Franklin County Legal Journal

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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Kirby Lynn Hockensmith, as Executor for the Estate of Charles C. Hockensmith, Plaintiff vs. Mid-Atlantic Health Care, LLC; Falling Spring Nursing and Rehabilitation Center, L.P. d/b/a Falling Springs Nursing and Rehabilitation; Falling Spring Holdings-SNF GP, LLC; Mid-Atlantic Health Care Acquisitions, LLC; Falling Spring Holdings, L.P.; Falling Spring Realty, L.P.; PA Nursing Home GP, LLC; PA Holding-SNF, L.P.; and PA Holdings-SNF GP, LLC, Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2016-1558

HEADNOTES

Preliminary Objections: Insufficient Specificity

1. To determine whether a complaint is sufficiently specific, the Court must evaluate "whether [it] is "sufficiently clear to enable the defendant to prepare his defense" or "whether [it] informed the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Green, 906 A.2d 1232, 1235 (Pa. Super. 2006) (quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n.36 (Pa. Super. 1973)).

2. A plaintiff suing a hospital could properly amend her complaint even on the eve of trial to include new information which enhanced her negligence claim because the amendments did not modify the original cause of action and the defendant hospital would therefore not be prejudiced. Connor v. Allegheny General Hospital, 461 A.2d 600, 602 (Pa. 1983).

3. It is well-decided in Pennsylvania that "the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party." Connor, 461 A.2d at 602 (quoting Schaffer v. Larzelere, 189 A.2d 267, 270 (Pa. 1963)).

Preliminary Objections: Scandalous or Impertinent Matter

4. The Pennsylvania Rules of Civil Procedure require that a complain state concisely and summarily the material facts to a claim. Pa. R.C.P. 1019(a).

5. Material facts are facts which are necessary to establish a cause of action. Nading v. Boice, 61 Pa. D. & C. 4th 353, 360 (C.P. Butler Cty. 2003) (citing Baker v. Rangos, 324 A.2d 498, 505 (Pa. Super. 1974)).

6. Allegations will be struck from a complaint as scandalous and impertinent where they are immaterial and inappropriate to proving the cause of action. Com., Dept. of Environmental Resources v. Peggs Run Coal Co., 423 A.2d 765, 769 (Pa. Cmwlth. 1980).

7. An allegation is impertinent if it is wholly irrelevant and will not influence the "the results of the judicial inquiry." Nading v. Boice, 61 Pa. D. & C. 4th at 360 (citing Jefferies v. Hoffman, 207 A.2d 774 (Pa. 1965)).

8. Striking allegations as scandalous or impertinent should be used sparingly "and only when a party can affirmatively show prejudice." Com., Dept. of Environmental Resources v. Hartford Acc. and Indem. Co., 396 A.2d 885, 888 (Pa. Cmwlth. 1979).

Negligence Per Se

9. To prove a claim of negligence *per se*, the plaintiff must establish: (1) the purpose of the statute must be to protect the interest of a specific group of individuals; (2) the statute must clearly apply to the defendant's actions; (3) the defendant must violate the statute; and (4) the defendant's violation of the statute must be the proximately cause of the plaintiff's alleged injuries. Wagner v. Anzon, Inc., 684 A.2d 570, 574 (Pa. Super. 1996).

10. Not all statutes may serve as the basis of a negligence *per se* claim; to determine whether a statute may serve as the basis of a negligence *per se* claim, the court must find that the purpose of the statute is to protect a specific group of individuals and whether that statute clearly applies to the defendant's actions. Cabiroy v. Scipione, 767 A.2d 1078, 1081 (Pa. Super. 2001).

11. To prove that the purpose of the statute is to protect a specific group of people, the plaintiff must show that the purpose of the statute is to (1) protect a class of people including those whose interest has been invaded; (2) protect the particular invaded interest; (3) to protect that interest against the type of harm which has resulted; and (4) to protect that interest against a certain hazard from which the alleged harm resulted. Wagner, 684 A.2d at 574.

12. Once these four elements are proven, the statute is adopted as the standard of care attributable to the defendant in a negligence action. Cabiroy, 767 A.2d at 1082; Restatement (Second) Torts §286.

13. Even a criminal statute aimed at protecting a specific group of individuals may serve as the basis of a negligence *per se* claim. Schemberg v. Smicherko, 85 A.3d 1071, 1074-75 (Pa. Super. 2014).

14. The Neglect of Care-Dependent Persons Act, a criminal statute, applies to serve as the basis of a negligence *per se* claim. 18 Pa. C.S.A. §2713(a)(1).

15. The Pennsylvania Older Adults Protective Services Act, a criminal statute, applies to serve as the basis of a negligence *per se* claim. 35 P.S. §10225.102.

Breach of Fiduciary Duty: Duty Owed to Nursing Home Residents

16. The nature of a relationship between a nursing home and its resident should be determined on a case by case basis, with the burden of establishing a relationship placed on the plaintiff. Zaborowski v. Hospitality Care Center of Hermitage, Inc., 60 Pa. D. & C. 4th 474, 489 (C.P. Mercer Cty. 2002).

17. To successfully plead a breach of fiduciary duty in Pennsylvania, the plaintiff must allege facts that establish a special relationship existed where on party had special confidence in another such that the parties do not deal on equal terms "either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Com., Dept. of Transp. v. E-Z Parks, Inc., 620 A.2d 712, 717 (Pa. Cmwlth. 1993).

18. A business association may establish this confidential relationship where "one party surrenders substantial control over some portion of his affairs to the other." Com., Dept. of Transp., 620 A.2d at 717 (citing Estate of Scott, 316 A.2d 883, 886 (Pa. 1974)).

