2010 WL 7715527 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Pauline POLLACK, an individual, Plaintiff,

v.

CARY NEIL POLLACK and Susan Beth Pollack, husband and wife, Defendants.

No. CV 2008-051867.
April 6, 2010.

Defendants' Trial Memorandum

Jerome K. Elwell, State Bar No. 012699, Phillip B. Visnansky, State Bar No. 025806, Warner Angle Hallam Jackson, & Formanek, PLC, 3550 North Central Avenue, Suite 1500, Phoenix, Arizona 85012-2188, Telephone: (602) 264-7101, Facsimile: (602) 234-0419, Attorneys for: Gary Neil Pollack and Susan Pollack.

Assigned to the Honorable Stephen Kupiszewski.

Defendants CARY NEIL POLLACK (“Cary” or “Defendants”) and SUSAN POLLACK (“Susan” or “Defendants”), through counsel undersigned, hereby submit the following Trial Memorandum. While plaintiff PAULINE POLLACK (“Pauline”), acting through her daughter and New York guardian LANA POLLACK (“Lana”), does question specific **financial** transactions occurring in 2006 and 2007, the real motivation behind this action is Lana's desire to extract revenge on the Defendants for the love and affection showered on them by Pauline.

All of the transactions questioned by the Pauline were completed with her full knowledge and consent. All transactions benefited the Pauline. Despite the venomous attacks against the Defendants initiated by Lana, the Defendants have undertook no actions which cause them to be liable to the Pauline. After reviewing the evidence, any finder of fact should determine that the questioned transactions appropriately benefit the Pauline.

1. Factual Background

From an early age, Cary made significant sacrifices so that his parents, PAULINE POLLACK (“Pauline”) and MORRIS POLLACK (“Morris”) would not be burdened. The most notable early example of this concern for his parents' welfare occurred as Cary approached enrollment in college. While his parents were willing to do what was necessary to pay higher education expenses, Cary did not want to saddle his family with the obligations of his education. As such, Cary worked his own way through college, sacrificing himself so that his parents' well-being was secured.

In part because of the character instilled in him by his devotion to his parents, Cary became a successful businessman. While much of his career focused on equity sales related concerns, Cary has founded and served as a director for many companies. The success of ventures such as ABA Holding Company, Inc. and Liboza Holdings, Inc. illustrates Cary's fidelity and loyalty when dealing with the assets of others.

Over time, Cary's career led him to Phoenix, Arizona where he has settled with his family. Other family members live in New York (LANA POLLACK (“Lana”)), New Jersey (ELLEN BARON (“Ellen”)), and Florida (ARTHUR POLLACK (“Arthur”)).

Prior to her move to Arizona, Pauline lived in Florida. However, after Morris died, Pauline expressed a strong desire to move to Arizona so that she could be close to Cary. Cary never attempted to convince Pauline to move to Arizona. In or around December, 2003, Pauline committed to the move to Phoenix and asked for Cary's assistance in arranging and overseeing the particulars of the move. In this role, Cary advanced significant sums of money on Pauline's behalf to pay movers, transport her automobile to Arizona, and pay other incidental expenses associated with relocating to Arizona.

Also in December, 2003, Pauline purchased a condominium in the Grayhawk subdivision located at 19700 North 76th Street in Scottsdale, Arizona (the "Condominium"). The purchase price was approximately $258,865.00. To assist Pauline in meeting down payment requirements, Cary advanced a total of $35,000.00 to Pauline. Later, in October, 2004, these sums were repaid to Cary through a $36,900.00 check with also reimbursed Cary for monies he advanced Pauline while she was relocating to Arizona. Such reimbursement is not at issue in this matter.

After her move to Arizona, Pauline asked Cary to assist in the joint management of her **finances** through mutual consultation with her. Through this mutual consultation, no decisions were made without Pauline's full cooperation, involvement, and voluntary consent. Cary never operated outside the guidelines of the relationship and Pauline maintained full control over her **finances**. While on July 7, 2005, Pauline executed a power of attorney nominating Cary has her power of attorney, upon information and belief, Cary never utilized any authority under this document.

Under this arrangement, Pauline approved and undertook numerous transactions. For example, she wrote and signed a $20,000.00 check to Countrywide Mortgage to pay down the principal balance of her mortgage. Pauline also purchased a $35,000.00 certificate of deposit in May, 2006. On or about October 24, 2006, Pauline authorized the transfer of $14,113.48 from her money market account to her checking account. While the bank erroneously denoted that this sum was transferred to account number "XXXXXXX," such account number was merely the transposition of the transfer amount as the account the sum was transferred to. All bank records indicate that the transaction was completed correctly.

Pauline undertook additional transactions based on this informal relationship. For example, in early 2007 she purchased an interest in Uni Connexions, Inc. Prior to purchasing this interest, Pauline spoke with third parties regarding the investment. In October, 2006, $100,000.00 was transferred from Pauline's Home National Bank account to First National Bank of Arizona to ensure full FDIC insurance protection. Also in October, 2006, Pauline gifted money to Cary and certain of his family members.

