

2011 WL 8177941 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Arizona.  
Maricopa County

Edward James SHELTMIRE, an 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; and John and Jane Does  
I-X, White Corporations I-V; and Black Partnerships I-V, Counterclaimants,

v.

Edward James Sheltmire, an individual, and Alec Sheltmire, an individual, Counterdefendants.

No. CV2008-051913.  
August 3, 2011.

**Plaintiffs' Response to Ldi's Memorandum of Law Re Fiduciary Relationship and APSA**

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Honorable Judge [Michael R. McVey](#).

Plaintiffs James Edward Sheltmire and Alec Sheltmire (“Plaintiffs”) through undersigned counsel, hereby respond to Defendant Life Development Institute’s (“LDI”) Memorandum of Law re Fiduciary Relationship and ASPA. LDI has attempted to disguise their improperly filed dispositive motion as a trial memorandum. This response is supported by the following Memorandum of Points and Authorities and the entire record herein.

***MEMORANDUM OF POINTS AND AUTHORITIES***

**I. INTRODUCTION**

LDI previously filed a motion for summary judgment on the issue of fiduciary duty that has been denied. LDI's trial memorandum is nothing more than a collateral attack on the Court's previous ruling denying the summary judgment on that issue. In any event, the issue of whether a fiduciary duty exists is a question of fact that a jury should determine after presentation of the evidence. As such, legal arguments and jury instructions on the question are entirely appropriate.

LDI's request to strike jury instructions and argument relating to the Adult Protective Services Act (“APSA”) is nothing more than an improperly filed motion for summary judgment. APSA does apply to the case at bar.

**II. LEGAL ARGUMENT**

**A. A Fiduciary Relationship Existed Between the Parties**

This Court has already found in its August 6, 2010 minute entry order denying portions of LDI's motion for summary judgment that there are genuine issues of material fact precluding a finding as a matter of law regarding whether a fiduciary relationship existed between the parties. Absent a finding as a matter of law, the issue is within the purview of the jury, and jury instructions on the matter are entirely appropriate.

To the extent that it is relevant at all, the case of *Cook v. Orkin Exterminating*, 609 Ariz. Adv. Rep. 26 (App. 2011), cited by LDI in its supplemental briefing, supports dismissal of LDI's motion. The *Cook* Court reaffirmed that the issue of whether a fiduciary relationship exists is generally one of fact. Factually, the *Cook* case is inapposite to the case at bar and otherwise does not lend any new perspective to the issue of fiduciary duty.

In any event, the ties between LDI and the Plaintiffs were much more extensive than portrayed in LDI's motion. Mr. Sheltmire entrusted his mentally retarded, ADHD, bi-polar son, Alec Sheltmire ("Alec") into the care of a school who assured him it was an appropriate placement. Additionally, the school managed Alec's medication, promised to take Alec grocery shopping, promised to teach Alec how to live in an apartment, promised to teach Alec how to cook, and promised to coordinate Alec's transportation to psychological appointments. LDI asserts that its advisors "develop a relationship based on trust and understanding," LDI also contends that students were comfortable confiding in their mentors. In fact, Alec confided in his mentors about his romantic relationships, an attempt to harm himself by taking pills, and drug dealing occurring at the apartment complex.

LDI also maintained a "superiority of position" over Alec. LDI punished Alec for behaviors with loss of personal property. LDI also held all the power with respect to the amount and depth of services it provided Alec. Thus, between Alec's vulnerability as a special needs individual and the relationship LDI cultivated, a jury will find that this evidence constitutes a fiduciary relationship.

The case of *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (App. 2005) is inapplicable to the issue of fiduciary duty as it addresses the APSA and not fiduciary duty. Whether a fiduciary relationship exists requires a fact intensive examination. The Court of Appeals has stated:

[A] fiduciary is a person who holds property or things of value for another—a trustee, executor, receiver, conservator or someone who acts in a representative capacity for another in dealing with the property of the other.

*Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 23, 945 P.2d 317, 334 (App. 1996), quoting *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1065 (9<sup>th</sup> Cir. 1971); see also *Restatement (First) of Contracts §472* comment c. (a fiduciary is "any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former").

LDI states that it teaches young adults independent living skills such as cooking, shopping, managing a checking account, how to find a job and learning computers. It is implicit in these promises that the students taken in by LDI lack independence in these areas. As the students were dependent on LDI to provide the basic necessities of everyday life, a fiduciary relationship existed and LDI's motion should be denied.

