

2014 WL 9910996 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Reyna Van TASSELL, on behalf of herself and all those
entitled to recover for the death of Byron Van Tassell, Plaintiff,

v.

UNIVERSITY MEDICAL CENTER, an Arizona corporation, Healthsouth
Corporation, an Arizona corporation doing business as Healthsouth Southern
Arizona Rehabilitation Hospital, John Does I-V, abc Corporations I-V, Defendants.

No. C20099898.
February 5, 2014.

**Defendant University Medical Center's Amended Motion for Summary
Judgment on Plaintiff's Adult Protective Services Act ("Apsa") Claim**

Mesch, Clark & Rothschild, P.C., 259 North Meyer Avenue, Tucson, Arizona 85701, Phone: (520)624-8886, Fax: (520)798-1037, Email: rdavis@mcrazlaw.com, By: [Richard Davis](#), # 12928, 92017-129/ars, for defendant University Medical Center.

Judge [Villarreal](#).

I. ISSUE

Should this Court dismiss Plaintiffs Adult Protective Services. Act ("APSA") claim considering the undisputed facts of this case.

II. FACTS

A. Case Overview from Co-Defendant SARRH's Separate Statement of Facts

Byron Van Tassell was hospitalized at UMC on November 9, 2007. (SOF ¶1.) He fell from a ladder and broke his back. (*Id.*) As a result of his injuries he became a paraplegic. (*Id.* at ¶2.)

On November 20, 2007, Van Tassell was transferred to SARRH, where he was to undergo rehabilitation. (*Id.* at ¶3.)

Van Tassell returned to UMC on December 4, 2007, when he developed a pulmonary embolus. (*Id.* at ¶4.) During his UMC stay, Van Tassell developed [pleural effusion](#), endured multiple code arrests, had chest tubes placed, and was transferred to ICU. (*Id.* at ¶5.) He slowly recovered from these life-threatening crises and eventually returned to SARRH on December 26, 2007. (*Id.*)

When Van Tassell returned to SARRH, he had skin breakdown over his sacrum. He also had a [pressure ulcer](#) on his left heel. (*Id.* at ¶6.) During this SARRH hospitalization. Van Tassell was attended by Mark Feldman, M.D. (internist), Jeffrey Wick, M.D. (physiatrist and certified wound care specialist), and Phyllis Click, F.N.P. (nurse practitioner employed by Dr. Wick). (*Id.* at ¶7.) Van Tassell was seen and followed by SARRH's wound care nurse, Michael Allen, L.P.N. and by SARRH's team of nurses, therapists, and nutritionists. (*Id.*)

In the early morning hours of January 6, 2008, Van Tassell was transported to Northwest Hospital emergency department, where he was diagnosed with [pneumonia](#). (*Id.* at ¶8.) He was started on IV antibiotics and sent back to SARRH. (*Id.*)

After Van Tassell's return to SARRH, he continued to be monitored by his health care providers. (*Id.* at ¶9.) Dr. Feldman, Dr. Wick, and Ms. Click saw Van Tassell frequently, were aware of his condition, and issued orders as they thought appropriate. (*Id.*) Ms. Allen monitored Van Tassell's sacral wounds and worked with Or, Wick to implement and to carry out a treatment plan, (*Id.*) Van Tassel was also seen by James Fiastro, M.D. for a pulmonary consultation. (*Id.* at ¶10.) Ms. Allen's documentation included photos of the wounds. (*Id.* at ¶11.)

After Van Tassell had been suffering recurrent fevers, Dr. Feldman ordered Van Tassell to be transferred to Northwest Hospital. (*Id.* at ¶12.) While at Northwest Hospital, Van Tassell was diagnosed with an infected sacral wound. (*Id.* at ¶13.) Among other things, he was treated with antibiotics and he underwent [surgical debridement of his wound](#), (*Id.*)

Van Tassel returned to SARRH on January 27, 2008. (*Id.* at ¶14.) Van Tassell remained at SARRH until February 2, 2008, (*Id.* at ¶15.) When he was discharged, his attending physician was pleased with Van Tassell's progress and deemed him stable enough to return home. (*Id.*)

For the next *four years*, Van Tassell suffered a variety of maladies, underwent multiple surgeries, and was admitted to hospitals and nursing home more than 20 times, (*Id.* at ¶16.) Among his maladies were [recurrent urinary tract infections](#), recurrent skin breakdown, [gangrene](#), [depression](#), pulmonary embolus, [bowel obstructions](#), and [diabetes](#). (*Id.*) Between Van Tassell's discharge from UMC on December 26, 2007 and January 28, 2012, he was hospitalized three times at SARRH, eight times at St. Mary's Hospital, 15 times at Northwest Hospital, once at Cornerstone Hospital, once at Park Avenue Rehabilitation Center, and once at La Canada Care Center. (*Id.*)

Van Tassell died on January 28, 2012. (*Id.* at ¶17.) The Pima County Medical Examiner conducted a “record” autopsy and concluded that Van Tassell died of “complications of [paraplegia](#)”. (*Id.*) According to Van Tassell's attending physician, Van Tassell suffered from acute respiratory failure, secondary to his [paraplegia](#). (*Id.* at ¶18.) He also had [pneumonia](#), [pulmonary hypertension](#), and other ailments. (*Id.*)

Plaintiff's causation expert is Jennifer James, M.D. (*Id.* at ¶34.) Dr. James thinks that, during Van Tassell's December 4-26, 2007 hospitalization, he developed a severe metabolic derangement, catabolism, because of his severe illness and because of his sacral [pressure sore](#). (*Id.* at ¶46.) James opined that this catabolic state was severe, terminal, and irreversible by the time Van Tassell arrived at SARRH on December 26, 2007. (*Id.* at 47.) James believes that, as a result of this catabolic state, Van Tassell's wounds did not heal, he suffered multiple infections, he experienced multiple organ malfunction, and he eventually died. (*Id.* at 48.)