Unfortunately, and without any cause on Cary's part, Pauline's National Bank erred with respect to a December 4, 2006 transfer of $2,500.00. Rather than transferring the funds to the intended account, the funds were placed in Cary's son's account. The error was noticed, however, and since then the bank has corrected its error so that no harm has occurred to Pauline's funds.

After residing in Arizona for a couple of years, Pauline began to explore the feasibility of moving to New York City. Consistent with his lifetime of sacrifices for his parents, Cary was prepared to loan Pauline up to $150,000.00 to assist in purchasing a New York residence. In October, 2005, Cary transferred $50,000.00 into Pauline's bank account as a loan for the sole purpose of aiding the home purchase. In addition to needing **financial** assistance, one of Pauline's requirements for completing the move was that any residence purchased and the associated mortgage had to be jointly in her, Lana, and/or Lana's husband's name. However, after Lana's husband's son prepared the mortgage documents, it was clear that only Pauline would be obligated under the mortgage. As a result of this fact, Pauline decided that it was not in her best interest to move to New York and decided to stay in Arizona. Because the $50,000.00 was no longer needed by Pauline, the sum was returned to Cary on or about January 24, 2006. The return of this money is not an issue in this matter; however, it illustrates how far Cary would go to assist his mother.

Roughly a year later, in October, 2006, Pauline decided to sell the Condominium and relocate to an unassisted living facility. The Condominium was listed and a contract was entered into for a total $412,000.00 sales price. From this sale's price, $129,864.68 was deducted for the outstanding mortgage settlement charges to seller, home owner's association's charges, and other customary charges to seller. As a result, $282,536.21 was deposited into Pauline's bank account.

The facility Pauline relocated to provided wonderful services to its residents. Included in these services were bus and limo benefits which negated any requirement that Pauline maintain a vehicle. Because the transportation options at the facility totally met her needs, Pauline decided that she would not need her vehicle and decided to give Cary her 2000 Lexus. This decision was made of her own free will.

Despite the attention Cary lavished on his mother and the demands of his business roles, Cary decided to take a trip to Israel in November, 2006. The trip was a combination business and pleasure trip that was designed to allow Cary to sing at many charitable functions. When Cary informed Pauline of his trip, she offered to pay for all costs associated with the trip if she could accompany him to Israel and look after her during the duration of the voyage. While the offer to pay for the trip was not Cary's motivation, he accepted his mother's offer.

During the trip, Cary accompanied his mother throughout Israel. However, when he had to make business meetings of which she could not accompany him, he ensured that she was not left alone. Whenever she needed anything, whether it be food, drink, or medicine, Cary ensured that she received it.

The trip was nearly a month long. The various costs of the trip were placed on Cary's American Express card. Pursuant to Pauline's offer and with the complete knowledge and approval of Pauline, checks were written from Pauline's checking account to American Express.

In this mater, Pauline was not a vulnerable adult during the time period of the transactions questioned by her. Rather, any vulnerability suffered by Pauline has actually developed since Lana moved her to New York, a fact which, as discussed later, causes foundation of this very law suit to be questioned.

In preparing her March, 2009 expert report, Dr. Willson reviewed extensive medical records from the relevant time period and spoke with numerous individuals regarding Pauline's vulnerability. Dr, Willson noted that these records support that Pauline was “healthy, well oriented, content, and generally doing quite well” throughout the time she was in Arizona. *See* Dr. Willson's report at age 7. Even her back pain “was rarely bad enough to interfere with her ability to function independently.” *Id.*

Importantly, the evidence received by Dr. Willson supports that Pauline became vulnerable once she moved to New York. On or about April 29, 2008, medical records reflect that Pauline had a fall and spent a considerable time in the hospital. Prior to the fall, on or about April 23, 2008, the last pre-fall nursing report was completed and indicated no mood or cognitive defects. *Id.* at 16. On or about June 2, 2008, Pauline's first nursing report was completed upon her return from the hospital. Differing greatly with the April 23 report, this nursing report noted the development of cognitive and memory impairment.

Based on this extensive review, Dr. Willson opined to a high degree of neuropsychological certainty Pauline Pollack did not meet the criteria for Vulnerable Adult status at any time prior to August, 2007; between that time and June 2, 2008 her mental status was less certain. *Id.* at 22. In fact, Pauline's vulnerability cannot be confirmed until after June 2, 2008, the date of the post-hospitalization nursing report. *Id.*

Pauline's attorneys have secured an export report that opines that Pauline was a vulnerable adult during her time in Arizona. However, as noted in Dr. Willson's report, Pauline's expert's opinions are simply not supported by medical records. Additionally, Pauline's expert spoke only with Pauline and Lana, thereby neglecting to interview the other individuals who interacted with Pauline on a daily basis.