19. If a fiduciary relationship is established, the fiduciary has a duty to "act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." Basile v. H&R Block, 777 A.2d 95, 101 (Pa. Super. 2001) (quoting Young v. Kaye, 279 A.2d 759, 763 (Pa. 1971)).

Breach of Fiduciary Duty: Gist of the Action Doctrine

20. The gist of the action doctrine "precludes plaintiffs from recasting ordinary breach of contract claims into tort claims." Erie Ins. Exchange v. Abbott Furnace Co., 972 A.2d 1232, 1238 (Pa. Super. 2009).

21. A plaintiff may not bring a tort claim for a breach which occurred solely based on the contractual relationship of the parties and grounded in the contract itself, because tort claim would merely duplicate the underlying contractual claim. Erie Ins. Exchange, 972 A.2d at 1238-39 (citing Reardon v. Allegheny College, 926 A.2d 477, 486-87 (Pa. Super. 2007)).

22. A plaintiff should be limited to contract claims "when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts." eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002) (quoting Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3rd Cir. Pa. 2001)).

Punitive Damages

23. Under the Restatement (Second) of Torts §908, Comment (b), "punitive damages are available where there has been outrageous conduct [like] acts done with an evil motive or with reckless indifference to the rights of others." Geyer v. Steinbronn, 506 A.2d 901, 913 (Pa. Super. 1986).

24. Wanton misconduct as deigned in the Restatement (Second) of Torts, §500 is not the same as outrageous conduct done with reckless indifference to the interests of others. Focht v. Rabada, 268 A.2d 157, 160 (Pa. Super. 1970).

25. Pennsylvania courts have looked to the Restatement (Second) of Torts, §500 to define the requisite state of mind for punitive damages based on reckless indifference: the actor is aware of the risk and proceeds in conscious disregard of that risk or the actor is aware of the facts, but does not appreciate the risk as a reasonable person would. Hutchinson ex rel. Hutchinson v. Luddy, 870 A.2d 766, 771 (Pa. 2005) (citing Martin v. Johns-Manville Corp., 494 A.2d 1088, 1097 n. 12 (Pa. 1985)).

26. In Pennsylvania, claims for punitive damages must be established by evidence of the defendant's subjective appreciation of the risk of harm inflicted on the plaintiff and that he acted, or failed to act, in conscious disregard of that risk. Hutchinson ex rel. Hutchinson, 870 A.2d at 771.

27. "[A] defendant acts recklessly when his conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his conduct negligent." Scampone v. Grane Healthcare Co., 11 A.3d 967, 991 (Pa. Super. 2010) (quoting Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005)).

28. Punitive damages may be appropriate where plaintiff's evidence established that the nursing home facility was frequently understaffed, despite complaints by that staff where the staff was altering and falsifying patient records to reflect that care was given which was not in fact given to certain patients. Scampone, 11 A.3d at 991.

29. Understaffing along with additional egregious conduct was sufficient to establish a basis for punitive damages. Hall v. Episcopal Long Term Care, 54 A.3d 381, 397 (Pa. Super. 2012).

30. Under the Medical Care and Reduction of Error Act, punitive damages may be awarded against a healthcare provider "for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others." 40 P.S. §1303.505(a).

31. Punitive damages cannot be awarded in wrongful death actions. Harbey v. Hassinger, 461 A.2d 814, 815-16 (Pa. Super. 1983).

Appearances:

William P. Murray, III, Esq., Lorraine H. Donnelly, Esq., and John B. Zonarich, Esq. *for the Plaintiff*

Scott D. Josephson, Esq. and William J. Mundy, Esq. *for Defendants*

OPINION

Before Meyers, J.

PROCEDURAL HISTORY

The Plaintiff, Kirby Lynn Hockensmith filed a Praecipe for Writ of Summons on May 2, 2016 initiating an action against Mid-Atlantic Health Care, LLC, Falling Spring Nursing and Rehabilitation Center, L.P. d/b/a Falling Spring Nursing and Rehabilitation, Falling Spring Holdings-SNF GP, LLC, Mid-Atlantic Health Care Acquisitions, LLC, Falling Spring Holdings, L.P., Falling Spring Realty, L.P., PA Nursing Home GP, LLC, PA Holdings – SNF, L.P. and PA Holdings – SNF, L.P. and PA Holdings – SNF GP, LLC [hereinafter "the Defendants"]. Mr. Hockensmith filed a Complaint against the Defendants on January 4, 2017.[1]

On January 23, 2017, the Defendants filed Preliminary Objections to Mr. Hockensmith's Complaint [hereinafter "Preliminary Objections"]. Mr. Hockensmith filed a Response in Opposition to Defendants' Preliminary Objections [hereinafter "Response"] on February 9, 2017. The Defendants filed a Sur-Reply Brief and Answer to Mr. Hockensmith's Response on February 16, 2017 [hereinafter "Sur-Reply"].

By Praecipe of the Defendants and subsequent Order of Court, this matter was set for oral argument on March 2, 2017. However, on February 14, 2017, the parties filed a certification that they agreed to waive oral argument and have the Court decide upon briefs alone.

This matter is now ripe for decision before this Court.