## **B. The Applicability of the APSA is a Question of Law**

This Court should also deny LDI's motion with regard to the applicability of the APSA. Whether LDI is bound by the APSA is a question of law for the Court to determine. *Matthews v. Life Care Centers of America, Inc.*, 217 Ariz. 606, 608, 177 P.3d 867, 869 (App. 2008). As such, if LDI wanted to obtain a pretrial ruling that the APSA does not apply, then it should have raised the issue as a motion for summary judgment. This Court has already ruled that it is well past the deadline for dispositive motions. See Minute Entry Order dated 4/4/11. LDI's motion is untimely and should be denied.

### C. The APSA Does Apply to LDI

In any event, LDI's motion should be denied because the APSA does apply to the case at bar. [A.R.S. §46-455](#) is a remedial statute that should be construed broadly. *Estate of Braden ex rel Gabaldon v. State*, 255 Ariz. 391, 395, 238 P.3d 1265, 1269 (App. 2010). The purpose of the APSA is to protect all vulnerable and incapacitated adults. *Id. citing In re Estate of Winn*, 215 Ariz. 149, 150, 150 P.3d 236 (2007).

LDI is improperly attempting to narrow the meaning of the APSA. Nothing in the statute limits the definition of protected persons to the **elderly**, nor does it contain any language restricting its application to facilities with certain types of licensure. Rather, [A.R.S. §46-455\(B\)](#) states that:

A 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, [or] that has assumed a legal duty to provide care ... to such vulnerable adult for having caused or permitted such action,

The Act defines “vulnerable adult” to include an “incapacitated person” within the meaning of [A.R.S. §14-5101](#). *See* [A.R.S. §46-451\(A\)\(9\)](#). In turn, “incapacitated person” is defined as

[A]ny 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 he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

[A.R.S. §14-5101\(1\)](#).

It is unquestionable in this case that Alec Sheltmire falls within the parameters of this definition. Furthermore, the same evidence that demonstrates the fiduciary nature of the relationship between Alec and LDI also demonstrates the applicability of the APSA to this case.

LDI was an “enterprise employed to provide care” for Alec. The contractual Residential Services Authorization and Agreement for Admission includes line items for both “supervised outside services” and living expenses. Footnote 3 to the contract states:

Living Expenses are used to pay electricity, water/sewer, weekly food stipend, cooking class and weekly maintenance (spending) money... Unused food stipend and/or spending money will go into a general account to absorb increased cost of utilities, etc.

(*See* Contract, attached as Exhibit 1) In practice, LDI controls these accounts and students cannot access the funds except through LDI personnel. (*See* LDI FAQ about Living Expenses, attached as Exhibit 2) Similarly, the Student Handbook for LDI demonstrates that LDI was involved in regulating almost every aspect of Alec's life while he lived there. (*See* Student Handbook, attached as Exhibit 3) This includes monitoring and dispensing prescription medication, helping students construct shopping lists for and menus on a weekly basis, conducting apartment inspections to ensure cleanliness, weekly meetings with student advisors, and creation of a ‘financial plan’ to monitor spending habits.

Even if this high level of involvement would not mean that LDI was “employed to provide care,” it is clear that LDI assumed a legal duty to provide care. Arizona law recognizes that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking. [Restatement \(2d\) of Torts, §323](#); [Jeter v. Mayo Clinic of Arizona](#), 211 Ariz. 386, 402, 121 P.3d 1256, 1272 (2005). This provision also applies to the economic harm resulting from LDI's failure to exercise reasonable care with regard to Alec. [Jeter](#), 211 Ariz, at 402, 121 P.3d at 1272. LDI undertook to care for a vulnerable adult, to educate him both academically and on the basics of everyday life. Alec suffered damages as a result of LDI's negligence in caring for him.

LDI's discussion of the legislative history of the APSA and [A.R.S. §46-455\(B\) and \(C\)](#) is little more than misdirection. Section B unambiguously applies to LDI. The limiting language in the latter portion of Sections B and Section C are restrictions intended to protect doctors from additional liability for what would otherwise be acts of simple medical malpractice. If the legislative history of the statute is relevant to any issue at hand, it shows that the proponents of the amendments were concerned about the effects of the statute on malpractice insurance. Neither party in this case has alleged that LDI is a "primary provider of medical services" within the meaning of subsection C. As such, these arguments should be disregarded in their entirety.

### III. CONCLUSION

For all these reasons, Plaintiffs respectfully request this Court disregard LDI's trial memorandum.

DATED this \_\_\_\_ day of August, 2011.

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