

# SET NO. 6

DIVISION ONE  
COURT OF APPEALS  
STATE OF ARIZONA

FILED JAN 25 2010

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

PHILIP G. URRY, CLERK  
BY \_\_\_\_\_

THE ESTATE OF MARY WINN,  
deceased, by and through its Personal  
Representative GEORGE WINN,  
  
Plaintiff/Appellant,

vs.

PLAZA HEALTHCARE, INC., an Arizona  
corporation dba Plaza Healthcare; PLAZA  
HEALTHCARE SCOTTSDALE  
CAMPUS, an Arizona corporation dba  
Plaza Healthcare,  
  
Defendants/Appellees.

No. 1 CA-CV 09-0649

Maricopa County Superior Court  
No. CV2003-017852

## ANSWERING BRIEF

Eileen Dennis GilBride, Bar #009220  
David S. Cohen, Bar #016888  
JONES, SKELTON & HOCHULI, P.L.C.  
2901 North Central Avenue, Suite 800  
Phoenix, Arizona 85012  
(602) 263-1700  
cgilbridc@jshfirm.com  
dcohen@jshfirm.com

Attorneys for Defendants/Appellees Plaza  
Healthcare, Inc. and Plaza Healthcare  
Scottsdale Campus

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2901 North Central Avenue, Suite 800  
Phoenix, Arizona 85012  
(602) 263-1700  
egilbride@jshfirm.com  
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## STATEMENT OF THE CASE

Plaintiff's Statement of the Case improperly includes argument and unsupported factual assertions, omits pertinent information, and misstates other information. As just one example, there is no evidence that "abuse killed" Mary Winn or that Defendants "negligently killed her." (OB at 1, 2, 4.) In fact, Plaintiff has substantively lost this case, so the assertion is insulting, in addition to being completely inappropriate in a Statement of the Case. Following is a proper, factual Statement of the Case.

This is an Adult Protective Services Act ("APSA") case against a nursing home facility brought by the Estate of Mary Winn for alleged abuse and neglect while Ms. Winn was at the facility. [C.R. 1.] The trial court initially granted Defendants summary judgment on statute of limitations grounds because Mr. Winn had not been timely named personal representative of the Estate, and the probate statutes give late-appointed personal representatives no authority to possess or administer Estate assets. [C.R. 37.]<sup>1</sup> The Arizona Supreme Court ultimately reversed that judgment, holding that a late-appointed personal representative may prosecute an APSA claim in spite of the probate statutes' language. [C.R. 56.]

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<sup>1</sup> The trial court did not grant summary judgment because it "believed the estate could not pursue an APSA claim." (OB at 2.)

The matter was remanded to the trial court and the Estate was substituted as Plaintiff. [C.R. 64.]. Because the APSA claim had no pecuniary value, Plaintiff moved for summary judgment arguing that the Estate was entitled to recover “the value of [Ms. Winn's] human life” in damages. [C.R. 61.] The matter was briefed, and the trial court, Hon. Ruth Hilliard, denied the motion, ruling that the Estate was not entitled to recover the “value of human life” in damages. [C.R. 73.] Because the denial of the motion meant that Plaintiff’s remaining case once again had virtually no value, Plaintiff included Rule 54(b) language in its form of judgment, and the court signed the form of judgment which stated, in pertinent part, “It is ordered entering judgment at this time.” [C.R. 82.]

Plaintiff then appealed the denial of summary judgment to this Court and the matter was briefed. *See* 1 CA-CV 07-0630. The Court ruled that it lacked jurisdiction, however, because although the trial court had included Rule 54(b) language in its order, the order denying Plaintiff summary judgment “did not resolve any of the claims alleged in the complaint.” [No. 1 CA-CV 07-0630, Order dated March 10, 2008.] The matter was thus returned to the superior court.

Thereafter, Plaintiff filed a Rule 60(c) motion to “set aside” the prior “judgment” against him – the ruling that the “intrinsic value of human life” is

not an element of the Estate's damages. [C.R. 114.] That motion was briefed [C.R. 117, 118] and denied. [C.R. 119.] The court further ruled that because Plaintiff's counsel had admitted his case would be worth less than \$50,000 without the "intrinsic value of human life" damages, the matter would be transferred for arbitration. [*Id.*] The case went to arbitration, where the arbitrator found in favor of Defendants. [C.R. 123.] Judgment against Plaintiff was entered on August 13, 2009 [C.R. 131], and Plaintiff timely appealed. [C.R. 134.]

## STATEMENT OF FACTS

Ms. Winn was a resident of Plaza Healthcare from January 11, 1999 to February 6, 1999 when she died. [C.R. 26, ¶¶2, 3.] More than four and one-half years later, Ms. Winn's husband George Winn brought an APSA claim under A.R.S. §46-455(B) against Plaza on behalf of himself, Ms. Winn's estate, and Ms. Winn's survivors. The APSA claim alleged that Plaza or its agents abused or neglected Ms. Winn while she resided at Plaza's Scottsdale campus. *See In re Estate of Winn*, 214 Ariz. 149, ¶2, 150 P.3d 236, 237 (2007).

