2012 WL 1855592 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Dolores SANCHEZ, a single woman, Plaintiff,
v.
LIFESTAR AMBULETTE, INC., an Arizona corporation; John Does I-X; Jane Does I-X; ABC Corporations I-X; and XYZ Partnerships I-X, Defendants.

No. CV2010051134.
January 11, 2012.

Trial Memorandum

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(Assigned to Hon. Alfred M. Fenzel).

Defendants, LifeStar Ambulette and Megan West, (hereinafter "Defendants"), through their undersigned attorneys, submit this Trial Memorandum for the Courts consideration. Defendants anticipate that the Court may be asked to rule on two issues as a matter of law either during the trial or at the conclusion of the same. Namely, Plaintiffs APSA claim and claim for punitive damages are legal issues that will be closely contested and subject to decisions by the Court as the matter proceeds. As such, Defendants take this opportunity to provide the Court with this Trial Memorandum outlining those two issues for the Court's ongoing consideration.

I. BRIEF FACTUAL BACKGROUND

Defendant LifeStar Ambulette, Inc. provides transportation to medical appointments to wheelchair-bound customers. Defendant Megan West is employed by Life Star Ambulette as a driver of a transport wheelchair-loading van who transports patients to and from medical appointments. West underwent training with LifeStar which included riding with another driver for a couple of weeks to learn the equipment, customer service, policies and procedures, and loading and off-loading customers. LifeStar does not train its employees to provide any formalized medical care to the customers, and it does not provide any such care to its customers. Its transport vans are not equipped with any medical equipment such as what one would find on an ambulance, nor are there any markings on the transport vehicles indicating they are anything other than for simple transportation. LifeStar essentially operates as a taxi cab company to transport customers who are confined to wheelchairs. Defendants at all times provided transportation services as the operators of a "Wheelchair Van" as defined under Arizona law. *See* A.R.S. §36-2201(29) § 36-2223.

II. APSA DOES NOT APPLY TO THIS CASE

On the date of the accident, Defendant West was off-loading Plaintiff from the van when Plaintiff's wheelchair rolled off the ramp. Although this case involves simple negligence, Plaintiff, in Count Four of her Complaint, alleges that Defendant Life Star and it employees "caused or permitted the life of Plaintiff to be endangered and/or caused of permitted Plaintiff's health to be injured or endangered by neglect, a violation of A.R.S. § 46455B." Defendants contend that the Adult Protective Services Act ("APSA") found in A.R.S. § 46-451, et seq. does not apply as transportation services are not the type of "care" governed

by APSA. Moreover, and assuming medical services generally are covered by APSA; Defendants were neither permitted nor provided such services. *See* A.R.S. § 36-2201(29) & 36-2223.

In relevant part, APSA provides:

> 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,*** 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.

A.R.S. § 46-455(B) (emphasis added). Plaintiff contends that the "provide care" language encompasses any provision of any level of service to any vulnerable person as defined by APSA, while Defendants contend that the language of the statute, the Legislative history, and other relevant statutes reflect that "provide care" must be interpreted as concerns the provision of care related to the long-term residency of a vulnerable adult.

Unfortunately, APSA does not define the term "provide care" and therefore, in the context of whether the Legislature meant for the APSA to apply to transportation services provided to vulnerable adults, the term "provide care" is vague. The goal in construing a statute is "to fulfill the intent of the legislature that wrote it," but when the statute's language is vague, legislative intent is determined by, "reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as that statute's context, subject matter, historical background, effects and consequences, spirit and purpose." *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996).

Against any contention that the term is unambiguous and clear, Defendants would offer the following. First, without interpretation, applying "provide care" results in an absurdity. Second, the "provide care" language needs to be interpreted within the context of the statutory language declaring the institutions that are amenable to APSA claims. Third, Plaintiffs interpretation completely ignores the language in A.R.S. §§ 36-2201.29 & 36-2223 limiting Defendants role to simply providing transportation and does not encompass "providing care" as that term is used in APSA.

If Plaintiff is correct, and "provide care" is to be read literally without reasonable interpretation, then the scope of this statute knows no bounds. As defined, the word "provide" when used as a transitive verb means, "to supply or make available (something wanted or needed) < provided new uniforms for the band> also: afford < curtains provide privacy> . Merriam-Webster Online Dictionary, *www.merriam-webster.com/dictionary/provide.* The word "care" is defined as, "painstaking or watchful attention." *Id.* at *www.merriam-webster.com/dictionarv/care.* Thus, anyone who supplies watchful attention to a person covered under APSA may be sued under that statute. Under Plaintiff's logic, a person providing watchful attention need not even be aware that the person is a vulnerable adult in order to be subject to APSA.

