

SET NO. 6

DIVISION ONE
COURT OF APPEALS
STATE OF ARIZONA

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

FILED FEB 22 2010

PHILIP G. URRY, CLERK
BY _____

In the Matter of the Estate of MARY WINN, Deceased.

**THE ESTATE OF MARY WINN, Deceased,
by and through GEORGE WINN,
its personal representative,**

Plaintiff-Appellant,

v.

**PLAZA HEALTHCARE, INC., an Arizona corporation, d/b/a PLAZA
HEALTHCARE; PLAZA HEALTHCARE SCOTTSDALE CAMPUS, an
Arizona corporation d/b/a PLAZA HEALTHCARE,**

Defendants-Appellees.

1 CA-CV 09-0649

**Maricopa County Superior Court Case No. CV 2003-017852
Honorable A. Craig Blakey, II**

**REPLY BRIEF OF PLAINTIFF/APPELLANT
THE ESTATE OF MARY WINN**

**David L. Abney, Esq. (009001)
LAW OFFICES OF DAVID L. ABNEY, ESQ.
4025 East Chandler Boulevard, No. 70-A8
Phoenix, Arizona 85048
(480) 734-8652; abneymaturin@aol.com
Attorney for Plaintiff-Appellant
The Estate of Mary Winn**

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

In the Matter of the Estate of MARY WINN, Deceased.

**THE ESTATE OF MARY WINN, Deceased,
by and through GEORGE WINN,
its personal representative,**

Plaintiff-Appellant,

v.

**PLAZA HEALTHCARE, INC., an Arizona corporation, d/b/a PLAZA
HEALTHCARE; PLAZA HEALTHCARE SCOTTSDALE CAMPUS, an
Arizona corporation d/b/a PLAZA HEALTHCARE,**

Defendants-Appellees.

1 CA-CV 09-0649

**Maricopa County Superior Court Case No. CV 2003-017852
Honorable A. Craig Blakey, II**

**REPLY BRIEF OF PLAINTIFF/APPELLANT
THE ESTATE OF MARY WINN**

**David L. Abney, Esq. (009001)
LAW OFFICES OF DAVID L. ABNEY, ESQ.
4025 East Chandler Boulevard, No. 70-A8
Phoenix, Arizona 85048
(480) 734-8652; abneymaturin@aol.com
Attorney for Plaintiff-Appellant
The Estate of Mary Winn**

Table of Contents

	Page
Table of authorities	iii
Legal argument	1
1. The defense admits that human life has value.	1
2. Under the Arizona Adult Protective Services Act, an estate has standing to prosecute a claim for actual damages.	1
3. Loss of a human life causes actual damages. An estate may prosecute a claim for that loss even if the estate is barred from bringing a wrongful-death claim.	2
4. An estate can claim damages not existing before it existed.	3
Conclusion	4
Certificate of compliance	5
Mailing certificate	5

Table of Authorities

Cases

	Page
<i>In re Estate of Winn</i> , 214 Ariz. 149, 150 P.3d 236 (2007)	3
<i>In re Estate of Wyttenbach</i> , 219 Ariz. 120, 193 P.3d 814 (App. 2008)	1
<i>In re Lister's Estate</i> , 22 Ariz. 185, 195 P. 1113 (1921)	3
<i>Matter of Guardianship/Conservatorship of Denton</i> , 190 Ariz. 152, 945 P.2d 1283 (1997)	3

Statutes

A.R.S. § 46-456(B) (1999 version)	1
A.R.S. § 46-456(G) (1999 version)	1
A.R.S. § 46-456(M) (1999 version)	2

Legal Argument

1. The defense admits that human life has value.

In its answering brief, the defense admits this appeal's major premise: Human life has actual value.¹ The defense also admits that the issue in our appeal is not whether juries can reasonably place a value on an intangible thing like a human life.² With those two key points admitted, we can move to an estate's right to seek actual damages for loss of a human life's actual value.

2. Under the Arizona Adult Protective Services Act, an estate has standing to prosecute a claim for actual damages.

An estate may file a civil action under the Adult Protective Services Act because that statute gives an estate standing to sue.³ When a person violates APSA and injures a vulnerable adult like Mary Winn, that person is subject to actual damages in an estate's civil action. Indeed, APSA does not seem to let anyone else bring a post-death claim on behalf of a deceased vulnerable adult.⁴

¹ *Answering Brief* at 7, line 9 (Jan. 25, 2010).

² *Id.* at 8, lines 1-3.

³ See A.R.S. § 46-456(G) (1999 version) ("The . . . duly appointed . . . personal representative of the vulnerable adult's estate has priority to, and may file, a civil action under this section."); A.R.S. § 46-456(B) (1999 version) (A person violating APSA "shall be subject to actual damages in a civil action brought by or on behalf of a vulnerable adult.").