FACTUAL HISTORY

1 Count One alleges general negligence, professional negligence, corporate negligence, carelessness and recklessness of all Defendants by and through their respective agents. Complaint, ¶¶103, 106. Count One also sets forth violations of various Pennsylvania Statutes enacted to protect Dependent Persons and Older Adults, which Mr. Hockensmith claims establish a basis for negligence *per se*. Complaint, ¶¶108-18. Count Two alleges that the Falling Spring facility breached its fiduciary duty to C.H. Complaint, ¶¶121-38. Count Three alleges that the "Corporate Defendants" (all Defendants other than the Falling Spring facility faulted in Count Two) aided and abetted Falling Spring in violating their fiduciary duty to C.H. Complaint, ¶¶139-48. Count Four alleges a survivor action based on the Defendants' intentional, outrageous, willful, wanton, and recklessly indifferent conduct, which warrants an award of punitive damages. Complaint, ¶¶149-57. Count Five alleges wrongful death and requests punitive damages. Complaint, ¶¶158-63.

Kirby Lynn Hockensmith ["Mr. Hockensmith"] is the son of the deceased Charles C. Hockensmith [hereinafter "C.H."], and brings the present action in his role as the Executor of the deceased's Estate.[2] Complaint, ¶¶1-3. The Defendants named herein are "vertically integrated organizations that were controlled by their respective members, managers and/or boards of directors, who were responsible for the operation, planning, management and quality control of" Falling Spring. Complaint, ¶32.

C.H. resided at Falling Spring from August 15, 2011 to November 11, 2015 when he died. Complaint, ¶2. During his time there, C.H. was totally dependent on the staff there for his daily physical, medical, and custodial needs, including caring for various illnesses. Complaint, ¶59. On June 17, 2014, C.H. fell at Falling Spring and broke his right hip.[3] Complaint, ¶66. Documentation of that fall falsely indicated that C.H.'s bed was in a low position and that mats were on the floor at the time.[4] Complaint, ¶68. Just seven days after C.H.'s fall, Falling Spring was cited by the Pennsylvania Department of Health for failing to provide C/H/ with hipsters to prevent falls, failure to place mats and lower the bed, and failing to complete an investigation to rule out neglect as the cause of that fall. Complaint, ¶69. On July 21, 2014, after investigation into Falling Spring's treatment of C.H., Franklin County Area of Aging and Protective Services founds that C.H. was the victim of caregiver neglect. Complaint, ¶71.

In addition to the fall, C.H. experienced numerous other illnesses and complications during his time at Falling Spring.[5] On September 30, 2014, C.H. suffered a Stage II pressure ulcer to his left buttock. Complaint, ¶71. By June 15, 2015, this pressure ulcer was unstageable. Complaint, ¶78. On December 18, 2014, C.H. had "unexplained open areas to his groin area." Complaint, ¶72. On January 18, 2015, C.H. underwent antibiotic treatment for an upper respiratory infection. C.H. suffered unexplained skin tears and bruising on five separate occasions. Complaint, ¶74. On March 25, 2015, C.H. began receiving antibiotic treatment for pneumonia. Complaint, ¶75. On April 2, 2015, after choking on a piece of meat, C.H. was diagnosed with

2 The Court notes that it recently disposed of Preliminary Objections in a similar case where Plaintiff's Counsel in the instant case also represented the Estate of a deceased prior resident of Falling Spring and filed suit, raising the same five claims raised herein. See Funk v. Mid-Atlantic Health Care, LLC, et al., Franklin County Civil Docket No. 2016-3397. The language of the Amended Complaint in that case is nearly identical to the Complaint filed here by Mr. Hockensmith with the exception of the specific facts regarding C.H.'s care during his residency at Falling Spring. However, the Defendants in Funk are represented by a different firm. Defendants here are represented by Burns White, whereas the same Defendants in Funk are represented by Naulty, Scaricamazza & McDevitt, LLC. In light of these two similar Complaints and the different approaches each defense firm as taken as to Preliminary Objections, this Court seek to reach a conclusion here which does not contradict its recent holding in Funk.

3 Prior to this fall, Falling Spring was aware that C.H. had fallen nine times before and was at risk of falling again. Complaint, ¶67.

4 Mr. Hockensmith also alleges that C.H.'s chart was missing information and lacked complete documentation. Complaint, ¶84.

5 In total, Mr. Hockensmith alleges that C.H. suffered a fractured hip resulting from a fall, pressure ulcers on his buttocks, multiple areas of skip tearing and bruising, contractures to his arms and legs, pneumonia, multiple urinary tract infections, episodes of chocking, weight loss, dehydration, poor hygiene, and severe pain which altogether contributed to and caused C.H.'s death. Complaint, ¶83.

dysphagia. Complaint, ¶76. On May 29, 2015, C.H. had another choking episode. Complaint, ¶77. On June 15, 2015, C.H. had areas of moisture-associated skin damage on his left and right buttocks which remained until his death. On July 27, 2015, C.H. was documented as having contractures to his arms and legs. Complaint, ¶80. C.H. died on November 11, 2015, with dysphagia and dementia listed as the causes of death. Complaint, ¶81.

DISCUSSION

I. APPLICABLE STANDARD: PRELIMINARY OBJECTIONS

The standard for evaluating preliminary objections, including demurrer, is laid out in Allegheny Sportsmen's League v. Ridge:

> [W]hen ruling upon preliminary objections, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by refusal to sustain them. A demurrer, which results in the dismissal of a suit, should be sustained only in cases that are free and clear from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded.

790 A.2d 350 (Pa. Cmwlth. 2002) (internal citations omitted). Preliminary objections must state specifically the grounds upon which relief should be granted. See Foster v. Peat Marwick Main & Co., 587 A.2d 382 (Pa. Cmwlth. 1991). In consideration of this standard, this court now analyzes the Defendants' seven preliminary objections.

