2014 WL 5308815 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Yolanda CARRANCO, et al,
v.
COUNTY OF VENTURA, et al.

No. 56201300436522.
January 16, 2014.

Date: February 28, 2014
Time: 8:30 a.m.
Dept: 20
Reservation: 1912898
[Complaint filed May 15, 2013]

Notice of Demurrer and Demurrer of Defendant Traditions Psychology Group, Inc. dba Traditions Behavioral Health to Plaintiffs' Second Amended Complaint; Memorandum of Points and Authorities; Exhibits

Bradley C. Clark, Esq. (SBN 108933), bclark@schmidvoiles.com, Julia E. Murray, Esq. (SBN 126077), jmurray@schmidvoiles.com, Schmid & Voiles, 333 South Hope Street, 8th Floor, Los Angeles, CA 90071, Tel: (213) 473-8700/ fax: (213) 473-8777, for defendant, Traditions Psychology Group, Inc. dba Traditions Behavioral Health.

(Dept. 20; the Honorable Barbara A. Lane, Presiding).

TABLE OF CONTENTS

INTRODUCTION 1
SUMMARY OF RELEVANT ALLEGATIONS 1
SUMMARY OF ARGUMENT 2
1. CALIFORNIA LAW DOES NOT RECOGNIZE A LEGAL DUTY TO PREVENT ANOTHER'S SELF-INFLICTED HARM ABSENT A LEGALLY RECOGNIZED “SPECIAL RELATIONSHIP” 3
2. ONLY ONE COUNT OF (PROFESSIONAL) NEGLIGENCE CAN FLOW FROM ALLEGATIONS AGAINST TRADITIONS, A HEALTH CARE PROVIDER 7
A. The Supreme Court Prohibits Dual Negligence Theories Against Health Care Providers (1st & 2nd COA's and Survival 3rd COA) 7
B. TRADITIONS is a “Health Care Provider” Under MICRA 8
C. TRADITIONS was Sued for “Professional Negligence” for Purposes of MICRA - that Decedent was not a Patient is Irrelevant 8
3. THE MOTHER DID NOT OBSERVE THE HANGING, ONLY ITS AFTERMATH - SHE CANNOT RECOVER FOR NIED (4th COA) 10
4. DEPENDENT ADULT ABUSE IS NOT AND CANNOT BE PLEADED (5th COA) 12
CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Bellah v. Greenson (1978) 81 Cal.App.3d 614 5
Benun v. Superior Court (2004) 123 Cal.App.4th 113 16
Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396 16
Consumer Cause, Inc. v. Weider Nutrition Intntl., Inc. (2002) 92 Cal.App.4th 363 14

Country Villa Claremont Healthcare Center, Inc. v. Superior Court (2004) 120 Cal.App.4th 426 16
Covenant Care, Inc. v. Superior Court (2004) 32 Cal.4th 771 ..... 15, 16
Delaney v. Baker (1999) 20 Cal.4th 23 15
Ebarb v. Woodbridge Park Assn., Inc. (1985) 164 Cal.App.3d 781 13
Flowers v. Torrance Memorial Hospital (1994) 8 Cal.4th 992 ..... 8, 9
Gallanis-Politis v. Medina (2007) 152 Cal.App.4th 600 3
Hurlbut v. Sonora Community Hospital (1989) 207 Cal.App.3d 388. ..... 12, 13
Johnson v. Superior Court (2002) 101 Cal.App.4th 869 9
Kockelman v. Segal (1998) 61 Cal.App.4th 491 5
Meier v. Ross General Hospital (1968) 69 Cal.2d 420 ..... 4, 7
Nally v. Grace Community Church (1988) 47 Cal.3d 278 ..... 4, 7, 8
Ochoa v. Superior Court (1985) 39 Cal. 3d 159 13
Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917 9
Smith v. Ben Bennett, Inc., (2005) 133 Cal. App. 4th 1507 16
Thing v. La Chusa (1989) 48 Cal. 3d 644 11
Vistica v. Presbyterian Hospital (1967) 67 Cal.2d 465 ..... 4, 7
Williams v. Superior Court (1994) 30 Cal.App.4th 318 10