2. Legal Argument

The Defendants are not liable to the Plaintiff under the theories she pled. Rather, at all times, the Defendants have acted reasonably with respect to Plaintiff and have ensured that her assets were applied for her benefit.

a. Defendants Have Not Violated the Arizona Adult Protective Services Act

Under Arizona Revised Statutes section 46-456, in order for an individual to be liable for **financial** exploitation, he must occupy a position of trust and confidence to a vulnerable adult. Additionally, a person occupying a position of trust and confidence to a vulnerable adult must ensure that the vulnerable adult receives the benefit of her assets. Interested transactions are not void if the vulnerable adult received advice from a third party. *Davis v. Zatos*, 211 Ariz. 519, 123 P.3d 1156 (Ariz. Ct. App. 2005).

1. Plaintiff was not a Vulnerable Adult While Living in Arizona

The term "vulnerable adult" is essential to maintaining **financial** exploitation allegations and is defined at Arizona Revised Statutes section 46-451(A)(10). An adult is vulnerable if she is unable to protect herself due to a physical or mental impairment. *Id.* In *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (Ariz. Ct. App. 2005), the court of appeals approved this definition and linked it to an **elderly** women who was physically frail, unable to walk, and slipping into dementia. Most importantly, however, was the fact that the **elderly** woman was entirely dependant on her caretaker. Of course, for the provisions of Arizona Revised Statutes section 46-456 to apply, the vulnerability must exist at the time of the alleged exploitation.

In this matter, Pauline was not a vulnerable adult during the time period of the transactions questioned by Ms. Sabnekar. Rather, any vulnerability suffered by Pauline has actually developed since Lana moved her to New York, a fact which, as discussed later, causes foundation of this very law suit to be questioned.

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2. Defendants Acted for Pauline's Benefit

As the Plaintiff was not a vulnerable adult while residing in Arizona, Arizona Revised Statutes section 46-456 provides no basis to hold the Defendants liable. However, even if such statute did apply, the Defendants complied with all relevant duties owing to Plaintiff and ensured that her assets were applied for her benefit. Additionally, Pauline received third party advice regarding specific transactions. For further explanation, see section (b)(2), below.

b. Defendants Have Breached No Duties Owing to Plaintiff

A breach of fiduciary duty and breach of confidential duty claim is a tort claim. *See Estate of Newman*, 219 Ariz. 260, 196 P.2d 863, 876 (Ariz. Ct. App. 2008). As such, Plaintiff must prove the existence of the duty, breach of the duty, and resulting damages. *See generally Gibson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228 (Ariz. 2007).

With respect to Plaintiff's assertion of a cause of action under Arizona Revised Statutes section 46-456, in order for the duty to treat Plaintiff as a trustee would treat a beneficiary, the Plaintiff must be, among other elements, a vulnerable adult. In any event, all of the questioned transactions benefited Pauline.

1. Existence of Fiduciary and Confidential Duty

According to the court in *Valley National Bank of Phoenix v. Milmoe, 74* Ariz. 290, 248 P.2d 740 (Ariz. 1952), an agency relationship forms when the principal manifests her intention to have another act on her behalf and the agent manifests his acceptance of such intention. *Id.* at 295-96. *See also Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 597, 161 P.3d 1253 (Ariz. Ct. App. 2007) (quoting Restatement 3d Agency § 1,01).

If a fiduciary or confidential auty exists in this matter, it only arises through an agency relationship formed between Plaintiff as principal and Cary as agent. There are only two sources for such relationship: the July, 2005 power of attorney or through Plaintiff's desire to have Cary assist her in her **finances** through mutual consultation. Because Cary never took any action in reliance on the power of attorney, he never manifested his acceptance of such appointment and thus no fiduciary relationship forms as a result of the document. Rather, if an agency relationship formed in this matter, its genesis lies in the Plaintiff's desire for Cary to assist her with her **finances** through mutual consultation and Cary's manifestation of acceptance of such desire.

2. There Has Been No Breach of Fiduciary or Confidential Duties

An agent is a fiduciary and generally the “relationship imposes on an agent the duty of utmost good faith, integrity, honest, and loyalty” in transactions. *Musselman v. Southwinds Realty, Inc.*, 146 Ariz. 173, 175, 704 P.2d 814 (Ariz. Ct. App. 1985). However, an agent is also duty bound to obey all lawful directions of the principal. *See Kirchof v. Friedman*, 10 Ariz. App. 220, 457 P.2d 760 (Ariz. Ct. App. 1969) (stating that where an agent “refuses to follow the reasonable directions of the” principal, the agency may be terminated). *See also* Restatement 3d § 8.09 (stating that an “agent has a duty to comply with all lawful instructions received from the principal). In addition, comment “c” to the Restatement 3d states that the agent's duty to obey his principal is inviolate “although the agent believes that doing otherwise would be better for the principal.”

In addition to duties owed by the agent to the principal, a principal owes an agent a duty to indemnify her agent for payments made by the agent on behalf of the principal. *See, e.g.* Restatement 3d Agency § 8.14. In this matter, Plaintiff has alleged a breach of duty centering on

$238,529.00. This sum can be broken down as follows: (1) Uni Connexions, Inc. - $85,900.00; (2) Reimbursement - $53,129.00; (3) Gifts - $96,000.00; and, (4) Miscellaneous- $3,500.00. [1]

1. The Uni Conexions Transaction

In April, 2006, Plaintiff received $84,899.00 from the United States government. This check represented victory in a prolonged battle caused by the government's failure to recognize Cary's father as 100% disabled for the purposes of his military pension. Disagreeing with the disability classification Plaintiff embarked on a crusade to have Cary's father declared 100% disabled and to receive the proceeds from such classification.

