

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ESTATE OF FLORENCE SILVERMAN	:	CIVIL ACTION
APTEKMAN ET AL.	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, ASHTON	:	
HALL NURSING HOME, BEATRICE	:	
STENTA AND APRIL LOWMAN,	:	
Defendants.	:	NO. 01-4963

**M E M O R A N D U M**

Newcomer, S.J. November , 2001

Presently before the Court is a Motion to Dismiss filed by defendants Ashton Hall Nursing Home and Beatrice Stenta.

**I. BACKGROUND**

Plaintiffs, the estate of decedent Florence Silverman by Stephen Michael Silverman and Mark Joel Silverman, Co-Administrators of decedent's estate, and Stephen Michael Silverman individually, Mark Joel Silverman individually and Louis Aptekman, individually, seek damages arising out of decedent's death on November 8, 2000. On November 8, 2000, while a resident and under the care of defendant Ashton Hall Nursing Home ("Ashton Hall"), the decedent suddenly collapsed at approximately 1:00 p.m., and later died.

Ashton Hall is a corporation located in Philadelphia, Pennsylvania, and provides health and nursing care to elderly individuals. At all times relevant to plaintiffs' Complaint,

defendant Beatrice Stenta was the Administrator of Ashton Hall. Defendant City of Philadelphia operates and manages the Philadelphia Fire Department, an outfit that allegedly failed to provide decedant with proper care. Finally, at all times relevant to plaintiffs' Complaint, defendant April Lowman was employed by the Philadelphia Fire Department as a 911 emergency operator and dispatcher for the City.

Plaintiffs further allege the following facts: On November 8, 2001 at about 1:00 p.m. decedent suddenly collapsed in Ashton Hall's dining room and "gave the appearance of having gone into cardiac arrest." Complaint, at ¶ 38. In fact, decedent was experiencing cardiac arrest, but Ashton Hall's staff failed to recognize the gravity of decedent's condition. Nevertheless, Ashton Hall's staff informed defendant Stenta of decedent's condition and Stenta summoned an ambulance. However, Stenta and Ashton Hall's staff failed to call the City's emergency services at 911, or an Ashton Hall physician. Additionally, Ashton Hall did not employ an "on-premises" physician to diagnose or treat elderly residents in the event they required emergency first aid or medical assistance.

The ambulance technicians were unable to provide decedent advanced life support care, and telephoned the City's emergency services at 911. Defendant Lowman was the 911 emergency operator on duty at that time. Instead of contacting

the City's fire radio bands and forward the information she received during the 911 call as mandated by City procedure, defendant Lowman forwarded the information to the City's Medic Unit 6. However, Medic Unit 6 was unable to respond, and had defendant Lowman followed the proper procedure, emergency medical personnel could have been dispatched to decedent immediately. Plaintiffs further allege that the City failed to properly supervise and train defendant Lowman.

When no emergency unit arrived to assist decedent, the ambulance technicians telephoned 911 again. At that time, the City followed the proper procedure and dispatched an emergency unit to decedent. Nevertheless, decedent died.

Accordingly, plaintiffs allege that the City and Lowman violated decedent's rights under 42 U.S.C. § 1983, and seek attorney's fees against those defendants under 42 U.S.C. § 1988 in counts one and two of the Complaint. Count three alleges that defendant Ashton Hall is liable for corporate negligence under Pennsylvania law. Count four claims that both Ashton Hall and Stenta are liable for negligence. In count five, plaintiffs allege that all defendants are liable to under the Pennsylvania Wrongful Death Act, 42 Pa. Cons. Stat. § 8301 et seq., and plaintiffs seek punitive damages under that statute. Finally, in count six, the Co-Administrators Pendente Lite of plaintiffs' estate bring a survival action against all defendants under

Pennsylvania law.

Now, defendants Ashton Hall and Lowman have moved to dismiss count three of plaintiffs' Complaint, and all of plaintiffs claims for punitive damages pursuant to Federal Rule of Civil Procedure 12(b)(6). Thus, the Court turns to defendants' Motion.

## **II. DISCUSSION**

### **A. Legal Standard**

When evaluating a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept each allegation in a well pleaded complaint as true. Albright v. Oliver, 510 U.S. 266, 268 (1994). Additionally, a Motion to Dismiss should only be granted if the Court finds that no proven set of facts would entitle the plaintiff to recovery under the filed pleadings. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

It is also firmly established that in reviewing a Federal Rule of Civil Procedure 12(b)(6) motion, the Court must draw all reasonable inferences in the plaintiff's favor. Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991).

### **B. Corporate Negligence**

Ashton Hall moves to dismiss count three of plaintiffs' Complaint first contending that the doctrine of corporate negligence established in Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991) does not apply to it. In Thompson, the Pennsylvania

Supreme Court upheld a theory of liability against the defendant hospital, stating:

Corporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital. This theory of liability creates a nondelegable duty which the hospital owes directly to a patient. Therefore, an injured party does not have to rely on and establish the negligence of a third party.