Statutes

Business & Professions Code § 6146 9
Civil Code § 3333.1 9
Code of Civil Procedure § 1295 9
Code of Civil Procedure § 364 9
Code of Civil Procedure § 667.7 9
Welfare & Institutions Code § 15657 ..... 12, 14

TO THE PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 28, 2014 at 8:30 a.m., or as soon thereafter as the parties may be heard in Department 20 of the above court located at 800 South Victoria Avenue, Ventura, California, defendant TRADITIONS PSYCHOLOGY GROUP, INC. DBA TRADITIONS BEHAVIORAL HEALTH will demur to plaintiffs' second amended complaint ("SAC") on the following grounds:

THE FIRST CAUSE OF ACTION FOR MEDICAL NEGLIGENCE/WRONGFUL DEATH

1. Plaintiffs fail to state any viable claim because the defendant had no legal duty to prevent the decedent's suicide. (Code Civ. Proc., § 430.10, subd.(e));

THE SECOND CAUSE OF ACTION FOR NEGLIGENCE/PREMISES LIABILITY/WRONGFUL DEATH

2. Plaintiffs fail to state any viable claim because the defendant had no legal duty to prevent the decedent's suicide. (Code Civ. Proc., § 430.10, subd. (e));

THE THIRD CAUSE OF ACTION FOR NEGLIGENCE/SURVIVAL

3. Plaintiffs fail to state any viable claim because the defendant had no legal duty to prevent the decedent's suicide. (Code Civ. Proc., § 430.10, subd. (e));

THE FOURTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

4. Plaintiff Yolanda Carranco fails to state any viable claim because the defendant had no legal duty to prevent the decedent's suicide. (Code Civ. Proc., § 430.10, subd. (e));

THE FIFTH CAUSE OF ACTION FOR DEPENDENT ADULT ABUSE

5. Plaintiffs fail to state any viable claim because the defendant had no legal duty to prevent the decedent's suicide. (Code Civ. Proc., § 430.10, subd. (e)).

ALTERNATIVELY, IF DENIED ON THE ABOVE GROUNDS:

THE SECOND CAUSE OF ACTION FOR NEGLIGENCE/PREMISES LIABILITY/WRONGFUL DEATH

6. Plaintiffs fail to state facts sufficient to constitute a cause of action because a [general] negligence/premises liability claim cannot stand in addition to plaintiffs' first cause of action for medical negligence (C.C.P. § 430.10(e));

THE THIRD CAUSE OF ACTION FOR NEGLIGENCE/SURVIVAL

7. Plaintiffs' survival cause of action is uncertain as they fail to plead whether the survival action is premised on medical negligence or negligence/premises liability - plaintiffs cannot pursue both negligence theories against the defendant health care provider (see no. 6, supra), (C.C.P. § 430.10(f));

THE FOURTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

8. Plaintiff Yolanda Carranco fails to state facts sufficient to constitute a cause of action because she did not observe decedent self-inflict his injury and as such, she necessarily also lacked contemporaneous awareness that defendant's conduct or lack thereof was a cause of his harm (C.C.P. § 430.10(e));

THE FIFTH CAUSE OF ACTION FOR DEPENDENT ADULT ABUSE

9. Plaintiffs fail to particularly plead facts, and facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e)).

The demurrer is based on this Notice, the Memorandum of Points and Authorities, the Second Amended Complaint for Damages, the body of which attached as Exhibit "A" for the court's convenience, matters subject to judicial notice, and on any further oral and documentary evidence that may be presented prior to or at the hearing.

DATED: January 15, 2014 SCHMID & VOILES

By

BRADLEY C. CLARK, ESQ.

JULIA E. MURRAY, ESQ.

Attorneys for Defendant,

TRADITIONS PSYCHOLOGY GROUP, INC. DBA TRADITIONS BEHAVIORAL HEALTH

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This wrongful death/survival action is prosecuted by the parents of decedent Robert Rangel. The allegations concern his suicide by hanging in the men's restroom of Hillmont's waiting room. Plaintiffs allege defendant Traditions Psychology Group, Inc., doing business as Traditions Behavioral Health ("TRADITIONS") contracted with the County of Ventura to operate Hillmont Psychiatric Center ("Hillmont") (Exhibit "A", p. 2, ¶3.) [1]

Decedent was not a patient of Hillmont at the time of his suicide. He was the reception area with his mother, having been discharged from Hillmont's care the previous day. TRADITIONS' demurrer to plaintiff's first amended complaint, premised on Supreme Court precedent holding that no cause of action is recognized for the suicide of a person who is not an inpatient of the health care institution at the time, was sustained with leave to amend. [2] Hoping to circumvent this precedent, plaintiffs now allege Hillmont owed a duty to prevent his suicide based on an "outpatient relationship" created by an "ongoing course of treatment" because someone gave him a prescription for medication after he was discharged (p. 4:17-21). As shown below, plaintiffs' new allegations do not aid them.