As the check itself indicates, Plaintiff was ultimately successful. However, because she never believed she would see success against the government, Plaintiff viewed the $84,899.00 as “found money.” As such, when she received the check, she told Cary he should keep it.

Cary did not keep the check and instead it was deposited into Plaintiff's bank account. However, in February, 2007, Plaintiff learned of a company in Canada, Uni Connexions, Inc., in which Cary was involved. Plaintiff decided she wanted to invest in Uni Connexons and spoke to PEDRO CARDOSO (“Pedro”) in such regard. Pedro, a long acquaintance of Plaintiff, warned her about the realities of investing in new companies and cautioned her on the investment. After such conversations with Pedro, Plaintiff decided to invest her “found money” in Uni Connexions, rather than her original desire to invest all of her money. Upon information and belief, at the time of the purchase Plaintiff was a fully competent adult, free to make and capable of making her own decisions [2] and she was fully aware of all relevant and material circumstances respecting the purchase.

On or about February 20, 2007, Plaintiff paid $85,900.00 for 100,000 shares of the company. However, because shares could only be purchased in $25,000.00 increments, Cary made a gift to Plaintiff totaling $14,100.00 so that she could maximize her investment.

The purchase of the Uni Connexions stock was a decision Plaintiff made on her own. Importantly, she consulted with Pedro prior to purchasing the shares and even revised the amount of her investment as a result of such conversation.

As Plaintiff was free to make the decision concerning the expenditure of her money in February, 2007, it is not appropriate to second-guess Plaintiff spending decisions two years later. She understood the risks of investing and willing entered into the purchase of the stock. Moreover, Cary was merely following the Plaintiff's direction with respect to the purchase, something that he was duty bound to do.

2. The Reimbursements Were Proper

a. November 6, 2006 - $11,569.00 Transfer

A November 6, 2006 check made payable to American Express in the amount of $11,569.00 is also challenged by Plaintiff. Originally, due to a confusion of dates, this check was explained as Plaintiff's payment for the November through December, 2006 Israel trip. However, as the date of the check indicates, such explanation was mistaken; albeit still for Pauline's benefit.

Rather than constituting payment for the entire Israel trip, this check was reimbursement for the airfare for the trip, a purchase at the Weisenthal Center, and a dinner at Sapporo. As the excerpt from the October, 2006 American Express statement demonstrates, $6,294.00 was spent on airfare for Plaintiff and Cary to Israel on or about October 8, 2006. On or about September 14, 2006, Cary purchased a book from the Weisenthal Center, as demonstrated by the excerpt from the September, 2006 American Express statement, as well as the receipt from the Weisenthal Center. Thereafter, Plaintiff told Cary that she wanted to pay for the book. As such, when calculating the sums for the November 6, 2006 reimbursement check, Cary included this sum in the total amount owing to him. Finally, on or about October 2, 2006, Plaintiff told Cary that she wanted to purchase dinner at Sapporo's in Scottsdale, Arizona. As was their usual practice, Cary placed the expense on his American Express card.

As all of the charges reimbursed via the November 6, 2006 check were expenses that Plaintiff explicitly told Cary she wanted to pay, it is not appropriate to now assert that Cary breached any duty owing to his mother as a result of the payment. As noted above, there is no indication in any medical records during this period that Plaintiff suffered from any ailment that impaired her ability to make her own **financial** decisions. As such, the sums represented by this check are proper and reimbursement from Cary should not be sought.

b. December 13, 2006 - $2,560,00 Transfer

Plaintiff also challenges a December 13, 2006 check made payable to American Express in the amount of $2,560.00. This check represents reimbursement to Cary for expenses related to the purchase of a new mattress for Plaintiff which was purchased on or about November 10, 2006.

This mattress was solely for Plaintiff's use. As was their typical practice, Cary charged the purchase to his American Express card and thereafter sought reimbursement for the purchase. Accordingly, there is no claim to surcharge Cary and Susan for this amount as it was a purchase for Plaintiff.

c. January 2, 2007 - $10,000.00 Transfer

On or about January 2, 2007, $10,000,00 was transferred from Home National Bank account number 6903 to an account owned by Cary. As illustrated below, this is a continuation of reimbursement for Plaintiff's expenses that were advanced by Cary. Specifically, this check represents the balance of reimbursement due to Cary from Plaintiff's desire to pay for the Israel trip.

As the American Express statements for December, 2006 and January, 2008 demonstrate, there were $5,185.59 in charges related to the Israel trip, including lodging at the Scottish Guest House and other incidentals. On top of these charges, Cary advanced $890.00 for taxi services, $130.00 for Plaintiff's doctor visits and medication in Israel, $3,500.00 in meal expenses, and $300.00 in shopping expenses. Totaling these expenses, Cary was entitled to $10,005.59 in reimbursement from Israel related expenses.