I. ANALYSIS

A. DEFENDANTS' FIRST PRELIMINARY OBJECTION: Lack of Specificity and Motion to Strike Certain Phrases from Plaintiff's Complaint

The Defendants' First Preliminary Objection argues that the phrases "among other things," "including, inter alia," and "in and about his body and possible aggravation and/or activation of any pre-existing conditions, illnesses, ailments, or diseases he had, and/or activation of any pre-existing conditions, illnesses, ailments, or diseases he had, and/or the accelerated deterioration of his health, physical and mental condition," "some of all of which were permanent," "along with other body pain and damage,"

and "some or all of which were permanent together with other medical complications" should be struck from the record due to lack of specificity. Preliminary Objections, ¶7. To determine whether a complaint is sufficiently specific, the Court must evaluate "whether [it] is "sufficiently clear to enable the defendant to prepare his defense" or "whether [it] informed the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Green, 906 A.2d 1232, 1235 (Pa. Super. 2006) (quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n.36 (Pa. Super. 1973)).

In Connor v. Allegheny General Hospital, the Pennsylvania Supreme Court held that a plaintiff suing a hospital could properly amend her complaint even on the eve of trial to include new information which enhanced her negligence claim. 461 A.2d 600, 602 (Pa. 1983). The Court found that because the amendment did not actually modify the original cause of action, the defendant hospital would not be prejudiced by the additional language. Id. Moreover, in a footnote, the Court indicated that if the defendant hospital was displeased with the specificity of the complaint, it should have filed a preliminary objection indicating as much. Id. at 602 n.3.

In the present case, the Defendants are now taking the advice of the Court in Connor by closing the back door to any future facts which may "amplify" negligence claims by Mr. Hockensmith. Indeed, the language cited by the Defendants is vague and leaves no direction to the Defendants as to what aggravating actions they refer and to what pre-existing conditions may have been aggravated by those actions. Complaint, ¶87. Moreover, the language "among other things," and "inter alia" by their very definitions leave open the door for additional factual allegations in the future without any indication to the Defendants as how to establish a defense. Simply, the Defendants cannot possibly form a defense when the Complaint vaguely refers to facts which may or may not be specifically alleged in the future. However, Connor also stands for the well-decided principal in Pennsylvania that "the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party." Connor, 461 A.2d at 602 (quoting Schaffer v. Larzelere, 189 A.2d 267, 270 (Pa. 1963)). Even if the Court herein ordered that the requested language be struck from Mr. Hockensmith's Complaint as lacking sufficient specificity, under Connor, Mr. Hockensmith may not be entirely barred from amending his Complaint further down the road if it does not modify his cause of action and does not prejudice the Defendants. Therefore, the Court grants Mr. Hockensmith leave to file an Amended Complaint, which specifically sets out facts which support the vague phrases called

into question under the Defendants' First Preliminary Objection.[6]

The Defendants' First Preliminary Objection is SUSTAINED.

B. DEFENDANTS' SECOND PRELIMINARY OBJECTION: Motion to Strike References to Maximizing Profits as Scandalous or Impertinent Matter

The Defendants' Second Preliminary Objection seeks to have paragraphs 40, 41, 49, and 50 struck from Mr. Hockensmith's Complaint because accusations of greed and profit-mongering are irrelevant to the underlying claims. Preliminary Objections, ¶¶18, 21. The Pennsylvania Rules of Civil Procedure require that a complain state concisely and summarily the material facts to a claim. Pa. R.C.P. 1019(a). Material facts are facts which are necessary to establish a cause of action. Nading v. Boice, 61 Pa. D. & C. 4th 353, 360 (C.P. Butler Cty. 2003) (citing Baker v. Rangos, 324 A.2d 498, 505 (Pa. Super. 1974)). Allegations will be struck from a complaint as scandalous and impertinent where they are immaterial and inappropriate to proving the cause of action. Com., Dept. of Environmental Resources v. Peggs Run Coal Co., 423 A.2d 765, 769 (Pa. Cmwlth. 1980). An allegation is impertinent if it is wholly irrelevant and will not influence the "the results of the judicial inquiry." Nading v. Boice, 61 Pa. D. & C. 4th at 360 (citing Jefferies v. Hoffman, 207 A.2d 774 (Pa. 1965)). Striking allegations as scandalous or impertinent should be used sparingly "and only when a party can affirmatively show prejudice." Com., Dept. of Environmental Resources v. Hartford Acc. And Indem. Co., 396 A.2d 885, 888 (Pa. Cmwlth. 1979).

The Defendants here contend that any reference to maximizing profits is wholly irrelevant to all of Mr. Hockensmith's claims. However, any accusations as to the motive and mind-set of the Defendants, especially as they relate to causing the harm done to C.H., are wholly relevant. The Complaint as a whole paints a picture that the motivations of the Defendants directly resulted in the Defendants acting in such a way that C.H. received negligent care at Falling Spring and directly suffered injuries as a result. Whether Mr. Hockensmith's claims about the Defendants' motivations are supported by evidence is yet to be decided and is a question not presently before the Court. However, if the Court accepts these allegations as true, the Defendants' motivations behind how they treat their residents at Falling Spring would be incredibly relevant to Mr. Hockensmith establishing the claims set forth in his Complaint. Moreover, the Defendants have failed to specifically allege any prejudice they would suffer from the inclusion of these allegations.

6 The paragraphs which contain these phrases remain in the Complaint.

 to be continued in next edition

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Therefore, the Defendants' Second Preliminary Objection is OVERRULED.

