2014 WL 8624000 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Marie CAMPOS, Plaintiff,

v.

Teresa CAMPOS, Gilbert Smith, Centaurus **Financial** Inc. and Does 1-10, Defendants.

No. 56201300446165.
October 29, 2014.

PO-VTA
[Separate Statement of Undisputed Facts Filed Concurrently]
Date: January 12, 2015
Time: 8:30 a.m.
Dept: 21
Case Filed: 12/18/13
Trial Date: 2/17/15
Reservation #2001751

Notice of Motion and Motion by Defendants Centaurus Financial Inc. and Gilbert Smith for Summary Judgment or Alternatively for Summary Adjudication; Memorandum; Evidence

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To Plaintiff Marie Campos and Defendant Teresa Campos and to their attorneys of record:

NOTICE IS HEREBY GIVEN that on January 12, 2015, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 21 of this court, located at 800 S. Victoria Ave., Ventura, CA Defendants Gilbert Smith ("Smith") and Centaurus **Financial** Inc. ("CFI") will, and hereby do, move for an order that judgment be entered in favor of Smith and CFI and against Plaintiff Marie Campos for claims as prayed for in plaintiffs First Amended Complaint ("FAC"). The motion is made on the grounds that the action has no merit, there is no triable issue of material fact as to these Defendants and Smith and CFI are entitled to judgment as a matter of law. In the alternative, Defendants Smith and CFI will, and hereby do, move for an order granting summary adjudication in favor of Defendants Smith and CFI and against Plaintiff Marie Campos as to Plaintiffs First, Second and Third Causes of Action and Plaintiffs claim for punitive damages. The alternative motion is made on the grounds that there is no merit to these three causes of action or the claim for punitive damages.

The motion and alternative motion are based on this notice of motion and motion, the attached declaration of Gilbert Smith with exhibits, the concurrently filed separate statement of undisputed material facts, the attached supporting memorandum, the papers, records, and file herein, and such evidence as may be presented at the hearing of the motion.

Dated: October 27, 2014

Dave Lenny, Esq.

Attorney for Defendants Gilbert Smith and Centaurus **Financial** Inc.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

Defendants Smith and CFI may move for summary judgment or adjudication when they contend as they do here that the action has no merit, there is no triable issue of material fact as to these defendants, and they are entitled to judgment as a matter of law.

I. FACTS

This case is brought by Plaintiff Marie Campos against Defendants alleging that Defendants unduly influenced the late Custodio Campos into changing the beneficiaries on his IRA account and pension plan from his children to his second wife, Defendant

Teresa Campos. There is no dispute that Defendant Teresa Campos' late husband Custodio Campos had an IRA account with Defendant Centaurus **Financial**, Inc., or that Defendant Gilbert Smith was the registered representative handling the account for CFI. There is also no dispute that on June 17, 2014 Smith visited Mr. Campos at his home, where Mr. Campos signed a change of beneficiary form for that account, changing the beneficiaries from Mr. Campos' three children to his second wife, Teresa Campos. Mr. Campos also signed an updated New Account Form.

Plaintiff complains that Defendant Campos essentially "subjugated the mind of Mr. Campos to her will, having the effect of overcoming Mr. Campos' free agency and constraining him to make a disposition of his retirement accounts contrary and different from what he would have done had he been permitted to follow his own inclination," and "forced her will on Mr. Campos to name her as his sole beneficiary for his retirement accounts." FAC par. 27. The allegations in the FAC directed at Smith/CFI are:
12. For the many years prior to the final week of his life, Mr. Campos had maintained his three children as the primary beneficiaries of all of his retirement accounts, including the Pershing Account and the Pension account.

13. Approximately four days before his death, *Defendant Teresa* Campos summoned Defendant Smith to the house and advised him that Mr. Campos wished to make changes to his beneficiary designation, despite the fact that at that time, Mr. Campos was completely bedridden and the cancer had so severely affected Mr. Campos' vocal chords that he could not speak.