Based on Plaintiff's desire to pay for their joint Israel trip, Cary did not act inappropriately in accepting these sums.

d. April 23, 2007- $5,000.00 Transfer

An April 23, 2007 $5,000.00 cash withdrawal is also challenged by Plaintiff. Much like previous transactions, this cash withdrawal represents reibursement to Cary for a multitude of expenses that he advanced for his mother.

Cary's May, 2006 American Express statement evidences an April 27, 2006 trip to Costco wherein of the $461.33 spent, $140.00 of such purchase was for Plaintiff. A second Costco trip occurred on May 16, 2006. Of the total of $741.52, $190.00 was for purchases requested by Plaintiff.

The April, 2006 statement from Cary's MasterCard also substantiates this reimbursement. On or about March 17, 2006, Plaintiff revised her Last Will and Testament with We the People, a legal services company. This charge was paid for by Cary and totaled $349.00.

On or about July 15, 2005, Plaintiff's Lexus automobile required service. This charge was $343.30 and was advanced by Cary.

Cary also advanced payments to Plaintiff's home warranty and security companies. The home warranty cost $37.00 and the security service cost $35.00 a month. Each service was active for eighteen months for a total advance by Cary totaling $1,296.00.

Cary also paid for various cash expenses for Plaintiff. For example, he purchased a $350.00 cellular telephone, car registration for 2006 totaling $197.00, 26 house cleanings by Nora at $50 per cleaning totaling $1,300.00, a one-time cleaning by Nora totaling $300.00, and handy-man services from the Fix-It-Guys totaling $525.00. These expenses equal $2,672.00.

e. July 3, 2007 - $10,000,00 Transfer

Further questions arise from a July 3, 2007 transfer of $10,000.00 to an account owned by Cary. Once again, this transfer represents a reimbursement of expenses that were advanced by Cary.

As illustrated on a receipt from H&R Block for Plaintiff's tax preparation, $179.00 was advanced by Cary so that Plaintiff's taxes could be prepared.

In March, 2007, Plaintiff was admitted to Scottsdale Healthcare's Shea campus. This $300.00 expense was incurred by Plaintiff and paid by Cary using his American Express card.

Cary's 2007 statements from MBNA MasterCard also demonstrate the sums he advanced for his mother. Pursuant to these statements, $700.00 in charges to DR. JAY FRIEDMAN, Plaintiff's doctor, were paid for by Cary. Additionally, $355.00 was paid by Cary to ComfaCare on behalf of Plaintiff.

Cary's June, 2007 American Express statement evidences airfare for Plaintiff purchased on June 18, 2007, prior to her July, 2007 New York visit. The cost of this ticket was $873.80. A February 2007 American Express statement evidences a January 19, 2007 trip to Costco. Of the $499.67 charged to Cary's American Express, $160.00 was for purchases Plaintiff requested.

In addition to these expenses, Cary advanced Plaintiff considerable money for cash expenses. Through July 3, 2007, these expenses included $1,200.00 at various department stores, $200.00 for Christmas purchases at The Tuscany, $3,500.00 in cash as spending money, $1,200.00 for supermarket purchases, $1,200.00 for various medications, and $150.00 for movers and tips in New York.

Totaling these advances, Cary paid $10,017.80 in Plaintiff's expenses. As these charges were for Plaintiff's benefit and made at her direction, it is not appropriate to saddle Cary and Susan with their cost.

f. December 7, 2006 - $6,000.00 Transfer

The December 7, 2006 transfer of $6,000.00 was also a reimbursement transaction.

In April and September, 2006, Plaintiff visited her eye doctor and received new glasses. Cary paid for these glasses on his American Express card. Prescription forms from the eye doctor showing payment of $400.00 and $262.00 illustrate this expense, as well as Cary's April, 2006 and October, 2006 American Express statements.

In March, 2006, Plaintiff purchased a television, computer, and other electronics from Best Buy. As usual, these charges were placed on Plaintiff's American Express card. Cary's April, 2006 American Express statement excerpt demonstrates $4,809.63 in charges from Best Buy paid for by Gary.

Finally, the August, 2006 American Express statement evidences a $383.14 purchase from Bed Bath & Beyond ion August 11, 2006. This was a purchase for Plaintiff made at her request and charged to Cary's American Express. While not indicated on account statements, Cary also paid for various sundries for Plaintiff totaling $150.00.

This various expenses total $6,004.77. As all purchases were appropriately made on Plaintiff's behalf at her request, it is not appropriate to seek reimbursement of these expenses from Cary.

g. November 24, 2006 - $3,000.00 Transfer

On or about November 24, 2006, $3,000.00 was withdrawn from Home National Bank account number 0389. This withdrawal represents a request by Plaintiff to have some spending money for her upcoming month-long trip to Israel. As such sums were solely withdrawn for Plaintiff's use and at her direction, it is inappropriate to surcharge Cary of Susan for them.

h. January 24, 2007 - $5,000.00 Transfer

A January 24, 2007 $5,000.00 withdrawal is also challenged by Plaintiff. As shown below, Cary is not liable for any of the sums represented by this transfer as it was intended as reimbursement for various expenses he advanced on his mother's behalf.

