes its students (more than 50,000 at last count) fiduciary duties or that ASU is somehow a trustee to each of its students.

LDI and the Sheltmires entered into an arm's length transaction, and the duties and obligations of that transaction are identified in the contracts signed by Plaintiffs, and in the Student and Parent Handbooks and Orientation prepared by LDI and given to students and parents.

In Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6. 23-24, 945 P.2d 317, 334-335 (Ariz. App. 1996), a bank claimed its accounting firm owed it a fiduciary duty, but the Arizona Court of Appeals disagreed.
PW argues that SC also failed to establish a fiduciary relationship between PW and Union. SC responds that a fiduciary relationship was demonstrated by evidence that Union, encouraged by PW to trust in PW's auditing expertise and knowledge of United, relied on PW to ensure that closing conditions of the United purchase were met. SC also relies on the fact that Union

directly relied on PW's help in preparing and registering the securities offering that Union undertook to finance the United acquisition. This evidence, however, does not suffice to establish a fiduciary relationship.

Our case law distinguishes a fiduciary relationship from an arm's length relationship. *See, e.g.*, *Brazee v. Morris*, 68 Ariz. 224, 228-29, 204 P.2d475,477-78 (1949); *Rhoads v. Harvev Pubs., Inc.*, 145 Ariz. 142, 148-49, 700 P.2d 840, 846-47 (App.1984). *Mere trust in another's competence or integrity does not suffice; "peculiar* reliance in the trustworthiness of another" is required. *Stewart v. Phoenix Nat*'l *Bank*, 49 Ariz. 34, 44, 64 P.2d 101, 106 (1937); *Rhoads*, 145 Ariz. at 148-49, 700 P.2d 840, 846-47. *A fiduciary relationship is a confidential relationship whose attributes* include "great intimacy, disclosure of secrets, [or] intrusting of *power."* *Rhoads*, 145 Ariz. at 149. 700 P.2d at 847 (quoting *Condos v. Felder*, 92 Ariz. 366, 371. 377 P.2d 305,308 (1962)). In a fiduciary relationship, the fiduciary holds "superiority of position" over the beneficiary. *Id. This superiority of position may be demonstrated in material aspects of the transaction at issue by a "substitution* of [the fiduciary's] will." *Herz & Lewis, Inc. v. Union Bank*, 22 Ariz.App. 437, 439, 528 P.2d 188, 190 (1974) (quoting *In re Guardianship of Chandos*, 18 Ariz.App. 583,585, 504 P.2d 524, 526 (1972)).

Although the existence of a fiduciary duty is generally a question of fact, "[w]hen the evidence is insufficient to support a verdict, the trial court has a duty to decide the issue." *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504-05,917 P.2d 222, 233-34 (1996) (quoting Rhoads, 145 Ariz. at 148, 700 P.2d at 846). We find the evidence insufficient to support a verdict in this case.

(Emphasis added)(footnotes omitted).

Plaintiffs not only want to create a fiduciary relationship where none exists to support their claim that LDI breached such a duty owed to them, but to support their claim that LDI violated APSA. LDI hopes that its students and their parents have confidence that its programs will benefit the students, and trust that LDI will do what it can to make each student's participation in LDI programs a success. However, that is no more than any business offering its services to the public at large hopes and encourages. Joe the Plumber wants the homeowner to have confidence that he knows what he is doing and can solve the homeowner's plumbing problem. He hopes the homeowner trusts him, and in some cases, that actually occurs. However, this does not make Joe the Plumber the trustee of the homeowner and does not create a fiduciary relationship between the two.

Fiduciary relationships exists between clergy and parishioner, lawyer and client, doctor and patient, psychiatrist/psychologist and client/patient. These are very special relationships and recognized appropriately as being fiduciary in nature. Parents and student who sign contracts to allow the student to enroll in LDI's programs do not then become LDI's wards to whom LDI owes fiduciary obligations.

II. APSA Does Not Apply to LDI

APSA is inapplicable to LDI and only applies to facilities that provide long-term *care* such as nursing homes and assisted living facilities. This point is well established by both the legislative intent and the plain language of the statute.

APSA claims exist only against persons or facilities that provide long-term *care* such as nursing homes and assisted living facilities. A.R.S. § 46-455(B) provides:

> An incapacitated or vulnerable adult whose life or health is being or has been endangered or injured by neglect, **abuse** or exploitation may file an action in superior court against any person or enterprise that has been *employed to provide care,* that has *assumed a legal duty to provide care* or that has been *appointed by a court to provide care* to such vulnerable adult for having caused or permitted such conduct.

(Emphasis added.)