14. On the afternoon of June 17, 2013, and in response to Defendant Teresa Campos's summons, Defendant Smith visited decedent's home and found him propped up in bed staring blankly at a television that was displaying a movie without any sound.

15. Plaintiff is further informed and believes, and on that basis alleges that Defendant Smith observed various medications at decedent's bedside but did not inquire what the medications were, when decedent had last taken any medication or what effects said medications might have on decedent's ability to comprehend what was occurring

16. Defendant Campos advised Defendant Smith that Mr. Campos wished to change his various accounts to make her his sole beneficiary.

17. At the time that Defendant Campos arranged for the visit from Defendant Smith, Defendant Campos was aware of Mr. Campos' extremely weakened condition.

18. At the time that Defendant Smith entered decedent's bedroom on the afternoon of June 17, 2013, Defendant Smith was aware of decedent's extremely weakened condition.

19. Plaintiff is informed and believes that the only effort that Defendant Smith made to determine decedent's capacity to understand and comprehend the nature of the actions being taken was decedent's written response to three extremely basic questions, which responses consisted of a total of four words.

20. Plaintiff is further informed and believes that all communications with decedent occurred with Defendant Campos in the room and in close proximity to decedent.

Plaintiff finally alleges Mr. Campos "lacked the requisite mental capacity to understand the nature of the changes being made." FAC par. 26. The FAC also alleges in pars. 22-26 that Smith came out to the house to visit Mr. Campos a second time three days later on June 20, 2013 to "roll over the Pension Account into the Pershing Account." But, the undisputed facts are as follows:

Defendant Smith is a security licensed registered representative of CFI, a licensed broker-dealer. In this capacity, he was the appointed registered representative on the IRA brokerage account registered with CFI in the name of Custodio Campos. Pershing LLC served in the capacity of account administrator and custodian. Statement of Undisputed Facts ("SUF"), Fact #1 ("1"). On

the morning of June 17, 2013, he received a phone call from a lady who identified herself as Teresa Campos ("Teresa"), the wife of his client Custodio Campos. Up until the time of this call, Smith was not aware that his client Custodio had recently re-married. Smith had never met nor heard of Teresa Campos before this phone call. SUF 2.

Teresa Campos told him that she was calling him at her husband Custodio's request for the purpose of initiating an IRA beneficiary change to his Pershing administered brokerage account account number XXXXXXXXX) She told Smith that up until now she had no knowledge as to any of Custodio's personal **financial** affairs, but that Custodio had given her Smith's business card, and requested that she call him on his behest to initiate this account beneficiary change. She further informed Smith that he needed to execute this beneficiary change as soon as possible, as Custodio was at home in bed dying from an advanced form of cancer that had spread to his vocal cords. SUF 3.

Because of his rapidly deteriorating health condition, Teresa requested that it would be very much appreciated if Smith could bring the form to their house that very afternoon so that it could be executed and filed. Because of the sensitivity of the issue, Smith next asked Teresa Campos to comment on Mr. Campos' current mental state and whether he was able to make an informed decision in executing this form. Teresa assured Smith that her husband Custodio was fully conscious, responsive, and of clear-mind, and therefore in her view fully capable of making an informed, independent decision regarding this important matter. SUF 4.

Smith next asked her if he could speak to Custodio over the phone to verify that this was indeed his intent. Teresa said that he could not actually speak with Smith since the cancer had so affected his vocal cords that it had taken away this ability to speak, but that he was aware and capable of writing, making gestures as well as guttural sounds with his throat in response to questions. SUF 5. Smith ended the phone conversation by telling her he would drive out to her home with the required form that very afternoon because of the apparent time urgency of the matter, and requested that she provide him a copy of their marriage certificate to verify their marriage. She said she would provide him a copy upon his arrival, which she did. Attached as Exhibit A is a true and correct copy of the marriage certificate she gave Smith when he went to Mr. Campos' house. SUF 6; Exhibit A.