Two Costco trips were reimbursed to Cary through this transaction. As the September, 2006 American Express statement indicates, on or about September 9, 2006 $418.69 was expended at Costco, of which $75.00 was attributable to Plaintiff. Moreover, as the October, 2006 American Express statement indicates, on September 25, 2006 $166.83 was spent at Costco. Of this sum, $1 1 000 was attributable to purchases requested by Plaintiff.

Cary's July, 2005 MBNA MasterCard statement evidences more purchases for Plaintiff's benefit. On or about June 30, 2005, Cary charged $508.00 to his MasterCard when Plaintiff changed her will through We the People.

Cary's April, 2006 American Express statement excerpt indicates that on March 28, 2006, $236.25 was paid to All Purpose Moving. This was an expense necessitated by Plaintiff's move from her Grayhawk condominium to The Tuscany. An additional $125 was expended by Cary as a cash tip to the movers.

Additional expenses advanced by Cary are as follows: 2005 Lexus registration, $197.00; discounted commission to Grayhawk realtor, $3,000.00; tips to staff at Scottish Guest House, $350.00; payment to Anthony, a individual who assisted Plaintiff in Israel, $500.00; gift to Ross, the son of Andy Baron, Plaintiff's son-in-law, $100.00.

Totaling these expenses, $5,201.25 was advanced by Cary.

3. Plaintiff Made $96,000.00 in Gifts to Defendants

a. October 3, 2006 - Three $20,000.00 Transfers

The first transactions challenged by Plaintiff focus on three $20,000.00 gifts she made to Cary, Susan, and SHANE POLLACK (“Shane”) in October, 2006 after her Grayhawk condominium sold. Based on the October, 2006 statement for Home National Bank account number 6903 where the three gifts originated, two of the transfers indicate that they were made upon the request of Plaintiff. In her deposition, Plaintiff recognized the appropriateness of these two transactions, stating that if it said “per Pauline,” “[i]t would be something that I said to do.” *See* Exhibit “D” - Transcript of Plaintiff's deposition at page 134, lines 11 through 14.

Additionally, the representation of the third gift transfer as “per Cary” is in error. All three transfers were completed in person at Home National Bank. The “per Cary” transfer was the first of the three gift transfers and was completed immediately after Cary completed a transfer on one of his other accounts. The teller was confused and inadvertently marked the transfer “per Cary” while in actuality, the transfer was “per Pauline.” Bank personnel Brandon Rappaport will testify to this error.

As these transfers represent gifts made by Plaintiff to Cary, Susan, and Shane, it is not appropriate to surcharge Cary for these amounts.

b. May 21, 2007 - $36,000.00 Transfer

On or about May 21, 2007 three $12,000.00 transfers were completed from Home National Bank account number 6903. These transfers represent a gift Plaintiff wished to give Cary, Susan, and Shane. As Plaintiff was free to make gifts of her property as she wished, there is not basis to revisit this decision and surcharge Cary and Susan for Plaintiff's generosity.

4. Miscellaneous Transactions Present No Breach of Duty

a. First National Bank

Upon the sale of Plaintiff's Grayhawk condominium, she received $282,536.21 in proceeds, as substantiated by the closing statement. These proceeds were deposited into account number 6903 at Home National Bank. The deposit of the proceeds resulted in nearly $300,000.00 being deposited into this account, well outside applicable FDIC protections then in effect.

To remedy this possible problem, a new account was opened at First National Bank (now known as Mutual of Omaha). To fund this account, $100,000.00 was transferred into the account owned by Plaintiff.

In neither the Complaint or Plaintiff's expert's report is any allegation made that Cary withdrew or misappropriated any of the $100,000.00 deposited into the First National Bank account. It is also not alleged that securing adequate FDIC coverage is contrary to Plaintiff's interest. In fact, Sabnekar's report expressly states that the account was closed at Plaintiff's request in February, 2008 after Lana had taken Plaintiff to New York, As such, Cary did nothing inappropriate with these funds and any attempt to surcharge him in such amount is not supportable in fact or law.

b. October 24, 2006 - $14,113.48 Transfer

Sabnekar also claims that on October 24, 2006 a $14,113.48 transfer occurred between two of Plaintiff's bank accounts. As the October, 2006 statement for Home National Bank account number 6903 and the November, 2006 statement for account number 0389 demonstrate that the transfer went to an account Plaintiff owned and no allegation is made that Cary or Susan withdrew the transferred money; the inclusion of such sum cannot support a damage claim. The relevant Home National Bank Statements and Sabnekar's report provide no evidence to claim this money was misappropriated by Defendants.

c. December 4, 2006 - $250000 Transfer

A further challenge originates with a December 4, 2006 transfer from Home National Bank account number 0389 to Home National Bank account number 9127. This transfer totaled $2,500.00 and erroneously was placed in the account of Cary's son, LANDON POLLACK (“Landon”), by Home National Bank. When Cary learned of this error, he directed Home National Bank to correct it. Home National Bank informed Cary that they had corrected the error by placing the funds from Landon's account into the proper account. Such action is evidenced by correspondence from Home National Bank.

d. November 13, 2007 - Transfer

A final transfer questioned by Plaintiff occurred on November 13, 2007 and totaled $1,000.00. While Plaintiff was residing at The Tuscany, and while Cary was out of the country, she mistakenly deposited approximately $5,000.00 into her account at First National Bank of Arizona. As all her bills were paid from the Home National Bank accounts, Cary and his wife were concerned that there would be insufficient funds in the Home National Bank accounts to cover any checks. Thus, Susan paid for many of Plaintiff's expenses around this time from her personal funds to ensure that no overdraft situation was encountered. Later, Susan was reimbursed $1,000.00 for these advances.