C. DEFENDANTS' THIRD PRELIMINARY OBJECTION: Motion to Strike References to Fraud as Scandalous and Impertinent

The Defendants' Third Preliminary Objection claims that paragraphs 68 and 103(r) should be stricken from Mr. Hockensmith's Complaint as scandalous and impertinent matter. As stated above, allegations are scandalous or impertinent if they are "immaterial and inappropriate" to proving the underlying cause of action. The Court cannot find here that any reference to fraudulent documenting of C.H.'s care is irrelevant to the underlying causes of action. Mr. Hockensmith alleges fraudulent documenting of the state of C.H.'s bed before his fall, and that the Defendants are negligent for allowing such fraudulent documentation. Complaint, ¶¶6, 103(r). Mr. Hockensmith has not raised a specific allegation of fraud which would require more specific pleading under Pa. R.C.P. 1910(b). Rather, Mr. Hockensmith is alleging various forms of negligence and raises instances of fraudulent behavior in support of those allegations. If these facts are proven as true, they are wholly relevant to Mr. Hockensmith's claims. However, whether these accusations are in fact supported by evidence is not a question presently before the Court. Moreover, the Defendants have failed to state specifically how these allegations prejudice them.

The Defendants' Third Preliminary Objection is OVERRULED.

D. DEFENDANTS' FOURTH PRELIMINARY OBJECTION: Motion to Strike Negligence Per Se *Claims Based Upon the Neglect of a Care-Dependent Person Act*

a. Based on Demurrer

The Defendants' Fourth Preliminary Objection argues that Mr. Hockensmith's claims of negligence *per se* under the Neglect of a Care-Dependent Person Act should be dismissed for legal insufficiency. Preliminary Objection, ¶¶41-46. To prove a claim of negligence *per se*, the plaintiff must establish: (1) the purpose of the statute must be to protect the interest of a specific group of individuals; (2) the statute must clearly apply to the defendant's actions; (3) the defendant must violate the statute; and (4) the defendant's violation of the statute must be the proximately cause of the plaintiff's alleged injuries. Wagner v. Anzon, Inc., 684 A.2d 570, 574 (Pa. Super. 1996).

However, not all statutes may serve as the basis of a negligence *per se* claim. To determine whether a statute may serve as the basis of a negligence *per se* claim, the court must find that the purpose of the statute

is to protect a specific group of individuals and whether that statute clearly applies to the defendant's actions. Cabiroy v. Scipione, 767 A.2d 1078, 1081 (Pa. Super. 2001). Specifically, to prove that the purpose of the statute is to protect a specific group of people, the plaintiff must show that the purpose of the statute is to (1) protect a class of people including those whose interest has been invaded; (2) protect the particular invaded interest; (3) to protect that interest against the type of harm which has resulted; and (4) to protect that interest against a certain hazard from which the alleged harm resulted. Wagner, 684 A.2d at 574. Once these four elements are proven, the statute is adopted as the standard of care attributable to the defendant in a negligence action. See Cabiroy, 767 A.2d at 1082; Restatement (Second) Torts §286.

Under the Neglect of Care-Dependent Persons Act, a caretaker is guilty of neglect of a care-dependent person when he "intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care." 18 Pa. C.S.A. §2713(a)(1). A care-dependent person is defined as "any adult who due to physical or cognitive disability or impairment, requires assistance to meet his needs for food, shelter, clothing, personal care or health care. " 18 Pa. C.S.A. §2713(f). On its face, this statute's purpose is to protect the interests of all care-dependent persons who interests have been invaded by their entrusted caretakers.

Even a criminal statute aimed at protecting a specific group of individuals may serve as the basis of a negligence *per se* claim. Schemberg v. Smicherko, 85 A.3d 1071, 1074-75 (Pa. Super. 2014). In Schemberg, the court held that preliminary objections were improperly sustained where it was not clear and free from doubt that the defendant would not be able to prove the violation of a criminal statute drafted to protect public servants and bystanders to a defendant's resisting arrest. Id. The Court reasoned that the criminal statute specified that accepting the plaintiff's averment as true, a fact finder could reasonably conclude that the defendant had violated the criminal statute. Id. at 1074. Moreover, the Court found that the purpose of the statute was to protect the interests of a specific group of individuals of which the plaintiff was a member. Id. at 1075. As such, this alleged violation could serve as the basis of a negligence *per se* claim. Id.

Here, the Neglect of Care-Dependent Persons Act, a criminal statute, clearly applies to the present action. Mr. Hockensmith has clearly pled that C.H. was a care-dependent person, by definition, and Falling Spring was his caretaker, responsible for his daily personal and health care. Complaint, ¶110. Contrary to the Defendants' arguments, the statute describes the particular intentional, knowing, and reckless behavior which could cause

bodily injury by failure to provide certain goods, services, or care which the party is obligated to provide in his role as caretaker. Mr. Hockensmith has laid out the various ways in which he believes the Defendants harmed C.H. by failing to provide certain goods, services, and care which the Defendants were responsible for providing. Complaint, ¶¶103-06. Specifically, Mr. Hockensmith alleges that both the Pennsylvania Department of Health and the Franklin County Area of Aging and Protective Services investigated Falling Spring's treatment of C.H. finding likely neglect in how C.H.'s fall occurred. Complaint, ¶¶69-70. Like the criminal statute in Schemberg, the criminal statute at issue here specifically aims at protecting care-dependent people from harm caused by their caretakers. Although the Defendants have not been held criminally liable for their purported treatment of C.H., Mr. Hockensmith has pled sufficient facts throughout his Complaint which if accepted as true could lead a fact finder to conclude that the Defendants, as C.H.'s caretakers, in fact violated the statute, thereby forming the basis of a negligence *per se* claim. Complaint, ¶¶108-12.

b. Based on Lack of Specificity[1]

Moreover, Mr. Hockensmith's pleadings of facts as to his negligence *per se* claim under the Neglect of Care-Dependent Persons Act are sufficiently specific to alert the Defendants to their available and appropriate defenses. As stated above, Mr. Hockensmith's Complaint asserts specific instances in which he believes the Defendants improperly acted and caused harm to C.H. In light of the Complaint as a whole, the Defendants are enlightened as to specific allegations made against them and able to make out a defense to that allegedly negligent conduct.