SUMMARY OF RELEVANT ALLEGATIONS

Decedent was admitted as an inpatient at Hillmont on a 72-hour hold. He was discharged 5/29/12 (p. 4:1-2, 7). He was provided with a prescription for Risperidone by an unnamed person when he returned the date of his discharge (p. 4:7-11). The following day, 5/30/12, decedent and his mother returned to Hillmont where he "presented himself to the receptionist with the observation that the medication did not seem to be working" (p. 4:12-14). While in the waiting room, decedent used the restroom (p. 4:22-23). His mother became concerned after he was in the restroom longer than expected so she knocked on the locked door, and got no response (p. 4:21-25). She asked the receptionist for a key to the restroom and was told she had no keys, only maintenance could open the doors. The receptionist called maintenance, got no response, and said it was often difficult to get them to respond immediately to calls (pp. 4:27-28; 5:1-2). After about 15 minutes, two Hillmont workers picked the lock and opened the door (p. 5:3-4). As the door was opened, decedent could be seen, and was seen by his mother, hanging from the automatic door closing arm, having hanged himself with his shoelaces (p. 5:4-7). When it was discovered he still had a pulse, he was admitted to the hospital where he expired June 4, 2012 (p. 5:7-9).

SUMMARY OF ARGUMENT

Plaintiffs again assert a first cause of action ("COA") for wrongful death arising out of medical negligence; a second COA for wrongful death arising out of premises liability/ordinary negligence; a third COA, a survival action based on "negligence", a fourth COA for negligent infliction of emotional distress ("NIED"), and a fifth COA for Dependent Adult **Abuse**. TRADITIONS challenges them all, collectively and individually.

Absent a "special relationship" which in the case of a health care institution like Hillmont requires a custodial relationship (hospitalization/inpatient), California recognizes no legal duty to prevent a suicide, however foreseeable it may be. The allegations establish without dispute that plaintiff had been discharged from Hillmont the day before he returned to its premises and hanged himself. That he received a prescription after his discharge and/or that he was on the premises of Hillmont the next day is irrelevant - the salient fact is undisputed - he lacked inpatient status when he committed suicide, foreclosing recovery under all theories asserted.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Alternatively, only one COA can be stated against the defendant health care provider and that is for professional negligence (1 st COA), not general negligence (2nd & 3rd COA's). As to the NIED COA, Ms. Carranco did not see her son's hanging, only the aftermath 15 minutes later. Lacking "contemporaneous awareness" of both the injury and the defendant's conduct, she cannot recover. Finally, even if **elder abuse** [3] is deemed capable of standing alone (fn., 2, supra), California has never recognized such a claim by a discharged patient who is not in the custodial care of the health care institution.

1. CALIFORNIA LAW DOES NOT RECOGNIZE A LEGAL DUTY TO PREVENT ANOTHER'S SELF-INFLICTED HARM ABSENT A LEGALLY RECOGNIZED "SPECIAL RELATIONSHIP"

The gravamen of a complaint is synonymous with the "principal thrust" of its causes of action. (Gallanis-Politis v. Medina (2007) 152 Cal.App.4 th 600, 615.) While plaintiffs seek to recover on various legal theories, the gravamen of their complaint is the defendants' failure to prevent the decedent's suicide (pp. 5, ¶16; 7, 1¶25, ¶19; 8, ¶29). Rejecting the assertion that a non-therapist owed a duty to prevent the suicide of a person he had counseled, the Supreme Court stated: "'A tort, whether intentional or negligent, involves a violation of a legal duty, imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is "damnum absque injuria" - injury without wrong. [Citations.]' [ ] Thus, in order to prove facts sufficient to support a finding of negligence, a plaintiff must show that defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury. []." (Nally v. Grace Community Church (1988) 47 Cal.3d 278, 292-293; int. cits. omit.)