Smith arrived at the Campos' residence that afternoon at approximately 2-2:30 p.m. The door was answered by Teresa Campos, who invited him into their home. SUF 7. Upon entering the home's living room, Smith observed his client Custodio Campos sitting upright in a bed (with his back supported by pillows), staring at a television that was displaying a movie without any sound. Smith then called out his name, and Mr. Campos then looked over, made eye contact with Smith, nodding his head in Smith's direction, and made a guttural noise, all of which Smith interpreted as a sign of recognition. SUF 8.

Smith next proceed to tell Mr. Campos that he had come to visit him at his request (as relayed to Smith by his wife Teresa) for the primary purpose of having him execute a new, updated beneficiary to his IRA brokerage account, and that this change would name Teresa as the account's sole beneficiary at the time of his death. Additionally, Smith needed to have him sign an updated Centaurus Client Agreement. SUF 9.

Since Mr. Campos could not speak, Smith knew he had a responsibility to attempt to judge both Mr. Campos' clarity of mind and his awareness of the purpose of his action in executing the beneficiary designation on his IRA account prior to having him sign the document. If he could not complete the answers on this form, it was Smith's intent to just leave the beneficiary change form, but not witness its execution, as change of beneficiary forms are most often sent to the customer and returned signed via mail. SUF 10. For this intended purpose, Smith told Mr. Campos that he had brought a separate prepared page of paper, where Smith asked a series of questions that he needed to answer in his own handwriting, before Smith would present him the account's beneficiary form for his signature. The questions asked him: (1) to identify Smith by name; (2) to identify the type of account Smith was handling for him; and, (3) to state if it was his intent to make a beneficiary change on this account. Smith informed Custodio that the purpose of these questions were for Smith to satisfy himself that he was capable of understanding the intent and significance of the document he was going to be signing, before actually having him sign the document. SUF 11.

Smith first verbally read him the three questions that the form would ask, and then Smith handed him the form with a pen, which he next proceeded to read, answer in pen, sign, and hand back to Smith. Smith read his correct responses on the form, which satisfied him that he was of sufficient clear mind to understand both the intent of the meeting, and the purpose of the beneficiary change form he was going to next sign. SUF 12; Exhibit B. Before handing the actual new account beneficiary form to Mr. Campos, Smith told him that he was about to hand him a beneficiary form on his IRA account which would be naming his wife Teresa as the sole beneficiary of his account to the exclusion of his children. Before handing him the form, Smith first asked him verbally if this was his desired intent. He looked at Smith, nodded his head and made a grunting noise with his throat which Smith interpreted through this body language and sound as his agreement. SUF 13.

Smith next proceeded to fill in Teresa Campos' name, address, social security number, and other pertinent information on the form listing her as the sole account beneficiary, and then handed Mr. Campos the beneficiary designation form, which he signed and handed back to Smith. Smith next reviewed the pertinent details of the updated client agreement with him, and had him additionally sign this form. SUF 14. This concluded Smith's business, so he said good-by to Custodio Campos for what turned out to be the last time. Smith told Mr. Campos' wife Teresa that he would fax the account's beneficiary form into Centaurus **Financial** Inc. when he returned to his office for their processing and forwarding to Pershing LLC, the account administrator and trustee. Upon returning to his office, Smith completed the last step of his involvement by faxing the form. SUF 15. During the entire time Smith was there on June 17, 2013, only Mr. and Mrs. Campos and Smith were present. While he was there Smith did not observe Teresa Campos doing anything other than watching while Smith conducted his business with Mr. Campos. SUF 16.