Therefore, Defendants' Fourth Preliminary Objection is OVERRULED as to both legal sufficiency and sufficient specificity.

E. DEFENDANTS' FIFTH PRELIMINARY OBJECTION: Motion to Strike Plaintiff's Negligence Per Se *Claim Based Upon the Older Adults Protective Services Act*

a. Based on Demurrer

To prove a claim of negligence *per se*, the plaintiff must establish: (1) the purpose of the statute must be to protect the interest of a specific group of individuals; (2) the statute must clearly apply to the defendant's actions; (3) the defendant must violate the statute; and (4) the defendant's violation of the statute must be the proximately cause of the plaintiff's

1 The Defendants raise this basis for dismissing Mr. Hockensmith's negligence *per se* claim only at the end of their argument, within their prayer for relief. Preliminary Objections, ¶17.

alleged injuries. Wagner v. Anzon, Inc., 684 A.2d 570, 574 (Pa. Super. 1996).

However, not all statutes may serve as the basis of a negligence *per se* claim. To determine whether a statute may serve as the basis of a negligence *per se* claim, the court must find that the purpose of the statute is to protect a specific group of individuals and whether that statute clearly applies to the defendant's actions. Cabiroy v. Scipione, 767 A.2d 1078, 1081 (Pa. Super. 2001). Specifically, to prove that the purpose of the statute is to protect a specific group of people, the plaintiff must show that the purpose of the statute is to (1) protect a class of people including those whose interest has been invaded; (2) protect the particular invaded interest; (3) to protect that interest against the type of harm which has resulted; and (4) to protect that interest against a certain hazard from which the alleged harm resulted. Wagner, 684 A.2d at 574. Once these four elements are proven, the statute is adopted as the standard of care attributable to the defendant in a negligence action. See Cabiroy, 767 A.2d at 1082; Restatement (Second) Torts §286.

The Pennsylvania Older Adults Protective Services Act protects the elderly by seeking to provide them with protective services:

> It is declared the policy of the Commonwealth of Pennsylvania that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare. It is not the purpose of this act to place restrictions upon the personal liberty of incapacitated older adults, but this act should be liberally construed to assure the availability of protective services to all older adults in need of them. Such services shall safeguard the rights of incapacitated older adults while protecting them from abuse, neglect, exploitation and abandonment. It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.

35 P.S. §10225.102. Under this statute, the people being protected are the elderly who are vulnerable to abuse or neglect. This statute seeks to protect this group's interests by eliminating "abuse, neglect, exploitation and abandonment."

As in Cabiroy, Mr. Hockensmith is not trying to bring a separate civil cause of action under this statute. Rather Mr. Hockensmith seeks to impose this statute as the standard of care owed to his father in his negligence *per se*

claim against the Defendants. The statute further seeks to prevent the hazards of individuals abusing, neglecting, exploiting, or abandoning elderly people who are vulnerable to such harm. Here, Mr. Hockensmith has alleged that the neglect and abuse of his father by the Defendants caused him harm. See Complaint, ¶¶65-83, 103, 113-18. In fact, both the Pennsylvania Department of Health and the Franklin County Area of Aging and Protective Services investigated Falling Spring's treatment of C.H. finding likely neglect as the cause of C.H.'s fall. Complaint, ¶¶69-70. Whether Mr. Hockensmith is capable of establishing negligence *per se* under this theory is a question of fact not presently before the Court. The statute seems to seek to protect people like C.H. from the harm he is alleged to have suffered at the hands of the Defendants. Furthermore, accepting Mr. Hockensmith's allegations as true, a fact finder could reasonably find that the Defendants violated this statute and may therefore be liable for negligence *per se* under this statute. As such, this Court cannot say as a matter of law that Mr. Hockensmith is prohibited from recovering under this claim.

b. Based on Lack of Specificity

Moreover, Mr. Hockensmith has pled sufficiently specific facts as they relate to the contents of the statute, the applicability of the statute, the Defendants' potential violation of the statute and any potential resulting harm to C.H. from the violation of that statute. See Complaint, ¶¶65-83, 103, 113-18. The Defendants are aware of the conduct in question and the harm alleged to have been done to C.H. as a result of that conduct such that the Defendants would be able to formulate a defense. Any additional information sought by the Defendants as to evidence of Mr. Hockensmith's claim may be obtained through the discovery. Presently, Mr. Hockensmith's allegations themselves are sufficiently specific as to how the Defendants' actions violated the referenced statutes and consequently caused harm to C.H.

Therefore, Defendants' Fourth Preliminary Objection is OVERRULED as to both legal sufficiency and sufficient specificity.

F. DEFENDANTS' SIXTH PRELIMINARY OBJECTION: Motion to Strike Breach of Fiduciary Duty Claim

a. Based on Demurrer

The Defendants' Sixth Preliminary Objection seeks to strike Mr. Hockensmith's Breach of Fiduciary Duty claim. The nature of a relationship between a nursing home and its resident should be determined on a case by case basis, with the burden of establishing a relationship placed on the

plaintiff. Zaborowski v. Hospitality Care Center of Hermitage, Inc., 60 Pa. D. & C. 4th 474, 489 (C.P. Mercer Cty. 2002). The Defendants' first argument as to demurrer of this claim prompts the Court to make evidentiary evaluations of medical notes to decide whether a fiduciary duty existed. Preliminary Objections, ¶¶68-74. However, the preliminary objection standard instructs this Court to assess Mr. Hockensmith's claims to determine, if all alleged facts are accepted as true, whether Mr. Hockensmith is barred from recovering as a matter of law.