Thus under Plaintiff's logic, a police officer who arrests someone over the age of 18 and puts that person in handcuffs in the back of a squad car is subject to APSA claims for any claimed negligence befalling the person in custody. The person in custody is certainly unable to protect himself and is definitely under the watchful attention being supplied by the officer. Similarly, a taxi driver who picks up a fare that happens to be a vulnerable person would likewise be subject to a claim under APSA for any claimed negligent failure on the part of the cab driver to provide care to the passenger in his charge.

Clearly this is not the case and the "provide care" modifier concerning who is subject to claims under APSA must be interpreted in some meaningful way so that the scope of this statutory regime does not leave its proper mooring. APSA's well-documented legislative history reveals that the Legislature intended APSA to apply only to long-term care facilities, such as assisted living centers, and adult care homes - not transportation providers. This intent is consistent with certain other provisions in APSA. *Milner v. Colonial Trust Co.*, 198 Ariz. 24, 27, ¶ 8,6 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."). Reading APSA to include application to transportation providers, like Defendants, impermissibly violates the bedrock principles of statutory

construction. *See Zamora,* 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (statutes must be interpreted "in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question").

A. Pre-McGill legislative history reveals the Legislature's intent to limit APSA to long-term care facilities.

A.R.S. §46-455(B), was codified in 1989. *See* Ariz, Sess. Laws 1989, Ch. 118, § 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 (Exhibit 1, at 3-4) (emphasis added). The statute provided a "central depository of claims against ***homes that house adults"*** and allowed "current status reports for *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 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 of McGill v. Albrecht,* 203 Ariz. 525, 528, ¶ 6, 57 P.3d 384, 387 (2002).

In 1998, the Legislature amended APSA. The amendments were enacted in conjunction with several other statutes to strengthen "***residential care facilities*** licensing laws." *See* Ariz. See. Laws 1998, Ch. 161, §§5, 8; Arizona Senate Fact Sheet for SB 1050 (1998) (Exhibit 2) (emphasis added). The Legislature was again concerned about **abuse**, neglect, and financial exploitation of adult residents of long-term care facilities, and specifically 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 (Exhibit 3) (emphasis added) [1] 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's ***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.***" *See* Exhibits 2 & 3 (emphasis added).

B. Post-McGill Amendment

The Arizona Legislature again amended APSA in response to the Supreme Court's 2003 decision in *Estate of McGill ex rel. McGill v. Albrecht,* 203 Ariz. 525, 57 P.3d 384 (2002), expanding APSA relief to certain health care providers. *See* Ariz. Sess. Laws 2003, Ch. 129, § 2. Legislative members noted that the Arizona Supreme Court misinterpreted the Legislature's intent, and clarified that APSA was "passed in response to what was perceived as ***nursing home abuses."*** *See* Minutes of Committee of Health for SB 1010, dated 2/27/03, comments of Senators Leff and Binder (emphasis added) (Exhibit 4); Minutes of Committee on Health for SB 1010, dated 4/3/03, comments of Senator Allen (emphasis added) (Exhibit 5).

Consistent with this stated purpose, the Legislature's 2003 Amendment to APSA limited those who could be sued under the APSA. It "expressly prohibit[ed] actions against licensed physicians unless they were employed or retained as the primary care provider by one of the care facilities ***enumerated*** in the statute." *Brunet v. Murphy,* 212 Ariz. 534, 536, ¶ 5. 135 P.3d 714, 716 (App. 2006) (emphasis added). APSA's ***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). Transportation facilities are omitted from this list. "[T]he amendment was intended to 'provide an exception from civil liability under the Adult Protective Services Act (APSA) for certain health care providers."' *Brunett,* 212 Ariz, at 539, ¶ 22, 135 P.3d at 719 (*quoting* Arizona State Senate Fact Sheet for SB 1010 (2003)).

Statutes must be interpreted "in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question." *Zamora,* 185 Ariz. at 275, 915 P.2d at 1230 (citation omitted); *see* also *Pfeil v. Smith,* 183 Ariz. 63, 64,

900 P.2d 12, 13 (App. 1995) ("The guiding principle of statutory construction is to ascertain and give effect to the legislative intent.").

A.R.S. §46-455(B) was enacted to curb **abuse** in long-term care facilities, and later amended to clarify that its stated and limited focus was ***long-term care facilities.*** Nowhere in the statute or the APSA's legislative history is there any indication that the Legislature intended to provide an APSA cause of action against anyone who provided any level of assistance to a vulnerable adult. When Arizona's Supreme Court attempted to expand APSA in McGill, the Legislature was quick to amend the statute to foreclose that judicially created extension in contravention of the Legislature's intent, and sent the message that APSA can only be the basis for a separate claim if it is against certain medical professionals, but only if they are working in a long-term-care-facility. *See* A.R.S. § 46-455(B)(1) & (2).