Smith returned to the Campos home one more time on June 20, 2013 prior to his death together with his son Trevor Smith, a licensed notary, at the request of Mrs. Campos. The purpose of this visit was for his son to witness Teresa Campos' signature on a union pension plan beneficiary election form document from a prior employer of Mr. Campos, which dealt with her optionally receiving either a lump sum or installment payout payment from the plan at Mr. Campos's death. The form she produced had previously been signed by Mr. Campos, but apparently not yet filed with the union. She signed the form where specified and Trevor Smith witnessed and notarized her signature. On conclusion of this action, Mr. Smith and his son both left the house together leaving the document in her possession. Neither his son nor Mr. Smith interacted with Mr. Campos, nor did they obtain or witness his signature on any document during the brief visit. SUF 17.

II. LEGAL ISSUES

A defendant may move for summary judgment in any action or proceeding if it is contended that the action has no merit (Code Civ. Proc. § 437c(a)). A cause of action has no merit if (1) one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, or (2) a defendant establishes an affirmative defense to the cause of action (Code Civ. Proc. § 437c(o)). The motion shall be granted if all of the papers submitted show that there is no triable issue as to any material fact and that defendant is entitled to a judgment as a matter of law (Code Civ. Proc. § 437c(c)). Defendant has met the burden of showing that a cause of action has no merit if the Defendant has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the Defendant has met that burden, the burden shifts to the Plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto (Code Civ. Proc. § 437c(p)(2); *see Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493. A moving defendant is not required to conclusively negate an element of the plaintiffs cause of action. All that is required is that the defendant show that one or more elements of the cause of action cannot be established by the plaintiff (Code Civ. Proc. § 437c(p)(2); *Aguilar*, 25 Cal. 4th @ 853. The defendant may do this by showing that the plaintiff does not possess and cannot reasonably obtain, needed evidence. *Aguilar* 25 Cal. 4th @ 854. When the only material issue presented is a question of law, it is appropriate for the trial court to resolve the legal issue and grant summary judgment. *Morales v. Fansler* (1989) 209 Cal. App. 3d 1581, 1584, 258 Cal. Rptr. 96.

A. DEFENDANTS SMITH/CFI DID NOT KNOWINGLY ASSIST DEFENDANT CAMPOS IN AN ALLEGED EFFORT TO APPROPRIATE DECEDENT'S FUNDS IN VIOLATION OF THE ELDER ABUSE STATUTE

The FAC at par. 34 alleges, "Defendant Smith, with knowledge of decedent's vulnerable condition, or with reckless disregard for the existence of such condition, knowingly assisted Defendant Campos with her efforts to redirect and appropriate decedent's funds for her own purposes." It further alleges "that the decedent lacked the mental capacity to comprehend the nature of his actions," FAC par. 35, and that Defendants including Smith/CFI made the changes with the "intent to benefit themselves..." FAC par. 36. As a result, they allege Smith/CFI engaged in "**financial elder abuse**."

The First Cause of Action for **Elder Abuse** against Centaurus and Mr. Smith should be dismissed because the pleadings establish that there was no **Financial Abuse**. The changing of names of the beneficiaries did not amount to a taking of Mr. Campos' property. The California **Elder Abuse** Act is set forth in Cal Wel & Inst Code ("WIC") §15600 et seq. (the "**Elder Abuse** Act"). Under the **Elder Abuse** Act, **Elder Abuse** may include various forms of conduct (e.g. physical **abuse**), WIC §15610.07, but the relevant conduct in this case is "**Financial Abuse**", which is specifically defined in §15610.30 (the "**Financial Abuse** Provision").

Under the **Financial Abuse** Provision, the type of actionable conduct all refers to taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder**, obviously none of which occurred here. By definition, a beneficiary designation is not taking anything from an **elder** as the beneficiary designation only becomes relevant after the **elder** has passed away. Even if the changing of names of the beneficiaries amounted to a taking of Mr. Campos' property, the First Cause of Action for **Elder Abuse** against Smith and CFI should be dismissed because the pleadings establish that there was no **Financial Abuse**. Centaurus/Mr. Smith did not assist in the taking of property for a wrongful use, with the *intent to defraud* or by undue influence.