The word "care" is vague, and, unfortunately it is not defined in APSA.[1] However, the statute's legislative history[2] is well documented, and reveals that the Arizona Legislature intended for APSA to apply only to long-term care facilities rather than schools such as LDI or even acute care facilities. The intent that APSA does not apply to LDI is also consistent with the other provisions in the statute. *See Milner v. Colonial Trust Co.*, 198 Ariz. 24, 27, 6 P.3d 329, 332 (App. 2000)("We look to statutes on the same subject matter or statutes that are part of the same statutory scheme to determine legislative intent and to maintain harmony.").

A. The Legislative History of APSA Reveals APSA Is Intended to Apply Only to Long-Term Care Facilities

A.R.S. § 46-455(B) was codified in 1989. *See* Ariz. Sess. Laws 1989, Ch. 118, § 1, attached hereto as Exhibit 1. The stated purpose was to "insure honesty *in long-term care"* in light of Arizona's "rapidly growing aging population" and the "thousands of people who are, or ought to be, *in licensed facilities."* *See* Minutes of Human Resources and Aging Committee for HB 2437, dated 3/9/89 (emphasis added), attached hereto as Exhibit 2, at 3-4. The statute provided a "central depository of claims against *homes that house adults"* and allowed "current status reports of *adult care housing."* *Id.* (emphasis added). It was intended to prescribe "actions for the restraint and remedying of violations *by adult health care providers."* *Id.* at 124 (emphasis added). The Arizona Supreme Court has recognized the limited scope of the original statute: "The legislature's intent and the policy behind the **elder abuse** statute are clear. Arizona has a substantial population of **elderly** people, and the legislature was concerned about ***elder abuse***." *In re Denton*, 190 Ariz. 152. 156, 945 P.2d 1283, 1287 (1997) (emphasis added); *see also Estate ofMcGill v. Albrecht*, 203 Ariz. 525, 528, 57 P.3d 384. 387 (2002).

In 1998, the statute was amended in conjunction with several others to strengthen "*residential care facilities* licensing laws." *See* Ariz. Sess. Laws 1998, Ch. 161, §§ 5, 8, attached hereto as Exhibit 3; *see also*, Arizona State Senate Fact Sheet for SB 1050 (1998) (emphasis added), attached hereto as Exhibit 4. Again, the Arizona Legislature was concerned about **abuse**, neglect, and financial exploitation of residents, and targeted "adult care homes, adult foster care homes, group homes, supervisory homes, supporting residential facilities, [and] nursing homes." *See* Minutes of Appropriations Committee for SB 1050, dated 4/21/98, attached hereto as Exhibit 5. The amendment followed the recommendations of a Joint Legislative Task Force on **Elderly Abuse**, which had been appointed "to investigate **abuses** of **elder** adults in Arizona *adult care industry,"* and charged with addressing several issues related to the protection of the vulnerable adult population, including the "improvement of the regulatory licensing structure of *residential care facilities."* Exhibits 2 & 3 (emphasis added). As a result, the licensing statutes for residential care institutions, nursing care institutions, and home health agencies, were amended to require fingerprinting and criminal history records checks of owners. *Id.; see* A.R.S. § 36-411 (A). These requirements were not extended to programs such as LDI or even institutions that provide acute care to the **elderly** or other vulnerable adults, such as hospitals. *Id.*

In 2003, the Arizona Legislature amended the APSA statutes in response to the Arizona Supreme Court's expansion of APSA relief against certain health care providers in *Estate of McGill. See* Ariz. Sess. Laws 2003, Ch. 129, § 2, attached hereto as Exhibit 6. In that case, the plaintiff sued two doctors under both the medical malpractice statute and APSA. *Estate ofMcGill*, 203 Ariz. at 52757 P.3d at 386. The Court held that a single act of medical negligence can provide a basis for an APSA action against licensed health care providers. *Id.* at 531, 57 P.3d at 390. The Court believed that this conclusion was consistent with the Legislature's intent in enacting APSA. *Id.* at 530-31, 57 P.3d at 389-90.

In response to that decision, the Arizona Legislature immediately corrected the scope of APSA, noting that the Court misinterpreted APSA's intent, and clarified that APSA was "passed in response to what was perceived as *nursing home **abuses***." *See* Minutes of Committee on Health for SB 1010, dated 2/27/03, comments of Senators Leff and Binder (emphasis added), attached hereto as Exhibit 7.