C. If APSA Applies to Wheelchair Van Services, it is Directly at Odds with Other Statutory Law.

Defendants contend that APSA does not pertain to assistance provided to vulnerable people outside and unrelated to the vulnerable person's residency in one of the facilities discussed by the Legislature and listed in the APSA statute. Even if the definition of "provide care" is stretched to include the provision of medical care, APSA cannot apply to Defendants as a serious conflict would arise between such an interpretation and the language of A.R.S. §§ 36-2201 & 36-2223.

"Wheelchair Van" which is statutorily defined as a "vehicle that contains or that is designed and constructed or modified to contain a wheelchair and that is operated to accommodate an incapacitated or disabled person who does not require medical monitoring, aid, care or treatment during transport." A.R.S. § 36-2201(29). It is specifically distinguished from an ambulance or other vehicles intended to provide medical services. Compare id. with A.R.S. § 36-2201(3) (defined as a vehicle providing a level of medical services).

There is no evidence that Plaintiff provided any medical care while being transported from her home to the dialysis center, nor was there any evidence that Defendants were employed to provide medical care to Plaintiff. Under Arizona law. Defendants did not and could not provide medical care to Plaintiff and operated in compliance with A.R.S. § 36-2223. A.R.S. § 36-2223 restricts the types of passengers Defendants can transport in its wheelchair vans and the type of equipment that can be kept in the van, as follows:
B. A stretcher van or wheelchair van shall not transport a person who:

1. Is being administered intravenous fluids;

2. Was administered a medication that might prevent that person from caring for himself;

3.Needs or may need oxygen unless that person's physician has prescribed oxygen as a self-administered therapy;

4. Needs or may need suctioning;

5. Has sustained an injury and has not yet been evaluated by a physician;

6. Is experiencing an acute condition or the exacerbation of a chronic condition or a sudden injury or illness;

7.Needs to be transported from on hospital to another hospital if the destination hospital is the same level or a higher level as the hospital of origin;

8 Is being evaluated in an emergency room and for any reason must be transported to another hospital for diagnostic tests t that are not available at the first hospital;

9. Is being medically monitored at the sending facility and will continue to be medically monitored at the destination facility.

C. A stretcher van wheelchair van shall not contain medical equipment or supplies or display any marking, symbols or warning devices that imply that it offers medical care or ambulance transportation.

F. A person transporting patients in stretcher or wheelchair vans in violation of the criteria in subsection B of this section or operating in violation of subsection C may be determined ... to have operated an unregistered ambulance in violation of § 36-2212.

A.R.S § 36-2223. Defendants were never in violation of these limitations.

D. Defendants' Are Not Covered By APSA.

Clearly, Defendants provision of the limited transportation service does not bring them within APSA. Defendants are not licensed and do not operate any of the types of facilities that "provide care" to vulnerable adults as noted by the Legislature and stated in APSA. Even if APSA applied to the provision of medical care generally, Defendants are still not operating within its bounds. To the contrary. Defendants are specifically precluded from providing such level of service.

Plaintiff would argue that APSA applies as Mrs. Sanchez was a vulnerable adult because she was in a wheelchair and that she was hurt on Defendants' watch. If these were the only criteria, then both the taxi driver and the police officer discussed earlier would be subject to APSA, which they are not. In this case, Defendants play no different role than the taxi driver and is no more subject to APSA than the taxi driver.

II. PUNTIVE DAMAGES

Defendant Megan West was off-loading Plaintiff from the van when Plaintiffs wheelchair rolled off the ramp. Specifically, Megan rolled Plaintiff's wheelchair onto the hydraulic lift so that Plaintiff could be lifted from the van down to the pavement and then taken into her doctor's office. After she positioned Plaintiff on the lift, Megan was trying to attach a safety belt around the wheelchair. Megan held onto the wheelchair with one hand as she tried to fasten the safety belt. While she was trying to attach the safety belt, Plaintiffs wheelchair rolled toward and off the back edge of the lift. Megan tried to keep the wheelchair from falling off the lift, but the weight of the wheelchair and Plaintiff were too much for Megan to stop. Only after Plaintiff's wheelchair rolled off the back of the lift did Megan see that a safety plate on the edge of the lift farthest from the van door was not in the up position. The plate is designed to be up when the lift is at the van height and then flip down when the lift is at sidewalk level. Megan was accustomed to the plate functioning as expected and simply did not notice that it was down when she began rolling Plaintiff onto the lift. Megan had not experienced any problems with the safety plate prior to Plaintiffs accident.