Mr. Winn's lawsuit was filed well beyond the limitations period for any wrongful death or negligence claim, so wrongful death damages are not at issue. *See* A.R.S. §12-542; OB at 1. Only the APSA claim was timely because it was brought within the then-effective seven-year limitations period. A.R.S. §46-455 (Supp. 1998).

**ISSUE PRESENTED FOR REVIEW**

Did the trial court correctly rule that under the APSA, an Estate cannot recover the "inherent value" of the deceased's life as compensatory damages?

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW

The Court should review de novo the legal issue of whether an Estate can recover, as part of its damages in an APSA claim, “the value of [Ms. Winn's] human life” in damages. *Burns v. Davis*, 196 Ariz. 155, 159, ¶ 4, 993 P.2d 1119, 1123 (App. 1999). There is no basis for the Court to “assume[ ] that all facts that the estate has alleged are true.” (OB at 5.) This is not a motion to dismiss case, and the facts relevant to the one legal issue here are not in dispute.

### II. THE "INHERENT VALUE OF THE DECEASED'S LIFE" IS NOT AN ITEM OF COMPENSATORY DAMAGES TO THE ESTATE UNDER THE APSA

This case raises one claim, and one claim only. That claim is an APSA claim under A.R.S. §46-455(B). It is not a wrongful death claim, since Plaintiff's complaint was filed long after the statute of limitations expired on any such claim. *See In re Estate of Winn*, 212 Ariz. 117, 118 n.3, 128 P.3d 234, 235 n.3 (App. 2006), *vacated on other grounds*, 214 Ariz. 149, 150 P.3d 236 (2007).

The gist of the APSA claim is Plaintiff's allegation that the health care facility injured Ms. Winn by abuse and neglect while she was a patient there. In pertinent part, the damages recoverable for any such abuse and neglect would be (1) any pre-death pain and suffering Ms. Winn had a result of the alleged abuse and neglect, and (2) any special damages, including medical expenses,

that the Estate of Ms. Winn incurred as a result of the alleged neglect. A.R.S. §46-455(H)(4) (after determination of liability, court may order payment of "actual and consequential damages, as well as costs of suit and reasonable attorney fees, to those persons injured by the conduct described in this section").<sup>2</sup> Because the Estate had none of these damages, the issue Plaintiff poses is whether the Estate has "lost the value of its deceased's life," as Plaintiff claims (*see, e.g.*, OB at 2, 4, 9), so as to be able to recover that "value" as an item of compensatory damage in an APSA claim.

It hasn't, and it can't. Human life does have value, as Plaintiff asserts. (OB, *passim*.) But that does not mean that such "value" is an element of an Estate's damages in an APSA case. An Estate cannot claim wrongful death damages now, or ever, for its own deceased's "value of life" because an estate does not "survive" the person's death or suffer from the person's death. It does not even exist until and unless the person dies.<sup>3</sup>

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<sup>2</sup> The damages are theoretical, however, because here the Estate had no actual APSA damages. The trial court granted Defendants summary judgment on Plaintiff's claim for pre-death pain and suffering damages, and Plaintiff has not appealed that ruling. [C.R. 113.] Nor has Plaintiff shown any damages for medical expenses incurred as a result of the alleged neglect.

<sup>3</sup> While the Estate may claim pain and suffering damages even though it does not suffer those damages, this is due only to a statutory exception to the rule that the patient's pain and suffering cannot be claimed after death. *See* A.R.S. §46-455(P); *Matter of Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 945 P.2d 1283 (1997). This does not mean that the Estate may

Plaintiff argues that juries can reasonably place an amount on intangibles such as the value of a life. (OB at 9, 11-12.) But the issue is not the difficulty of placing a value on life or about the “amount” of damages. It is about the elements of damage that can be claimed. The value of life is simply not an element of the Estate’s damage claim. An Estate does not *lose* the value of human life, and thus cannot recover for it. (See OB at 13 – “As far as Mary’s life, the estate lost something with actual, inherent value as surely as another estate might lose a professional’s substantial earnings.”) Plaintiff argues that if an estate can recover lost earnings and lost earning potential, it can recover for the lost life itself. (*Id.*, and at 21.) The analogy does not work. It is only in *wrongful death cases* that an estate seeks recovery for lost earning potential. See, e.g., *Gonzales v. Arizona Public Service Co.*, 161 Ariz. 84, 775 P.2d 1148 (App. 1989); *Katz v. Filandro*, 153 Ariz. 601, 739 P.2d 822 (App. 1987). This is not a wrongful death case. And the APSA statute is not a wrongful death statute.