*Id.* at 707. (footnote omitted). The court then set forth four general areas of corporate liability: (1) A duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) A duty to select and retain only competent physicians; (3) A duty to oversee all persons who practice medicine within its walls as to patient care; (4) A duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients. *Id.* When holding that hospitals may be liable for corporate negligence, the Thompson Court recognized "the corporate hospital's role in the total health care of its patients." *Id.* at 708.

As defendant correctly notes, neither the Pennsylvania Supreme Court nor the Superior Court have extended the corporate liability doctrine to nursing homes. "When presented with a novel issue of [state] law, or where applicable state precedent is ambiguous, absent or incomplete, [a federal court] must determine or predict how the highest state court would rule." Rolick v. Collins Pine Co., 925 F.2d 661, 664 (3d Cir. 1991).

Nevertheless, intermediate appellate state court opinions may facilitate a federal district court's predictive inquiry. Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998).

Although Thompson dealt with a hospital, the Pennsylvania Superior Court has recently extended corporate negligence to health maintenance organizations ("HMO") in Shannon v. McNulty, 718 A.2d 828 (Pa. Super. Ct. 1998). In Shannon, a mother and father (the "Shannons") sued for damages arising from the death of their pre-term baby son. 718 A.2d at 829. Among other causes of action, the Shannons sued their HMO for corporate liability for both negligent supervision of the obstetrician's care and "lack of appropriate procedures and protocols when dispensing telephonic medical advice to subscribers." Shannon, 718 A.2d at 829. Like the Court in Thompson, the Shannon Court's decision to extend the corporate liability doctrine to HMOs turned upon its recognition of "the central role played by HMOs in the total health care of its subscribers." Shannon, 718 A.2d at 835.

Given Shannon's interpretation of Thompson, and this Court's own review of Thompson, this Court concludes that under the right circumstances, the Pennsylvania Supreme Court may extend Thompson to other health organizations, including nursing homes. Thus, the question here is whether corporate liability

extends to the facts of this case.

At this early juncture, the Court cannot conclude that Ashton Hall did not play a central role in the total health care of decedent. Indeed, upon reviewing plaintiffs' Complaint, this Court finds that plaintiffs have alleged facts that indicate Ashton Hall played a central role in decedent's health care. For example, plaintiffs' Complaint alleges that decedent was under the "care, custody and control of defendant Ashton Hall when she died." Complaint, at ¶ 13. Further, as the Shannons alleged against their HMO, plaintiffs here allege that Ashton Hall failed to adopt and enforce adequate rules and policies to ensure quality care for its residents. Thus, plaintiffs have alleged sufficient facts to warrant their corporate negligence claim.

Ashton Hall also moves to dismiss count three of plaintiffs' Complaint to the extent that count alleges that Ashton Hall was under a duty to select and retain at least one "on-premises" physician to care for the emergency needs of decedent or other residents. Specifically, Ashton Hall argues that Ashton Hall was under no duty to provide such a physician.

The Court has already determined here that Ashton Hall owed decedent a duty under plaintiffs' corporate negligence theory. Once a court determines that a legal duty exists, liability may be imposed only where the harmful consequences of the defendant's conduct could reasonably have been foreseen and

prevented by the exercise of reasonable care. Mohler v. Jeke, 595 A.2d 1247, 1252 (Pa. Super. Ct. 1991). Thus, Ashton Hall's alleged failure to select and retain at least one "on-premises" physician is really a question of whether Ashton Hall exercised reasonable care. Such a question is one of fact for the jury to decide. E.g., Waering v. BASF Corp., 146 F. Supp.2d 675, 686 (M.D.Pa. 2001); Dougherty v. Boyerton Times, 547 A.2d 778, 787 (1988) ("Negligence is a question for the jury to determine upon proper instruction. The court should not remove the question from the jury unless the facts leave no room for doubt."). Thus, the Court will not dismiss plaintiffs' claim of corporate negligence against Ashton Hall on defendants' 12(b)(6) Motion.

### **C. Punitive Damages**

Next, Ashton Hall moves to dismiss plaintiffs' claim for punitive damages under Pennsylvania's Wrongful Death Act, 42 Pa. Cons. Stat. § 8301 et seq. Plaintiffs concede that such a claim is improper, and withdraw it. Thus, the Court will dismiss that claim.

Finally, Ashton Hall moves to dismiss all remaining claims for punitive damages in plaintiffs' Complaint pursuant to Rule 12(b)(6). In Pennsylvania, punitive damages are properly awarded for a defendant's "outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." Medvecz v. Choi, 569 F.2d 1221, 1226 (3d

Cir. 1977); Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963). Here, plaintiffs allege that defendants' conduct was "wanton, unreasonable, malicious, unnecessary and/or made with deliberate and reckless indifference to the decedent Plaintiff's health, safety and rights. Complaint at ¶ 81. Further, upon a review of the rest of plaintiffs' Complaint, the Court finds that plaintiffs have alleged facts that would permit a jury to award punitive damages. Thus, the Court will not dismiss plaintiffs' remaining claims for punitive damages.

An appropriate Order will follow.

---

Clarence C. Newcomer, S.J.