In Nally, the Supreme Court addressed its earlier decisions interpreting the "special relationship" rule in the setting of suicides in health care facilities. The court confirms a "special relationship" and thus a duty will be found when the individual is an inpatient receiving treatment. The court stated in language directly applicable here:
Although we have not previously addressed the issue presently before us, **we have imposed a duty to prevent a foreseeable suicide only when a special relationship existed between the suicidal individual and the defendant or its agents. For example,** *two cases imposed such a duty in wrongful death actions after plaintiffs proved that the deceased committed suicide in a hospital or other inpatient facility that had accepted the responsibility to care for and attend to the needs of the suicidal patient. (See Meier v. Ross General Hospital (1968) 69 Cal.2d 420 [71 Cal.Rptr. 903, 445 P.2d 519]; Vistica v. Presbyterian Hospital (1967) 67 Cal.2d 465 [62 Cal.Rptr. 577, 432 P.2d 193].) In Meier,* a cause of action for negligence was held to exist against both the treating psychiatrist and the hospital, and in Vistica, liability was imposed on the hospital alone, the only named defendant in the case. [¶]

Both Meier and Vistica address the issue of a special relationship, giving rise to a duty to take precautions to prevent suicide, in the limited context of hospital-patient relationships where the suicidal person died while under the care and custody of hospital physicians who were aware of the patient's unstable mental condition. In both cases, the patient committed suicide while confined in a hospital psychiatric ward. Liability was imposed because defendants failed to take precautions to prevent the patient's suicide even though the medical staff in charge of the patient's care knew that the patient was likely to attempt to take his own life. (*Nally v. Grace Community Church, supra,* 47 Cal.3d 278, 293-294; all emphasis added.)

Meier v. Ross General Hospital (1968) 69 Cal.2d 420 and *Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465 are dispositive. There is no dispute - decedent was not an inpatient confined in Hillmont when the suicide occurred. Rather, he committed suicide while using the restroom in the waiting room of Hillmont the day after his discharge (p. 4, ¶'s 10-11). The absence of an existing inpatient relationship with Hillmont at the time of the suicide precludes recovery.

Plaintiffs allege the conclusion that a "special relationship" existed because the decedent was given a prescription (by some unnamed person) after his discharge that he was to take (p. 4, ¶'s 10-12). They posit this created an "out-patient" relationship and an "ongoing course of treatment", which somehow should exempt them from the requirement that decedent be an inpatient at the time of the suicide. This confuses the two different "special relationship" tests that have evolved in the decisional law.

While a psychiatrist can be liable for a suicide of an out-patient based on the "special relationships" created by the doctor-patient relationship, an institution can be liable only for the foreseeable suicide of an inpatient while confined under the care of its doctors. This is illustrated in Kockelman v. Segal (1998) 61 Cal.App.4 th 491, a patient-psychiatrist "special relationship" case. In its analysis of *Bellah v. Greenson* (1978) 81 Cal.App.3d 614, the court recognized the difference between the "special relationship" in the doctor-patient relationship, i.e., that it can exist in an out-patient setting, versus that of an institution, where it does not:

The court first addressed the question whether the allegations were sufficient to state a cause of action for negligence. Citing Vistica and Meier, the court stated that "...the requisite special relationship does exist in the case of a patient under the care of a psychiatrist" and that "...a psychiatrist who knows that his patient is likely to attempt suicide has a duty to take preventive measures." (*Bellah v. Greenson, supra,* 81 Cal.App.3d at p. 619) **The court then distinguished Vistica and Meier on their facts, observing that "the duty imposed upon those responsible for the care of a patient in an institutional setting differs from that which may be involved in the case of a psychiatrist treating patients on an out-patient basis."** (Id. at p. 620.) (*Kockelman v. Segal, supra,* 61 Cal.App.4th 491, 501-502; bolding added.

