

2012 WL 8023678 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Florida,  
Thirteenth Judicial Circuit.  
Hillsborough County

The Estate of Gertrude M. MYERS, by and through Dana M. Martin, Personal Representative, Plaintiff,

v.

SOVEREIGN HEALTHCARE OF TAMPA, LLC a/k/a Sovereign Healthcare of Tampa, LLC  
d/b/a Sovereign HC of Tampa Nursing & Rehab Center; Sovereign Healthcare Holdings,  
LLC; John J. Notermann; R. Mark Cronquist; Southern Healthcare Management, LLC;  
Tampa Medical Associates, Inc; Tracey Greene n/k/a Tracey Nicole Cyree; Jean Caputo a/  
k/a Jean Margaret Caputo (as to Bayshore Pointe Nursing & Rehab Center), Defendants.

No. 09-9228.  
April 27, 2012.

Division: D

**Renewed Motion to Amend to Add Claim for Punitive Damages**

Kathleen Clark Knight Florida Bar No. 0047120, Wilkes & McHugh, PA, One N. Dale Mabry Highway, Suite 800, Tampa, FL 33609, Telephone: 813-873-0026, Facsimile: 813-286-8820, Attorney for Plaintiff.

Plaintiff respectfully requests this Honorable Court allow Plaintiff to amend the Complaint to seek punitive damages. As this Court is aware, this matter arises from injuries Mrs. Myer sustained while a resident in Bayshore Point Nursing and Rehabilitation Center. In the Proffer filed in support of the Motion to Amend to Add Punitive Damages, Plaintiff proffered evidence that the nursing home was short-staffed. Defendants' conduct created or condoned the understaffing in Bayshore Point. Plaintiff also proffered testimony that the ownership and management of the nursing home participated in the budget process for both financial expenditures and for staffing.

Understaffing the nursing home filled with **elderly** people unable to fend for themselves exhibited at best reckless disregard for the residents and was at worst criminal behavior under Florida law. "**Abuse** of the **elderly**" is defined by Fla. Stat. §825.102 which provides that "**abuse** of an **elderly** person or disabled adult means: (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an **elderly** person or disabled adult." The evidence previously proffered was that the nursing home was understaffed with management's full knowledge and consent. Additionally, evidence was proffered that Mrs. Myers was an **elderly** and disabled adult. She was in the nursing home to rehabilitate and receive therapy after fracturing her pelvis. Evidence was also proffered that Mrs. Myers suffered from **restless leg syndrome**. The proffered evidence was that she was left alone for at least four (4) hours without anyone from the nursing home checking on her despite the fact that she needed assistance with all of her activities of daily living. Evidence was proffered that despite being reimbursed to do so, Bayshore Point refused to provide Gertrude Myers with a safe environment or to provide her with adequate and appropriate healthcare sufficient to meet her needs. Additionally, despite being reimbursed to do so, Defendants purposefully violated the law requiring that the staffing in the nursing home be sufficient to meet the needs of the residents. The proffered testimony was that the needs of the residents were not even considered as a matter of course by the nursing home and its management. The proffered testimony was that instead, the nursing home and its management used mathematical calculations based on the number of the residents in the nursing home while consciously disregarding the level of need and care the residents required. Defendants accepted federal funds promising, in exchange, to meet Mrs. Myers' needs

but purposefully refused to even consider what her needs were. This is theft and exploitation as alleged in the Complaint and supported by the proffered evidence.

Defendant's purposeful short staffing of the nursing home "could reasonably be expected to result in physical or psychological injury" to the residents in their care. Here, in fact, Mrs. Myers was injured because of the Defendants' conduct. The Defendants were guilty of the criminal act of **abuse** of the **elderly** under Florida law. It is clear under Florida law, that the Defendants need not have even been the hands-on caregivers to be guilty of this crime. Having Mrs. Myers in the nursing home and not providing for her necessities is sufficient to warrant a criminal conviction. See *Peterson v. State*, 765 So.2d 861, 865 (Fla. 5<sup>th</sup> DCA 2000). In fact, failing or refusing to meet the needs of a disabled person to whom one owes a duty rises to the level of culpable negligence when the dependent person is injured. *Id.*

In Florida, where a defendant's conduct creates a foreseeable zone of risk, "the law generally will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that risk poses." *Jackson Hewitt, Inc. v. Kaman*, -- So.3d -- (Fla. 2d DCA 2011); 2011 WL 3962886 \*6 (Fla. 2<sup>nd</sup> DCA, Sep. 9, 2011). Plaintiff's proffer also provides a reasonable basis upon which a jury could find that the harm that occurred to Marie Novak was within the scope of danger attributable to the Defendants' conduct. *Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1116 (Fla. 2005). Defendants were legally obligated to provide Mrs. Myers with a safe environment by both state and federal law and regulation. Defendants' decision to create a zone of risk for residents like Mrs. Myers for financial gain not only subjects Defendants to punitive damages, but is an aggravator of sorts under Florida law. Florida Statute § 400.0238. The Florida Supreme Court explained that the level of conduct necessary to support punitive damages is akin to the level of conduct that would support a warrant for manslaughter. *White Constr. Co. v. DuPont*, 455 So.2d 1026, 1028 (Fla. 1984). Manslaughter is nothing more than culpable negligence that results in someone's death. See *Standard Jury Instruction for Manslaughter*. Culpable negligence is defined at Florida law as conduct that creates unreasonably great risk of harm to others. *State v. Green*, 348 So.2d 3, 4 (Fla. 1977). The evidence proffered here could support a jury determination that Defendants created an unreasonably great risk of harm to the residents. Therefore, Plaintiff should be allowed to amend the Complaint to allow the jury to decide whether to award punitive damages. See *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 644 (Fla. 5<sup>th</sup> DCA 2005) (Finding that when considering a motion to amend to add a claim for punitive damages, the court must "view the record evidence and the proffer in the light most favorable to [plaintiff] and accept it as true.")

Finally, the proffer provides a reasonable basis upon which a jury could find that either the Defendants engaged in conduct exhibiting a conscious disregard or indifference to the life, safety or rights of persons exposed to such conduct, or ratified or condoned such conduct in its employees.

Respectfully submitted,

<<signature>>

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