The pleadings make clear that there is no dispute that Defendant Teresa Campos was the only one who received any property of an **Elder**. So there is no dispute that Smith/CFI did not take or receive personal property. The only real issue is whether they are liable for **Financial Abuse** if they "assisted" in taking an **Elder's** personal property. To do so, they would have to have acted with a certain level of intent. Specifically, they would have had to have assisted for: (1) a wrongful use; (2) intent to defraud; or (3) by undue influence.

The pleadings do not allege that Centaurs/Smith knew of Mrs. Campos's wrongful conduct. The specific wrongful conduct is set forth in pars. 27 and 28, which allege that Defendant Campos used her position to overcome the decedent's free agency/ forced her will on him. The FAC does not allege that Smith knew of such misconduct—the closest that the Complaint gets to making the necessary allegation is found in pars. 34 and 35, but these paragraphs only discuss Smith's alleged awareness of Smith's vulnerable condition/mental capacity. The facts show that even if it was true that Smith was aware of the decedent's sickliness/lack of capacity, he was not aware that Mrs. Campos had used her position as caregiver to overcome the decedent's free will. The FAC is deficient because it does not allege that Smith actually knew that Mrs. Campos had used her position as caregiver to overcome the decedent's desire. The **Elder Abuse** remedies are designed to punish for wrongful conduct. If Smith did not have actual awareness of the fact that Defendant Campos allegedly had unduly influenced the decedent, then Smith is not the type of bad actor who the statute is designed to punish. Case law supports this argument.

"When a bank provides ordinary services that effectuate **financial abuse** by a third party, the bank may be found to have "assisted" the **financial abuse** only if it ***knew*** of the third party's wrongful conduct. W & I C § 15610.30, subd. (a)(2), as effective in 2006-2008, cannot be understood to impose strict liability for assistance in an act of **financial abuse**" [emphasis added]. *Das v. Bank of America, N.A.* (2010, 2d Dist) 186 Cal App 4th 727, 112 Cal Rptr 3d 439, 2010 Cal App LEXIS 1126, reh'g denied, *Das v. Bank of America* (2010, Cal. App. 2d Dist.) 2010 Cal. App. LEXIS 1291, review denied, Das (*Baishali) v. Bank of America, N.A.* (2010, Cal.) 2010 Cal. LEXIS 10159. Plaintiff in Das alleged "that respondent Bank of America, N.A., failed to report **financial abuse** involving her father (now deceased), and engaged in other misconduct regarding him," including taking advantage of his weakened mental state after a stroke. Further from *Das*, 186 Cal App 4th @ 744-745, 112 Cal Rptr 3d @ 453-454:

... The allegations fail to establish that respondent directly engaged in **financial abuse**. As effective during the pertinent events, subdivision (a)(1) of former section 15610.30 provided that **financial abuse** occurs when an entity "[t]akes, secretes, appropriates, or retains real or personal property of an **elder**...to [sic] a *wrongful use or with intent to defraud*, or both." (Italics added.) Subdivision (b) of former section 15610.30 further provided that "bad faith" was sufficient to satisfy the italicized condition. Nothing in appellant's complaints suggests that respondent, in issuing a loan to Kaustubh and transferring his funds at his request, obtained his property for an improper use, or acted in bad faith or with a fraudulent intent.

Furthermore, we conclude that the allegations fail to establish that respondent ***assisted*** in **financial abuse** by third parties. As effective during the pertinent events, subdivision (a)(2) of former section 15610.30 provided that **financial abuse** occurs when an entity "[a]ssists in taking, secreting, appropriating, or retaining real or personal property of an **elder** to [sic] a wrongful use or with intent to defraud, or both." As the **elder abuse** statutes do not define the term "assists," and no court has addressed the meaning of the term, we confront a question of statutory interpretation [emphasis added].