⁴ *In re Estate of Wyttenbach*, 219 Ariz. 120, 126 ¶ 27, 193 P.3d 814, 820 ¶ 27 (App. 2008) ("A personal representative is permitted to bring a claim under the APSA on behalf of the incapacitated or vulnerable adult. The

3. Loss of a human life causes actual damages. An estate may prosecute an APSA claim for that loss even if the estate is barred from bringing a wrongful-death action.

Nothing in APSA bars an estate from seeking actual damages for a vulnerable person's death. Still, the defense argues that APSA cannot seek actual damages for the lost value of Mary Winn's life because the statute of limitations for a wrongful-death claim has expired. But the version of A.R.S. § 45-455(M) that was in effect when Mary Winn died provides that an APSA civil action is remedial and "not limited by any other civil remedy."⁵ In fact, under A.R.S. § 45-455(M), an APSA civil action is not limited by "any other provision of law."⁶ Thus, the wrongful-death statute cannot limit the estate's right to seek actual damages for loss of the value of Mary Winn's life.

The opening brief explained that A.R.S. § 45-455(M) had no limits from any other statute, including the wrongful-death statute.⁷ The answering brief did not discuss the impact of that statutory clause—or even mention it. But its impact is profound. In fact, A.R.S. § 45-455(M) is unique among Arizona statutes. No other Arizona statute—whether the wrongful-death

statute, however, does not provide for claims by others.").

⁵ A.R.S. §46-455(M) (1999 version) ("A civil action authorized by this section is remedial and not punitive and does not limit and is not limited by any other civil remedy or criminal action or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.").

⁶ *Id.* (emphasis added).

⁷ *Opening Brief* at 10-11 (Dec. 15, 2009).

statute or the survival statute or any other statute—can preempt an estate’s APSA claim for actual damages arising from a vulnerable person’s death.⁸

4. An estate can claim damages not existing before it existed.

The defense argues that the Estate cannot claim actual damages for the loss of Mary Winn’s life because that loss occurred before the Estate existed. But no right of action to recover damages arising from a person’s death can exist until after the person dies.⁹ Despite that, estates routinely claim damages for funeral expenses and for post-death lost wages. Moreover, an estate can claim damages for final-medical-care bills, although some of them might not arrive or come due until after the patient’s death.¹⁰

The defense makes a related argument that if Mary Winn had lived she could not have claimed actual damages for the value of her lost life. Well,

⁸ See *In re Estate of Winn*, 214 Ariz. 149, 151 ¶ 9, 150 P.3d 236, 238 ¶ 9 (2007) (“The language of APSA § 46-455 is clear in creating a remedial cause of action that may not be limited by the death of the vulnerable adult ‘or any other provision of law.’ . . . The legislature has stated its intent to increase the remedies available to elder abuse victims by providing that APSA claims proceed unimpeded by either the death of the elder abuse victim or limitations imposed by other laws.”) (citation omitted). See also *Matter of Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 156-57, 945 P.2d 1283, 1287-88 (1997) (Under APSA, the survival statute does not limit damages that a personal representative can recover for the death of a vulnerable person.).

⁹ See *In re Lister’s Estate*, 22 Ariz. 185, 187, 195 P. 1113 (1921).

¹⁰ The answering brief’s second footnote claims that the Estate is not seeking damages for the medical expenses incurred in trying to save Mary Winn’s life after the fatal insulin overdose. Actually, the Estate is seeking damages for those medical costs.

there's no disputing that Mary has died. The defense has forgotten, however, that the claim for the inherent, actual value of Mary Winn's lost life is a claim belonging to her Estate. It is *not* a claim that Mary is bringing for herself, since she is dead.

Conclusion

Human life has actual value. Therefore, the loss of that human life causes actual damage. It's intangible damage. But as the defense admits, a jury can reasonably estimate the worth of a lost life's intangible value.

When neglect kills a vulnerable adult, the Arizona Adult Protective Services Act lets an estate recover actual damages. In fact, under APSA, no other provision of Arizona law can limit the awardable actual damages. Mary Winn's Estate thus asks this Court to hold that it has the right to seek actual damages for the actual value of her lost life. The Estate also asks the Court to vacate the summary judgment entered against it on this issue and to remand this case to the superior court for a trial on the merits.

DATED this 22nd day of February, 2010.

LAW OFFICES OF DAVID L. ABNEY, ESQ.


David L. Abney
Attorney for Plaintiff/Appellant
The Estate of Mary Winn

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 1,474 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Mailing Certificate

The above-signing lawyer filed the original and the correct number of copies with the Clerk of the Court, Arizona Court of Appeals, on the above date, and mailed two copies each of this document to the following:

- David S. Cohen, Esq. and Eileen Dennis GilBride, Esq. JONES, SKELTON & HOCHULI, P.L.C., 2901 North Central Avenue, Suite 800, Phoenix, Arizona 85012; (602) 263-1700; Fax: (602) 200-7823, Attorneys for Defendants/Appellees.