Plaintiff’s attempt to make a back-door claim for wrongful death damages is evident from its reliance on *Southern Pacific Transp. Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599 (1975) – a wrongful death case. (OB at 11-12.)

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recover wrongful death damages for the death of the patient. Indeed, Ms. Winn would not be able to recover for her own “value of life” for an APSA violation had she lived.

As is noted above, though, that claim on behalf of Mr. Winn was not timely filed. Further, the trial court's ruling does not violate the provision stating that the APSA claim is "not limited by" any other civil remedy or provision, as Plaintiff asserts. (OB at 10.) The reason the Estate can't claim wrongful death damages under APSA is not that the wrongful death statute prohibits or limits it; it's that (a) the Estate has not lost the value of its own deceased's life, (b) wrongful death damages are not an item of compensatory damage to the Estate under the APSA, and (c) Plaintiff failed to timely file a wrongful death claim.

Plaintiff also errs in arguing that its position has merit because damages are presumed in battery and other types of cases, and because a plaintiff can recover "wrongful death" damages for the loss of a pet or fetus. (OB at 14-16.) These precepts have nothing to do with Plaintiff's attempt to claim wrongful death damages. In those types of cases, the plaintiff has been injured and suffered a loss by the tort. Here, the Estate has not been injured by the death; it exists because of the death.

Finally, Plaintiff argues that allowing the Estate to recover for the wrongful death of its decedent serves the APSA's "remedial purpose." (OB at 19-20.) In truth, allowing or disallowing this type of damage has nothing to do with the APSA's remedial purpose, because the Estate is fully able to bring its lawsuit even if it can't recover "wrongful death" damages. The Estate is still

able to seek its true, full compensatory damages (including for pre-death pain and suffering if they exist), fees and costs of suit. In fact, it is the allowance of the patient's pre-death pain and suffering damages that helps fulfill the statute's remedial purpose. Plaintiff's counsel simply doesn't like the fact that in this particular case, if he had been successful in proving liability, the proper compensatory amounts would be minimal – there are no economic damages, and any pain and suffering damages would be limited to the very short duration when Ms. Winn resided at Plaza. That, however, is not a problem with the statute, its remedial purpose, or the lower court's ruling. And while it might pose a problem for counsel's or client's pocket, this is not a reason to allow Plaintiff to end-run around the wrongful death statute of limitations, and seek what is really wrongful death damages in the context of an APSA claim.

## CONCLUSION

No one is “poisoned by cynicism” here (OB at 23-24), and Plaintiff’s lofty rhetoric about the “ideals forming the foundation of our legal system and civilization” is pointless here. (*Id.*) Everyone agrees that life has inherent value; but Plaintiff refuses to acknowledge the real issue, and that is, “has value to whom?” The answer is, to a wrongful death plaintiff, not to an APSA plaintiff or her Estate. Under no circumstances can an APSA plaintiff claim his own “life value” as an element of damage, and under no circumstances can an Estate claim the value of human life as an element of its damages. Plaintiff has not cited one authority holding so. Defendants respectfully request the Court to affirm the judgment in their favor.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of January, 2010.

JONES, SKELTON & HOCHULI, P.L.C.

By Eileen Dennis GilBride

Eileen Dennis GilBride

David S. Cohen

2901 North Central Avenue, Suite 800

Phoenix, Arizona 85012

Attorneys for Defendants/Appellees

Plaza Healthcare, Inc. and Plaza

Healthcare Scottsdale Campus

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 14(b), Arizona Rules of Civil Appellate Procedure, I certify that the attached brief

X Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 2,422 words or

           Uses monospaced type of no more than 10.5 characters per inch and

           Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs).

January 25, 2010  
Date

Eileen Dennis GilBride  
Eileen Dennis GilBride

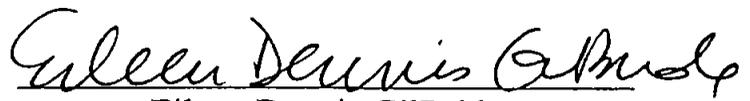
**CERTIFICATE OF SERVICE**

Eileen Dennis GilBride, being first duly sworn, upon oath states that on the 25<sup>th</sup> day of January, 2010, she caused the original and six copies of the foregoing Answering Brief to be delivered for filing to:

Clerk, Arizona Court of Appeals  
Division One  
1501 West Washington  
Phoenix, Arizona 85007-3329

and that she caused two copies of the foregoing brief to be deposited in the United States Mail, postage prepaid, to:

David L. Abney, Esq.  
AHWATUKEE LEGAL OFFICE  
4025 East Chandler Blvd., No. 70-A8  
Phoenix, Arizona 85048  
Attorneys for Plaintiff

  
Eileen Dennis GilBride

SUBSCRIBED AND SWORN to before me this 25<sup>th</sup> day of January, 2010.

  
Notary Public

2153055.1  
1/22/10