In our view, the provision cannot be understood to impose strict liability for assistance in an act of **financial abuse**. Generally, "California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. 'Liability may...be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citations.]' *"(Casey, supra, 127 Cal.App.4th at p. 1144, quoting Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1325-1326 [58 Cal. Rptr. 2d 308].*

As the Legislature is presumed to be aware of existing judicial decisions when it enacts or amends statutes, the term "[a]ssists," as found in former section 15610.30, subdivision (a)(2), is properly interpreted in light of the rule. *Bradley v. Breen* (1999) 73 Cal.App.4th 798, 804, 86 Cal. Rptr. 2d 726. Under that rule, a bank may be liable as an aider and abettor of a tort if the bank, in providing ordinary services, actually knew those transactions were assisting the customer in committing a specific tort." *Casey, supra,* 127 Cal.App.4th at p. 1145. We thus conclude that when, as here, a bank provides ordinary services that effectuate **financial abuse** by a third party, the bank may be found to have "assisted" the **financial abuse** only if it knew of the third party's wrongful conduct. [11]

Footnote 11: We find additional support for this conclusion in *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 83 Cal. Rptr. 3d 877. There, an attorney represented an **elderly** client and a third party posing as the **elderly** client's nephew in a series of transactions that enriched the third party at the expense of the **elderly** client. (*Id. at pp. 158-159.*) Following a trial, a judgment was entered against the attorney that included a fee award under section *15657.5.* (*167 Cal.App.4th at pp. 164-165.*) On appeal, the attorney contended that the fee award was improper because there was no evidence that he had "knowingly assisted" the third party's **financial abuse**. (Ibid.) In affirming the judgment, the appellate court concluded there was sufficient evidence that the attorney knew that the third party was taking the **elder's** funds for an improper purpose. (*Ibid.*)

Because appellant has not alleged that respondent knew about the schemes that victimized her father, she has failed to allege that respondent assisted in **financial abuse** under section *15610.30.* As explained in Casey, "on demurrer, a court must carefully scrutinize whether the plaintiff has alleged the bank had actual knowledge of the underlying wrong it purportedly aided and abetted." (*Casey, supra, 127 Cal.App.4th at p. 1152.*) In sum, the demurrers to her complaints were properly sustained.

Das thus stands for the proposition that Smith/CFI can only be liable if they actually knew of Mrs. Campos' alleged (mis)conduct. The Das case is clear that the actual knowledge goes to the knowledge of the wrongful conduct, not knowledge of the decedent's state of mind. There is no such evidence here, so the first cause of action for **elder abuse** must fail.

B. DEFENDANTS SMITH/CFI DID NOT INTENTIONALLY INTERFERE WITH PLAINTIFF'S EXPECTED INHERITANCE

The only additional allegation in the 2nd Cause of Action for Intentional Interference with Expected Inheritance("IIEI") is that the "changes were obtained by undue influence, fraud and duress exercised by Defendants." FAC par. 39. Regardless, Plaintiff does not allege, nor do the facts support, a claim for IIEI. The cause of action for IIEI was basically "invented" in California two years ago in *Beckwith v Dahl* (2012 Ct App 4th Dist.) 205 Cal. App. 4th 1039, 1057-1059; 141 Cal. Rptr. 3d 142, 157-158; 2012 Cal. App. LEXIS 528:

To state a claim for IIEI, a plaintiff must allege five distinct elements [citations omitted]. First, the plaintiff must plead he had an expectancy of an inheritance. It is not necessary to allege that "one is in fact named as a beneficiary in the will or that one has been devised the particular property at issue. [Citation.] That requirement would defeat the purpose of an expectancy claim.... It is only the expectation that one will receive some interest that gives rise to a cause of action. [Citations.]" Second, as in other interference torts, the complaint must allege causation. "This means that, as in other cases involving recovery for loss of expectancies ... there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator... if there had been no such interference." (Rest.2d Torts, § 774B, com. d, p. 59.) Third, ***the plaintiff must plead intent,*** i.e., that the *defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it.* [Citations omitted]. Fourth, the complaint must allege that the interference was conducted by ***independently tortious means,*** i.e., the underlying conduct must be wrong for some reason other than the fact of the interference. (*Doughty v. Morris* (Ct. App. 1994) 117 N.M. 284, 871 P.2d 380, 383-384. Finally, the plaintiff must plead he was damaged by the defendant's interference [Citations omitted].