To successfully plead a breach of fiduciary duty in Pennsylvania, the plaintiff must allege facts that establish a special relationship existed where on party had special confidence in another such that the parties do not deal on equal terms "either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Com., Dept. of Transp v. E-Z Parks, Inc., 620 A.2d 712, 717 (Pa. Cmwlth. 1993). A business association may establish this confidential relationship where "one party surrenders substantial control over some portion of his affairs to the other." Id. (citing Estate of Scott, 316 A.2d 883, 886 (Pa. 1974)). If a fiduciary relationship is established, the fiduciary has a duty to "act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." Basile v. H&R Block, 777 A.2d 95, 101 (Pa. Super. 2001) (quoting Young v. Kaye, 279 A.2d 759, 763 (Pa. 1971)).

Here, Mr. Hockensmith has pled the requisite factual assertions to establish that a confidential relationship existed between Falling Spring and C.H. and that the Defendants breach their duty to C.H. Complaint, ¶¶122-38. Specifically, Mr. Hockensmith alleges that in exchange for payment, Falling Spring accepted the "special confidence and trust" that comes with providing constant physical and mental care to any resident. Complaint, ¶¶125-26. Moreover, Mr. Hockensmith has alleged that this special relationship was based on Falling Spring's domination of C.H. given their specialized skill and C.H.'s vulnerable state. Complaint, ¶¶127-30. Mr. Hockensmith alleges the Defendants breached this fiduciary relationship in their negligence care and improper financial motivations. Complaint, ¶134. Whether Mr. Hockensmith is capable of proving the fiduciary relationship existed and was breached are questions of fact not yet before this Court. Moreover, the Defendants have failed to cite to any caselaw which indicates that a fiduciary relationship as a matter of law may not exist between a nursing home and its residents. Mr. Hockensmith has successfully pled facts which if proven may entitle him to relief, and he is not barred from relief under this theory as a matter of law. Therefore, the Defendants' first argument as to demurrer fails.

The Defendants also present a second argument for demurrer based on the "gist of the argument" theory. Preliminary Objections, ¶¶75-81. This doctrine "precludes plaintiffs from recasting ordinary breach of contract claims into tort claims." Erie Ins. Exchange v. Abbott Furnace Co., 972 A.2d 1232, 1238 (Pa. Super. 2009). Specifically, a plaintiff may not bring a tort claim for a breach which occurred solely based on the contractual relationship of the parties and grounded in the contract itself, because tort claim would merely duplicate the underlying contractual claim. Id. at 1238-39 (citing Reardon v. Allegheny College, 926 A.2d 477, 486-87 (Pa. Super. 2007)). In other words, a plaintiff should be limited to contract claims "when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts." eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002) (quoting Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3rd Cir. Pa. 2001), which held that a breach of fiduciary duty claim was not barred by gist of the action doctrine because the underlying duties are separate and distinct from contractual duties)).

Here, there is no claim for breach of contract made by Mr. Hockensmith. Based on the pleadings, Mr. Hockensmith's Breach of Fiduciary duty claim is grounded not in contract, but in the unique relationship between Falling Spring and C.H. as nursing home and resident, respectively. At issue in Mr. Hockensmith's Breach of Fiduciary Duty Claim is a question of the quality of care received by C.H., not whether Falling Spring in fact completed their end of the bargain by providing care to C.H. in exchange for money. In fact, Mr. Hockensmith's list of breaches of fiduciary duty cites his simultaneous allegations of negligence at Count I and the improper motivations of the Defendants which are alleged to have caused harm to C.H. Whether the Defendants were negligent in their care and decision-making as to C.H. is a question grounded in "larger social policies," rather than the actual agreement between the parties to provide care. As such, Mr. Hockensmith's claim for Breach of Fiduciary Duty is not barred by gist of the action doctrine.

b. Based on Lack of Specificity

The Defendants also state a claim based on lack of specificity without further argument or discussion. Preliminary Objections, ¶67. As to this claim, the Court finds that Mr. Hockensmith has laid out at length in his Complaint how and when he believes the Defendants breached their fiduciary duties to C.H. Complaint, ¶¶103-07, 138. Whether such allegations may be proven as a matter of fact is not a question presently before the Court. Mr. Hockensmith's allegations of negligent care and financial priorities are

sufficiently specific such that the Defendants are able to develop a defense as to the Breach of Fiduciary Duty claim.

Therefore, because Mr. Hockensmith's claim for Breach of Fiduciary Duty is sufficiently pled and sufficiently specific, the Defendants' Sixth Preliminary Objection is OVERRULED.

G. DEFENDANTS' SEVENTH PRELIMINARY OBJECTION: Motion to Strike All Claims for Punitive Damages and to Strike All Language Eliciting the Notion Thereof

The Defendants' Seventh Preliminary Objection requests this Court strike any reference to and claim for punitive damages from Mr. Hockensmith's Complaint for failure to allege facts establishing a basis for punitive damages. Preliminary Objections, ¶¶83-93. Under the Restatement (Second) of Torts §908, Comment (b), "punitive damages are available where there has been outrageous conduct [like] acts done with an evil motive or with reckless indifference to the rights of others."[2] Geyer v. Steinbronn, 506 A.2d 901, 913 (Pa. Super. 1986). Pennsylvania courts have looked to the Restatement (Second) of Torts, §500 to define the requisite state of mind for punitive damages based on reckless indifference:

> Section 500 sets forth two very different types of state of mind as to reckless indifference. . . the first is where the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act or to fail to act in conscious disregard of or indifference to that risk, and . . . the second is where the actor had such knowledge or reason to know of the facts but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.