Plaintiff claims Megan West was on her cell phone at the time she was unloading Plaintiff and further contends that simply being on a cell phone constitutes action supporting a claim for punitive damages.[2] Plaintiff's claim concerning cell phone use is premised on the inconsistent recollections of Plaintiff, who her attorney describes as a "dementia witness" and Plaintiffs daughter's observation that Megan was on the phone when she came to pick up Plaintiff. For her part, Plaintiff is a demonstrably unreliable witness. She has a history of memory problems. She cannot remember how many children she had or their ages. Though her deposition was taken less than a year after the accident, Plaintiff first could not recall what year the accident occurred and then believed it happened in 2007. Her own counsel describes her as a "dementia witness" and brought claims specifically contending that she was incapacitated, presumably both physically and mentally. Aside from likely lacking the capacity to testify. Plaintiff's story of Megan's cell phone use was inconsistent even within her short deposition.

Shortly after Plaintiffs deposition, Defendant obtained Megan's cell phone records. The records show that Megan called her on-call supervisor about the accident at 5:58:07 a.m. on July 1, 2009. Megan's last call before that call was at 5:47:08 a.m. and ended at 5:55:04 a.m. More than three minutes passed between the time Megan was not on her cell phone and when she called her supervisor. This is the time frame in which the accident occurred and, as testified to by Megan, she was not on the phone when she was unloading Plaintiff.

Plaintiff has also disclosed that her daughter would testify that Megan was on her cell phone at the time she arrived to pick up Plaintiff. Whatever this says about Megan's use of her cell phone at the time she picked up Plaintiff, it is irrelevant to Megan's use of her cell phone when she was unloading Plaintiff.

Plaintiffs have not produced any case establishing that the use of a cell phone during an accident, without more, is a basis for punitive damages. In fact, the simple use of a cell phone while driving and having an accident may not result in negligence, let alone support a claim for punitive damages. *See Civil Liability Arising from Use of Cell Phone While Driving*, 36 A.L.R.6th 443, § 5 (2008). More generally, the Arizona Supreme Court recognized in *Rawlings v. Apodoca*, that punishment is an appropriate objective in a civil case only if the defendant's conduct involves "some element of outrage similar to that usually found in a crime." 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986). The court reasoned and held, "We do not believe that the concept of punitive damages should be stretched. We restrict its availability to those cases in which the defendants wrongful conduct was guided by evil motives." *Id.* The court required that "plaintiff must prove that defendants evil hand was guided by an evil mind." *Id.* In *Gurule v. Illinois Mutual Life Insurance Company*, the court further warned that punitive damages are inappropriate "unless Defendants acted with a knowing, culpable state of mind, or Defendants' conduct was so outrageous that the requisite mental state can be inferred." 152 Ariz. 600, 601, 734 P.2d 85, 87 (1987). Punitive damages are unwarranted unless plaintiffs establish all these requirements with clear and convincing evidence. *Linthicum v. Nationwide Insurance Company*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986). Even where horrific injuries could have been prevented with minimal insight and minimal costs, punitive damages is inapplicable absent the requisite mental state. *See Volz v. Coleman Co. Inc.*, 155 Ariz. 567, 571, 748 P.2d 1191, 1194 (Ariz. 1987) (holding that evidence of gross negligence and even reckless disregard of the circumstances fail to support a claim for punitive damages). *See also, Linthicum v. Nationwide Insurance Company*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986).

Defendants contend that the Court will be required to grant judgment for Defendants on Plaintiffs punitive damages claim at the end of Plaintiff's case. Any prejudicial effort by Plaintiff to advise the jury that this case involves punitive damages and/or any effort to adduce evidence to support a claim of punitive damages may result in a mistrial, particularly in this case involving admitted negligence for the accident.

III. CONCLUSION

Defendants appreciate the opportunity to provide the Court with this Trial Memorandum and requests the Court consider the same in determining what are likely to be reoccurring issues throughout the trial of this matter.

RESPECTFULLY SUBMITTED this 11th day of January, 2012.

JARDINE, BAKER, HICKMAN & HOUSTON

By */s/ Michael Warzynski*

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Footnotes

1 An important distinction is that persons admitted to long-term care facilities are “residents” consistent with the intent or expectation that the persons in these facilities generally stay for an extended period such that it becomes the person's residence. In contrast, a person riding a in a transportation van is never deemed or considered a “resident.”

2 Previously, Plaintiff claimed that Megan West admitted that she was too tired to drive the day of the accident having just returned from a camping trip with her family that very morning. When Defendants produced Megan's time records and further response to this baseless contention, Plaintiff had nothing further to say and withdrew, at least tacitly, this contention. Because the contention was baseless, easily disproved, and withdrawn by Plaintiff, Defendants do not elaborate on it further here.

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