Plaintiffs would disregard nearly 45 years of Supreme Court precedent requiring the decedent be confined as an inpatient and

expand it to find a "special relationship" based on the fact he was given a prescription by someone to take when he returned after his discharge from Hillmont's custody and care (p. 4:17-20). While such may evidence a "special relationship" continued to exist between the decedent and his treating psychiatrist while he was an "out-patient", it is insufficient as a matter of law to find a "special relationship" as between a former, discharged patient and a facility. Plaintiffs wrongly equate these distinct "special relationships" - unlike physician and patient where the duty arises by virtue of that relationship irrespective of the treatment setting, an institution's duty, and thus the "special relationship" begins with a custodial relationship and logically ends with termination of that relationship, upon discharge.

If, as plaintiffs assert, a duty were owed by an institution based on an "outpatient relationship" (p. 4:17-20), the duty of an institution to prevent another's self-inflicted harm as it has existed for nearly half a century would be abolished in favor of virtually limitless potential liability. Rather than being limited to inpatients, an institution would owe a duty to prevent the suicide of every former patient simply because he or she was prescribed medication by a physician after discharge. The law is otherwise.

That the decedent received medications at or after discharge and/or that he returned the day after discharge for any reason makes no difference; the facts remain - *he had been discharged* from Hillmont and was not an confined as an inpatient when he when returned to the waiting area the next day, went into the restroom, and hanged himself (p. 4, ¶f's 9-11). To paraphrase the Supreme Court, because there are no allegations that decedent attempted suicide while "under the care and custody of [Hillmont] physicians who were aware of the patient's unstable mental condition", plaintiffs cannot recover under any theory for a failure to prevent his self-inflicted harm. (*Nally v. Grace Community Church, supra,* 47 Cal.3d 278, 294.)

In further analyzing the allegations it is important to note that in assessing whether a duty to prevent a suicide is owed, the Supreme Court's duty analysis focuses exclusively on the *relationship* between the defendant and the injured person ***regardless*** of the degree of foreseeability (see pp. 5, ¶15, 10, 141). The foreseeability test was considered and rejected by the Supreme Court in the setting of suicide in favor of the "special relationship" test. (*Id.* at 293-294; *Meier v. Ross General Hospital, supra,* 69 Cal.2d 420; *Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465.)

In the words of the Supreme Court:

> Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm. (*Nally v. Grace Community Church, supra,* 47 Cal.3d 278, 297.)

Plaintiffs cannot meet the criteria necessary to recover for Robert Rangel's unfortunate suicide against TRADITIONS. The demurrer to the SAC should be sustained without leave to amend. The following arguments are presented ***in the alternative,*** in the event the court declines to sustain the demurrer as above.

2. ONLY ONE COUNT OF (PROFESSIONAL) NEGLIGENCE CAN FLOW FROM ALLEGATIONS AGAINST TRADITIONS, A HEALTH CARE PROVIDER

A. The Supreme Court Prohibits Dual Negligence Theories Against Health Care Providers (1st & 2nd COA's and Survival 3rd COA)

Plaintiffs advance a first COA for wrongful death based on medical negligence and a second COA for wrongful death based on general negligence on a theory of premises liability. The Supreme Court expressly prohibits dual negligence theories against a health care provider (*Flowers v. Torrance Memorial Hospital* (1994) 8 Cal.4th 992 "Flowers".) In Flowers, the Supreme Court rejected exactly what plaintiffs try to do here - pursue two theories of negligence against a health care provider based on the same set of facts. In *Flowers,* plaintiff sued health care providers for medical malpractice because she fell off a gurney under their care. The Supreme Court held the appellate court erred in finding that *both ordinary* and professional negligence could flow from the same set of facts:

> The Court of Appeal thus erred in finding plaintiff's pleadings 'broad enough' to state a cause of action for ordinary negligence as well as professional negligence. **This analysis necessarily implies that the same factual predicate can give rise to two independent obligations to exercise due care according to two different standards.** But this is a legal impossibility: a defendant has only one duty, measured by one standard of care, under any given circumstances." (*Flowers,* 8 Cal.4th 992, 1000; court's italics, bolding added.)

B. TRADITIONS is a "Health Care Provider" Under MICRA

Traditions Psychology Group, Inc., a medical group/corporation is a "health care provider" for purposes of MICRA. Palmer v. Superior Court (2002) 103 Cal.App.4th 953 held a medical corporation is a health care provider within the meaning of C.C.P. section 425.13, which governs the inclusion of a punitive damage claims in professional negligence. (*Id.* at pp. 962-967.) Section 425.13 uses the same definition of "health care provider" as MICRA and has a similar legislative purpose; therefore, the Legislature intended that "health care provider" have the same meaning in section 425.13 and MICRA. (*Johnson v. Superior Court* (2002) 101 Cal.App.4th 869, 877-879; *accord, Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 926.)