5. Plaintiff Has No Damages

As there has been no breach of any duty owing to Plaintiff, a damage analysis is irrelevant. However, even if a duty owing to Plaintiff was breached, has suffered no damages. While the

c. Plaintiff is not Entitled to an Accounting

Arizona Revised Statutes section 14-10813 states when a beneficiary of a trust is entitled to an accounting. Under such statute, to receive an accounting the requesting party must be a beneficiary of the trust. The Arizona Trust Code's provisions on the production of an accounting apply to express, statutory, judicial, and charitable trusts. See Ariz. Rev. Stat. Ann. §14-10102.

Here, the questioned transactions do not focus on any purported trust assets. As such, the provisions of section 14-10813 are not applicable.

d. Defendants have Committed no Fraud on Plaintiff

Actual fraud focuses on the intent of a grantee to deceive the grantor. *In re McDonnell's Estate*, 65 Ariz. 248, 253, 179 P.2d 238 (Ariz. 1947). Generally, nine elements must be proven: 1) a representation; 2) the representation's falsity; 3) the representation's materiality; 4) the speakers knowledge of the representation's falsity; 5) an intent to have the hearer act on the representation; 6) hearer's lack of knowledge of representation's falsity; 7) reliance on the truth of the representation; 8) a right to rely on the representation; and 9) damages. *Taeger v. Catholic Family and Community Services*, 196 Ariz. 285, 294, 995 P.2d 721 (Ariz. Ct. App. 1999).

In the Complaint, Pauline alleges that Cary made representations that he would "protect Pauline by taking care and control of her **finances**." Cary never made such representation. Instead, Cary and Pauline mutually agreed to jointly manage her **finances** through mutual consultation. Through this mutual consultation, no decisions were made without Pauline's full cooperation, involvement, and voluntary consent. Accordingly, the representation Pauline's fraud claim is based upon was never made. As a result, no cause of action for fraud exists.

Notwithstanding the fact that the representation alleged by Pauline was not made, even if the representation was made, it was not false nor did Cary have any knowledge of any falsity. Additionally, there was never any intent on Cary's part for Pauline to rely on any alleged representation. The facts of this matter reveal that all of the mutually agreed upon transactions assisted in protecting Pauline's funds and benefited her. As such, Pauline has not suffered any damages.

In any event, upon information and belief, any alleged representation made by Cary was not material in any decision made by Pauline. Upon information and belief, Pauline decided to vest mutual authority in Cary prior to any alleged representation.

e. Defendants have made No Negligent Misrepresentations

The tort of negligent misrepresentation occurs where a tortfeasor "fails to exercise reasonable care and competence in obtaining or communicating information and thereby ... provides false information for the guidance of others in their business transactions" causing damage based on justifiable reliance, *PLM Tax Certificate Program 1991-92, L.P. v. Schweikert*, 216 Ariz. 47, 50, 162 P.3d 1267 (Ariz. Ct. App. 2007).

In this matter, no basis exists from which to impose a duty of care on the Defendants. However, notwithstanding the absence of a duty and without waiving such argument, even if such duty existed, no negligent misrepresentations were made. Initially,

it is affirmatively stated that the alleged representation in Paragraph 101(B) of the Complaint is not a representation made by Cary (nor a representation at all), and thus is irrelevant to the instant matter.

Cary never represented that he would protect Pauline through the management and control of her **finances**, as alleged in the Complaint, As indicated above, Cary and Pauline mutually agreed to jointly manage her **finances** through mutual consultation. Through this mutual consultation, no decisions were made without Pauline's full cooperation, involvement, and voluntary consent. As Cary never made the representation alleged by Pauline, no cause of action lies for negligent misrepresentation. In any event, at all times, Cary acted within any duty of care imposed on him. in fact, no facts are alleged by Pauline to indicate otherwise.

f. Defendants have not Converted an Automobile

An action for conversion lies where the defendant has exerted "wrongful dominion or control over personal property in denial of or inconsistent with the i rights of another." *Case Corp. v. Gehrke*, 208 Ariz. 140, 143, 91 P.3d 362 (Ariz. Ct. App. 2004). In order to present the claim, the plaintiff must have the ability to demand "immediate possession. *Id.* Where a plaintiff has consented in the alleged act of conversion, no claim will exist. *Scott v. Allstate Ins. Co.*, 27 Ariz. App. 236, 240, 553 P.2d 1221 (Ariz. Ct. App. 1221). Additionally, where a plaintiff creates an impression that the defendant is entitled to property, such mistake will foreclose an action for conversion. *Id.*

In the matter at bar, no conversion has occurred, Pauline, on her own authority, decided to give her vehicle to Cary when she no longer needed it because of the transportation options provided at her unassisted care facility. Through the transfer of title, Pauline relinquished any and all property rights in the automobile. As a result of such relinquishment, Pauline could not demand immediate possession of the vehicle. Thus, Cary could exercise no control over the vehicle which would interfere with Pauline's rights because any property rights possessed by Pauline were voluntarily released.