Hutchinson ex rel. Hutchinson v. Luddy, 870 A.2d 766, 771 (Pa. 2005) (citing Martin v. Johns-Manville Corp., 494 A.2d 1088, 1097 n. 12 (Pa. 1985)). Based on this definition, the Pennsylvania Supreme Court has held that in Pennsylvania, claims for punitive damages must be established by evidence of the defendant's subjective appreciation of the risk of harm inflicted on the plaintiff and that he acted, or failed to act, in conscious disregard of that risk. Id.

Moreover, "a defendant acts recklessly when his conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his conduct negligent."

2 Wanton misconduct as deigned in the Restatement (Second) of Torts, §500 is not the same as outrageous conduct done with reckless indifference to the interests of others. Focht v. Rabada, 268 A.2d 157, 160 (Pa. Super. 1970).

Scampone v. Grane Healthcare Co., 11 A.3d 967, 991 (Pa. Super. 2010) (quoting Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005)).

The Court in Scampone found that punitive damages were appropriate where the plaintiff's evidence established that the nursing home facility was frequently understaffed, despite complaints by that staff. Id. As a result, the staff was altering and falsifying patient records to reflect that care was given which was not in fact given to certain patients, an act which the Court found to be outrageous enough to warrant punitive damages. Id. at 992. The Court also cited evidence of a total lack of care for the plaintiff in that facility for nineteen days prior to her death, including her "crying for water." Id. Understaffing along with additional egregious conduct was sufficient to establish a basis for punitive damages. See also Hall v. Episcopal Long Term Care, 54 AA.3d 381, 397 (Pa. Super. 2012) (holding sufficient evidence of understaffing, unheeded complaints, and other outrageous conduct creating an unreasonable risk of harm to the resident of a nursing home for question of punitive damages to be heard by jury).

As the Defendants state, under the Medical Care and Reduction of Error Act, punitive damages may be awarded against a healthcare provider under the following circumstance only:

> Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.

40 P.S. §1303.505(a). Mr. Hockensmith here has pled that the Defendants engaged in a systematic practice of understaffing Falling Spring, despite being aware of numerous citations from government agencies regarding insufficient care of its residents, including C.H. Complaint, ¶¶105-07. Specifically, Mr. Hockensmith alleged that the Defendants made conscious decisions to prioritize the business goals of the Defendants over the personal and health care needs of their residents by perpetually understaffing Falling Spring and accepting additional patients for whom they did not have sufficient means to care. Complaint, ¶¶40-52. Whether these allegations are proven and accepted by a fact-finder as rising to the level of willful, wanton, or recklessly indifferent conduct warranting punitive damages is not a question presently before this Court. Based on Mr. Hockensmith's specific allegations as to the Defendants' conduct pertaining to the care of C.H. and other residents during his time at Falling Spring, and accepting

those allegations as true, this Court cannot say as a matter of law that Mr. Hockensmith is barred from relief.

However, as to Mr. Hockensmith's demand for punitive damages at Count V, brought under the Wrongful Death Act, the law is clear that punitive damages cannot be awarded in wrongful death actions. Harbey v. Hassinger, 461 A.2d 814, 815-16 (Pa. Super. 1983). Therefore, as to punitive damages demanded under Mr. Hockensmith's Wrongful Death Claim at Count Five of his Complaint, the Defendants' Preliminary Objection is SUSTAINED because Mr. Hockensmith is barred from such relief as a matter of law.

As to all other demands for punitive damages in the Complaint, Mr. Hockensmith has sufficiently and specifically pled such relief. Therefore, the Defendants' Preliminary Objection as to the demand for punitive damages at Counts One, Two, Three, and Four is OVERRULED.

CONCLUSION

Defendants' First Preliminary Objection is SUSTAINED. The Plaintiff is granted leave to file an Amended Complaint which clarifies the language cited by the Defendants in their First Preliminary Objection within twenty (20) days of the date of this Order.

Defendants' Second Preliminary Objection is OVERRULED.

Defendants' Third Preliminary Objection is OVERRULED.

Defendants' Fourth Preliminary Objection is OVERRULED.

Defendants' Fifth Preliminary Objection is OVERRULED.

Defendants' Sixth Preliminary Objection is OVERRULED.

Defendants' Seventh Preliminary Objection SUSTAINED in part and OVERRULED in part.

ORDER OF COURT

AND NOW THIS 12th day of May, upon review of the record and applicable law,

IT IS HEREBY ORDERED that

1. Defendants' First Preliminary Objection is SUSTAINED. The Plaintiff is granted leave to file an Amended Complaint which clarifies the language cited by the Defendants in their First Preliminary Objection within twenty (20) days of the date of this Order.

2. Defendants' Second Preliminary Objection is OVERRULED.

3. Defendants' Third Preliminary Objection is OVERRULED.

4. Defendants' Fourth Preliminary Objection is OVERRULED.

5. Defendants' Fifth Preliminary Objection is OVERRULED.

6. Defendants' Sixth Preliminary Objection is OVERRULED.

7. Defendants' Seventh Preliminary Objection SUSTAINED in part and OVERRULED in part.

This Order is pursuant to the attached Opinion

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.