C. TRADITIONS was Sued for "Professional Negligence" for Purposes of MICRA - that Decedent was not a Patient is Irrelevant

The MICRA statutes each define "professional negligence" as follows: "Professional negligence' means a negligent rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Bus & Prof. Code § 6146, subd., (c)(3); Civ. Code, § 333.1 subd.; (c)(2), C.C.P. §§ 364, subd., (f)(2), 667.7, subd., (e)(4), 1295, subd., (g)(2).)

Plaintiffs allege that mother and son returned to Hillmont the day after his discharge with questions about the efficacy of his medication (p. 4:12-14). Though decedent was not a patient, he and his mother were on the premises of Hillmont for a medical purpose when he harmed himself. Under Flowers, plaintiffs can proceed under one theory of professional medical negligence

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

only. On point is Williams v. Superior Court (1994) 30 Cal.App.4 th 318 where the court held MICRA applicable to a business invitee injured on the premises of the defendant rehabilitation institute. Plaintiff was attacked by defendant's patient while drawing blood at the institute. She sued contending it was not "professional negligence" because no health care services were rendered to her; rather, she was a business invitee, and her case was based on premises liability and the institute's breach of its duty to exercise ordinary care and warn her of its patient's **abusive** behavior. The appellate court disagreed, finding her claim against the institute arose out of its functions, duties, and responsibilities as a hospital and was therefore "professional negligence", unaffected by plaintiff's status as a nonpatient. (Id. at 323.) This situation is more compelling. Unlike the Williams plaintiff who was not seeking treatment at the defendant institute, the decedent and his mother went to Hillmont for the purpose of obtaining medical care (p. 4, ¶ 11). Plaintiffs' claim, should it survive, is thus one for professional negligence only. The demurrer to the second COA for wrongful death based on premises liability should be sustained without leave to amend, and the ruling that this is "professional" negligence should apply to the third COA for survival based on "negligence".

3. THE MOTHER DID NOT OBSERVE THE HANGING, ONLY ITS AFTERMATH -SHE CANNOT RECOVER FOR NIED (4 th COA)

Again, TRADITIONS contends the parents cannot recover for decedent's suicide on any theory (Point 1 infra). Regardless, the plaintiff-mother does not satisfy the criteria necessary to proceed as an NIED bystander. In Thing v. La Chusa (1989) 48 Cal.3d 644, the Supreme Court established three mandatory requirements for bystander NIED claims: "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (Id. at 647; emphasis added.) In the absence of immediate presence at an injury-producing event, recovery is precluded. (Id. at 669.) In Thing, Ms. Thing rushed to the scene of a car accident where she saw her son, bloody and unconscious. She was denied NIED recovery because she saw her son bleeding in the street but did not see the car accident that injured him. Her observation of ongoing harm from the injurious event was not enough because she did not see the injurious event itself. Such is the posture of this case.

Like Ms. Thing, there is no dispute that the plaintiff did not witness the "accident", i.e., decedent hanging himself, the defining "injury" for purposes of her bystander recovery - that act occurred in the restroom behind a closed door. She had no way to know what was going on while her son was in the restroom hidden from her view. Though she suspected a problem when he was in the restroom longer than expected, she had no way to know he had hanged himself inside, he did so privately, unbeknownst to her. Like Ms. Thing, her failure to witness the injury means she lacked "contemporaneous awareness" of the injury and the connection between that injury and defendant's conduct. Her NIED recovery must be denied for the same reasons. Also illustrative of this point is Hurlbut v. Sonora Community Hospital (1989) 207 Cal.App.3d 388 where NIED recovery was denied to parents who became distressed seeing and hearing frantic medical personnel and medical measures directed to the pregnant plaintiff because they did not witness any injury inflicted upon the child:

There is an element of "certainty of injurious impact" necessary to establish the requisite sensory perception of the injury-producing event. [Cit. omit.] "Put simply, it is the contemporaneous perception of the *infliction of injury* on a closely related person that causes actionable emotional shock to a third party bystander. [Citation.] **Perception of endangerment, while potentially stressful, is insufficient to cause legally cognizable harm, for the stress has not yet ripened into disabling shock."** (*Id.* at 388, court's italics, bolding added.)