In furtherance of this stated purpose, the 2003 Amendment limited those who could be sued under APSA, and "expressly prohibit[ed] actions against licensed physicians unless they were employed or retained by one of the care facilities designated in the statute." *Brunet v. Murphy*, 212 Ariz. 534. 536, 135 P.3d 714, 716 (App. 2006). The enumerated facilities are a "nursing care institution, an assisted living center, an assisted living facility, an assisted living home, an adult day health care facility, a

residential care institution, an adult care home, a skilled nursing facility or a nursing facility." A.R.S. § 46-455(B)(1). Programs such as LDI are not among those enumerated by the Arizona Legislature. "[T]he amendment was intended to 'provide an exception from civil liability under the Adult Protective Services Act (APSA) for certain care providers." *Brunet*, 212 Ariz. at 539, 135 P.3d at 719 (quoting Arizona State Senate Fact Sheet for SB 1010 (2003)). *See* Arizona State Senate Fact Sheet for SB 1010 (2003), attached hereto as Exhibit 8.

A.R.S. § 46-455(B) was unquestionably aimed at curbing **abuse** in long-term care facilities. There is no indication that the Arizona Legislature intended to provide an additional cause of action for anyone enrolled in a program, unlicensed by the State of Arizona, which simply teaches adult living skills. In fact, when the Arizona Supreme Court expanded the scope of APSA in *Estate of McGill* beyond the nursing home and assisted living settings, the Legislature was quick to amend the statute to reflect that APSA can only form the basis for a claim separate for medical malpractice if it is against a certain long-term-care facility employees. *See* A.R.S. § 46-455(B)(1)-(2). Therefore, the legislative history of APSA instructs that APSA does not have any applicability beyond long-term care facilities and those healthcare providers affiliated with the long-term care facilities.

B. The Plain Language of APSA Indicates Programs Like LDI Are Not Subject to APSA Claims

The Legislature's decision not to include schools such as LDI in this list further demonstrates its intent to protect them from APSA's reach. "It is a fundamental principle of statutory construction that items not placed in a list of exemptions to a general rule are covered by that general rule." *Fund Manager, Pub. Safety Pers. Ret. Sys. v. Arizona Dept. of Admin.*, 151 Ariz. 93. 95, 725 P.2d 1127, 1129 (App. 1986) ("Under the well-established rule of statutory construction, ... if a statute specifies one exception to a general rule, other exceptions are excluded.") (quoting *Bushnell v. Superior Court*, 102 Ariz. 309, 311, 428 P.2d 987, 989 (1967)). Therefore, if APSA is supposed to apply to programs such as LDI which seeks to teach adults those living skills necessary for them to lead independent lives, the Legislature would have explicitly said so, but it did not.

Finally, A.R.S. § 46-45(C) solidifies the Legislature's intention that APSA is not to be applied to programs such as LDI or even acute care hospitals. A.R.S. § 46-455(C) provides:

> Any person who was the primary provider of medical services to the patient in the last two years before it was recommended that the patient be admitted to one of the facilities listed in subsection B, paragraph I of this section is exempt from civil liability for damages under this section.

This Subsection contemplates immunity for care providers in facilities *other than* the long term care facilities listed in Subsection B, which would naturally include (and exempt) care providers in acute care facilities. A contrary interpretation would contradict Subsection (C), and render it meaningless. *See Weitekamp v. Fireman's Fund Ins. Co.*, 147 Ariz. 274, 275-76, 709 P.2d 9909-910 (App. 1985) (a "cardinal rule" of statutory interpretation requires that each word or phrase must be given meaning so that no part is rendered void, superfluous, contradictory, or insignificant. If certain portions appear to be in conflict, they must be harmonized, if possible, to give full effect to the statute") (internal citations omitted); *see also Epstein v. Indus. Comm'n of Arizona*, 154 Ariz. 189, 194, 741 P.2d 322, 327 (App. 1987) ("Statutes must be given a sensible construction to avoid an absurd result.").

Plaintiffs should not be allowed to build into this case reversible error and confuse the jury by seeking instructions allegedly based on evidence that LDI occupied the position of fiduciary to Alec and/or Jim Sheltmire. or that it was trustee to one or both of them. There is simply no evidence to support such instructions, or that LDI breached a fiduciary duty it owed to either of the Sheltmires. Moreover, there is no basis for claiming APSA was intended to apply to programs like LDI, or that LDI violated APSA with respect to Alec Sheltmire.

DATED this _4TH_ day of May, 2011.

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Footnotes

1 Clearly, the contracts between LDI and Plaintiffs did not require LDI to provide care for Alec, and LDI is not licensed to provide care to vulnerable or incapacitated adults.

2 When a statute's language is not clear, the goal in construing statutes is to fulfill the legislature's intent when they wrote it, which is determined by "reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose" *Zamora v. Reinstein,* 185 Ariz. 272, 275,915 P.2d 1227, 1230 (1996).

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