Additionally, an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff. The cases firmly indicate a requirement that "[t]he fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is." [Citations omitted]. In other words, the defendant's tortious conduct must have induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance. (Rest.2d Torts, § 774B, com. b, p. 58; see *Schilling v. Herrera* (Fla. Dist. Ct. App. 2007) 952 So.2d 1231 [defendant unduly influenced testator to execute a new will in her favor]; *Cardenas v. Schober* (2001) 2001 PA Super 253 [783 A.2d 317, 326] [defendant's intentional failure to adhere to an agreement he made with testator to draft a will in favor of the plaintiffs constituted fraud and supported a claim for intentional interference with expected inheritance].) Even in the relatively few IIEI cases we found where the defendant's wrongful conduct was directed at someone other than the testator, the defendant's interference was never directed only at the plaintiff. (See *Allen, supra,* 974 P.2d at p. 205 [defendant interfered with testator's attempts to change his will by falsely telling testator's attorney testator was not lucid].)

Here, Beckwith alleged he had an expectancy in MacGinnis's estate that would have been realized but for Dahl's intentional interference. However, Beckwith did not allege Dahl directed any independently tortious conduct at MacGinnis. The only wrongful conduct alleged in Beckwith's complaint was Dahl's false promise to him. Accordingly, Beckwith's complaint failed to sufficiently allege the IIEI tort [emphasis added].

Here, we have a similar situation. There are no facts which show either intent by Defendants to injure Plaintiff or decedent, or was there any independently tortious conduct directed at decedent. Even allegations of "aiding and abetting" an intentional tort are inapplicable here. In *American Master Lease LLC v. Idanta Partners, Ltd.* (Cal. App. 2d Dist. 2014) 225 Cal. App. 4th 1451, 1475) the court said:

California law, however, does not treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly. In *Casey v. U.S. Bank Nat. Assn., supra,* 127 Cal.App.4th 1138, on which the trial court relied, a trustee in bankruptcy sued three banks, alleging that they aided and abetted the fiduciaries of the bankrupt corporation in a scheme to divert funds from the corporation. One of the causes of action was aiding and abetting a breach of fiduciary duty. (Id. at pp. 1141-1142.)... [Citations omitted]. The court in Casey observed that, "California has adopted the common law rule for subjecting a defendant to

liability for aiding and abetting a tort. "'Liability may ...be imposed on one who aids and abets the commission of an intentional tort if the person (a) **knows the other's conduct constitutes a breach of duty** and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and **the person's own conduct, separately considered, constitutes a breach of duty** to the third person." [Citations.]' [Citation.]" (Casey, supra, at p. 1144.)14

There are no facts here which support either of those described situations. For these reasons, the second cause of action for IIEI must fail.

C. DEFENDANTS SMITH/CFI WERE NOT NEGLIGENT

Plaintiff alleges Defendants Smith/CFI were negligent in "allowing a change in beneficiaries while decedent was on his deathbed, without an adequate investigation as to whether decedent had the capacity to knowingly make such decisions, and assisting in the transfer of assets from decedent's pension account into his Pershing account even after Defendants were advised that decedent had been found by at least one other professional to be incompetent to make knowing and intelligent decisions." FAC par. 46.