Additionally, in the event it is determined that Pauline's interest in the vehicle was not relinquished, she created a reasonable belief in Cary, of which he was justified to rely on, that she desired to give the automobile to him. If Pauline's objectively expressed desires were not her true intent, she in no way manifested in contrary belief. As such, *Scott* mandates that no cause of action for conversion exists.

g. Defendants have not Been Unjustly Enriched at Plaintiff's Detriment

In order to establish an unjust enrichment claim, Pauline must prove the existence of "(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy." *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 541, 48 P.3d 485 (Ariz. Ct. App. 2002).

Pauline cannot establish the facts necessary to support an unjust enrichment claim. First, despite the conclusory statements in Count Eight of the Complaint, no circumstances exist illustrating how Cary was enriched. Other than the limited gifts described in this Memorandum which originated by Pauline's free-will, Cary never benefited from Pauline's property or assets. Rather, due to constant advances of cash to Pauline and the payment of the various incidental expenses of life on behalf of Pauline, Cary has, in fact, been impoverished!

The Complaint also fails to establish a factual basis for any impoverishment of Pauline or how Cary was the source of any such impoverishment. In any event, the Complaint is deficient in linking any impoverishment to any enrichment because Cary was never enriched.

Finally, Pauline's own Complaint belies the fact that no action for unjust enrichment exists. Assuming, for the sake of argument only, that Pauline's allegations are correct, she has multiple other remedies available to her. *Trustmark* is clear that where other remedies exist at law, there is no justification in bringing an unjust enrichment claim.

h. Punitive Damages are not Appropriate

In order to prove the appropriateness of punitive damages, a plaintiff must demonstrate, by clear and convincing evidence, that the defendant acted via "reprehensible conduct and acted with an evil mind." *Warner v. Southwest Desert Images, LLC,* 218 Ariz. 121, 131, 180 P.3d 986 (Ariz. Ct. App. 2008). Evil mind may be demonstrated by actual intent, or by a "conscious disregard of a substantial risk of significant harm to others." *Id.* (internal punctuation omitted). *See also Walter v. Simmons,* 169 Ariz. 229, 225, 818 P.2d 214 (Ariz. Ct. App. 1991) ("A defendants 'evil mind' may be established by evidence that he either (1) intended to injure the plaintiff, (2) was motivated by spite or ill will, or (3) acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly harm others.").

Walter illustrates the high standard applied by courts when determining if punitive damages are proper. There, the plaintiff was involved in a vehicular accident and attempted to settle the matter with his insurance company, the defendant. *Id.* at 232. After the underwriter handling the claim determined that the loss claim was $34,500.00, he sold salvage rights to the vehicle for $12,000.00 to a third party. *Id.* Unfortunately, the underwriter sold the salvage rights with the knowledge that the plaintiff had not yet accepted the underwriter's determination of the loss. *Id.* After the plaintiff had refused to accept the amount of loss offered by the underwriter, he demanded to know where his vehicle was. *Id.* According to the court, the underwriter never informed him that it had been sold for salvage. *Id.* Despite the clear evidence of wrong-doing in *Water,* the court declined to hold that punative damages were appropriate, stating that the evidence "did not rise to the level necessary to award punitive damages." *Id.* at 240.

Cary maintains strict opposition to the allegations and relief sought in the Complaint. However, in the event a trier of fact determines that he is liable, the assessment of punitive damages is not proper as Cary never acted with an evil mind or the intent to harm his mother. At all times, he made informed decisions in strict consultation with Pauline and never initiated any transaction without her approval. As such, he did not act with a disregard of a substantial harm to others. As he retained no benefits from any transaction with Pauline, Cary never acted to serve his own interests. As such, based on the analysis in *Walter*, it is not proper to award punitive damages in the event Cary is liable on any count where such damages are proper.

3. Conclusion

While the Plaintiff's allegations are expansive, the Defendants maintained an appropriate relationship with her at all times and ensured that her assets were applied for her own benefit. Additionally, Plaintiff received third party advice regarding specific transactions.

After viewing all the evidence, it is apparent that the Defendants have not acted inappropriately with the Plaintiff. Thus, all of the Plaintiffs claims should be denied.

DATED this 6th day of April, 2010.

WARNER ANGLE HALLAM JACKSON & FORMANEK, PLC

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Footnotes

1 The Plaintiff has raised additional allegations that do not factor into her claim for damages. These allegations are also discussed in the Miscellaneous section, as well as in previous Disclosure Statements.

2 As demonstrated by her single-handed victory against the government.

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