B. Additional Facts Specific To Plaintiff's Claim Against UMC

Plaintiffs filed Third Amended Complaint alleges a violation of APSA. (SOF ¶33, 42.) Martha Hawkins is plaintiff's wound care expert (UMC's SOF ¶a.) The following excerpt from her deposition provides the gist of her testimony:

“A. Really is the whole gist of my allegations here, mainly, negligence due to the lack of turning, the lack of assessments. During the time - - on 12-8, he entered ICU. Okay? There was no documentation, skin-wise, on their transfer form, one. They have a transfer form from the general floor to ICU. There was absolutely no documentation of any redness on the transfer form. And then by 12-11, we now have a coccyx. That was the first measurement they ever did, at 04:00 in the morning, and it's a three-by-three area. They've given me a measurement. No mention of anything dealing with the left heel at all, and the left heel we know was staged on 12-5 as a stage two left heel breakdown. And there's-and then we noted on 12-7 that there was a purple - the heel now is deteriorated, and it has turned purple. Stage two would be reddened. Purple would indicate deeper damage. So there was a change in condition. We had the body picture on 12-8 that stated there was a redness to the coccyx area, but on the

same day they did the body picture, he was trans-- he was transferred to ICU, and they don't do anything at all as far as having any skin breakdown on the heel or on the coccyx.” (UMC's SOF ¶b.) (Bold added.)

III. THIS COURT SHOULD ISSUE AN ORDER THAT GRANTS THIS MOTION AND DISMISSES THE APSA CLAIM FROM THIS CASE

To sustain an APSA claim, Plaintiff must establish here the following: a) the patient was a vulnerable adult; b) UMC was an enterprise that was hired to provide care; e) UMC **abused**, neglected or exploited decedent; and d) decedent was injured as a result of the alleged **abuse**, neglect or exploitation. [A.R.S. §46-455\(B\)](#).

There is no genuine claim that UMC “exploited” decedent. Instead, it appears Plaintiff claims UMC “**abused**” decedent. While that term as defined in [A.R.S. §46-451\(A\)\(1\)\(b\)](#) includes “injury caused by negligent acts or omissions,” APSA does not apply to all allegedly negligent care provided to a vulnerable adult:

We hold instead that to be actionable **abuse** under APSA, the negligent act or acts (1) must arise from the relationship of the caregiver and recipient; 2) must be closely connected to that relationship; 3) must be linked to the service the caregiver undertook because of the recipient's incapacity; and 4) must be related to the problem or problems that caused the incapacity. [McGill v. Albrecht](#), 203 Ariz. 525, 530, 57 P.3d 384, 389(2002).

Moreover,”[w]e do not believe interpreting APSA so as to apply to any and every single act of medical malpractice would be consistent with the legislature's obvious intent to protect a class of mostly **elderly** or mentally ill citizens from harm caused by those who have undertaken to give them the care they cannot provide for themselves. Consider for a moment the situation of a surgeon who, while operating on a patient, negligently fails to remove an instrument or discover a perforation in the viscera. *Such negligence and the resulting injury can affect anyone, not just the incapacitated, and is completely separate from the unique role of caregiver and incapacitated recipient. Thus, it would fall only within MMC, not APSA.* *Id.*, 203 at 529-30, 57 P.3d at 388-89. (Emphasis added.)

Similarly, [In Re Estate of Wyatt](#), 232 Ariz. 506, 307P.3d 23(App. 2013), the Arizona Supreme Court stated that “[n]egligence is not actionable under APSA unless the plaintiff is able to show ‘a pattern of conduct...resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.’ This application of negligence under APSA is very different from the usual definition of negligence in a medical malpractice case, in which a plaintiff need only ‘prove the causal connection between an act or omission and the ultimate injury.’” *Id.* at ¶13, *citing* [A.R.S. §46-451\(A\)\(6\)](#) & [Barrett v. Harris](#), 207 Ariz. 374, 378, ¶12, 86 P.3d 954, 958 (App. 2004).

The undisputed facts of this case come nowhere close to meeting the applicable APSA standards. The **bedsores** that Plaintiff must necessarily link to the injury at issue (death), can happen to any patient that undergoes significant surgery. In addition, there was no “pattern of conduct... resulting in deprivation...necessary to maintain minimum physical or mental health.” Plaintiff here, without dispute, lived four *years* after UMC's alleged improper acts at issue under APSA. No reasonable fact finder could conclude that UMC engaged in a pattern of conduct that deprived decedent of minimum physical or mental health based on his four years of living post release from UMC. Therefore, this Court is legally obligated to grant this Motion and dismiss the APSA claim from this ease. *See, e.g., Westin Tucson Hotel Co. v. State Dep't. of Revenue*, 188 Ariz. 360, 366, 936 P.2d 183, 189 (App. 1997)(“If the undisputed facts are such that no reasonable jury could grant relief, then summary judgment is warranted.”)

IV. CONCLUSION

This Court should issue an order that grant this Motion and dismisses the APSA Claim from this ease.

DATED: February 5, 2014.

MESCH. CLARK & ROTHSCHILD. P.C.

By: <<signature>>

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