These generalized statements regarding an "alleged" mental incapacity or "physical impairment" are insufficient to allege negligence. There is no duty on a brokerage firm to do an analysis of "mental capacity" or investigate "medications" lying by the bed. Smith's conduct showed a reasonable effort to evaluate decedent's ability to understand the document he was signing and its effect, and there is not any contrary evidence. In Das v. Bank of America, N.A., supra, 186 Cal App 4th @ 742-743, 112 Cal Rptr 3d @ 452-453:

Appellant suggests that her allegations regarding her father's mental incapacity are sufficient to establish a claim for negligence or breach of fiduciary duty. Her complaints assert that Kaustubh's ability to manage his **finances** was substantially impaired, and that some of respondent's employees "wonder[ed] about... [his] mental state" when they carried out his instructions. Additionally, the first amended complaint specifically alleges that Kaustubh was of unsound mind within the meaning of Civil Code section 39, which states in pertinent part: "(a) A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission [pursuant to Civil Code section 1688 et seq.] (b) A rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist for purposes of this section if the person is substantially unable to manage his or her own **financial** resources or resist fraud or undue influence."

In our view, these allegations do not establish tortious misconduct by respondent because they fail to state even an adequate basis for rescission of a contract or transaction under common law principles. The fact that a person suffers from a measure of mental incapacity does not, by itself, extinguish the person's ability to participate in contractual relationships and transactions. *Burns v. Campbell* (1941) 17 Cal.2d 768, 773-775, 112 P.2d 237 [evidence of weakness of mind alone does not establish basis for rescission]; *Holman v. Stockton Sav. & Loan Bk.* (1942) 49 Cal.App.2d 500, 508, 122 P.2d 120 ["The law in this state is clear that senile dementia does not render one incapable of executing contracts or transacting business."].) 10 Civil Code section 1689, subdivision (b)(1), permits rescission of a contract when "the consent of the party rescinding" was "obtained through... undue influence, exercised by or with the connivance of the party as to whom he rescinds." Civil Code section 1575 further provides that "[u]ndue influence consists: [¶ [¶...[i] taking an unfair advantage of another's weakness of mind..."

To protect such an individual, California law provides for the establishment of a conservatorship. (Prob. Code, § 1400 et seq.) In view of these principles, "undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure ...." [Citations omitted]. Accordingly, to state a claim for rescission, the plaintiff must ordinarily allege that the party against whom rescission is sought took some advantage of the mental weakness or incapacity of the other party [Citations omitted]. Here, appellant's complaints do not allege that respondent improperly pressured her father to secure a loan or transfer his funds. In sum, appellant's allegations establish no claim against respondent on a legal basis outside the **elder abuse** statutes.

This describes the situation here. There are no facts which show "improper pressure," no facts from which Defendants Smith/CFI could ascertain any "mental incapacity" equivalent to that required for rescission of a contract, the applicable standard, nor any facts establishing some duty to determine ability to understand the documents other than what Smith did. For these reasons, the third cause of action for negligence also must fail.

D. DEFENDANTS SMITH/CFI ARE NOT LIABLE FOR PUNITIVE DAMAGES

Even if the **Elder** **Abuse** Cause of Action survives, Smith/CFI cannot be liable for punitive damages under Cal Wel & Inst Code Section 15657.5 for several reasons. The WIC §15657.5 (c) subsection focuses on punitive damages against employers for the acts of employees. Under this subsection, CFI can only be liable for punitive damages based on the conduct of Mr. Smith if it would be liable under §3294 of the Civil Code. So, potential liability for punitive damages under the **Elder** **Abuse** Act depends on whether Smith/CFI would be liable under §3294 of the Civil Code. Civil Code §3294(b) states:

> An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

Even if Smith was "unfit" CFI had no advance notice of such. But as to both Defendants, there are simply no facts as stated above that illustrate "intentional" or "reckless" intent to harm decedent. For those reasons, any punitive damages allegations must also fail.

Dated: October 27, 2014

Dave Lenny, Esq.

Attorney for Defendants

Gilbert Smith and Centaurus **Financial** Inc.

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