Such is what is alleged here. The plaintiff had a sense of anxiety when her son did not exit the restroom, but that sense of anxiety could not ripen into shock until the door opened and she visualized the after-effects of his self-inflicted injury some 15 minutes later (pp. 5, ¶14, 8, ¶32). As the court went on to observe in language directly applicable here:

Although the events described here were tragic, and undoubtedly caused a great deal of suffering for the parents, the facts do not justify a verdict under a *Dillon v. Legg theory.* [¶]...**The most that can be said is that certain experiences allowed the parents**

to "deduce" that some problem or injury had or would damage their child. There was no direct perception of injury. There is no evidence of any contemporaneous awareness that defendant's conduct was the cause of the prospective harm. It was not until after the fact that observations of the infant confirmed some injury. In *Ebarb v. Woodbridge Park Assn., Inc.* (1985) 164 Cal.App.3d 781, 785, 210 Cal.Rptr. 751, plaintiff argued that she was not required to be a percipient witness so long as she perceived the event "even if by deduction." The court concluded that plaintiff's deduction that her brother was dead based on the conduct of others was "not the type of 'perception' of the accident which allows recovery. It is merely a perception of the result of the accident, i.e., an example of 'learning of the accident from others after its occurrence."' (Id. at 399-400; bolding added.) While tragic, it is undeniable that Ms. Carranco was not a percipient witness to the hanging. Like the parents denied recovery in Hurlbut, she was anxious and distressed before the door was opened and feared there was a problem (pp. 4-5, ¶13); however, sensing or deducing a possible problem is not enough to recover without seeing the injury itself occur. She did not see her son until after his hanging was complete; it follows she could not possibly have been contemporaneously aware of any conduct by the defendants that facilitated that hanging which she did not know was occurring at the time. In accord with Hurlbut, quoting from the Supreme Court's decision in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 170: "Recovery is permitted where 'there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child,...[Cit. omit.] There was no evidence of such 'awareness' here."' (*Hurlbut v. Sonora Community Hospital, supra,* 207 Cal.App.3d 388, 399.) NIED recovery must likewise be denied here.

4. DEPENDENT ADULT ABUSE IS NOT AND CANNOT BE PLEADED (5th COA)

The **Elder Abuse** Act, Welf. & Inst. Code, § 15600 et seq., provides heightened remedies to a person who proves "by clear and convincing evidence" both that a defendant is liable for physical **abuse**, neglect, or **financial abuse** (as defined in the Act) and that the defendant is guilty of "recklessness, oppression, fraud, or malice" in the commission of such **abuse**. (Welf. & Inst. Code § 15657.) Neglect is defined in section 15610.57 as "[t]he negligent failure of any person having the care or custody of an **elder** or dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (*Id.,* subd. (a)(1); bolding added.) Even if plaintiffs had met their burden to plead **elder abuse** with particularity, which defendant disputes [4], their attempt to plead a custodial relationship by conclusion (p. 9:23-24) is belied by their factual allegations refuting it (p. 4, ¶'s 10-11). Specifically, the SAC shows without dispute decedent was not defendants' inpatient, he had been discharged the prior day and was on the premises as a business invitee on the date of his suicide (p. 4, ¶'s 10-11). Specific factual allegations control over conclusions to the contrary: "the assumption of truth [of properly pleaded allegations] does not apply to contentions, deductions, or conclusions of law and fact. (Consumer Cause, Inc. v. Weider Nutrition Intntl., Inc. (2002) 92 Cal.App.4th 363, 367.)

There is no California authority of which defendant is aware permitting a non-patient or non-inpatient to recover for dependent adult **abuse** against a health care provider merely because he is on their premises. Rather, the body of decisional law requiring a custodial (inpatient) relationship is too voluminous to detail. To the extent any doubt exists, the Supreme Court stated it twice in Delaney v. Baker (1999) 20 Cal.4th 23, describing "neglect" in terms of the defendant's responsibilities to the person: "the failure of those responsible for attending to the basic needs and comforts of **elderly** or dependent adults...to carry out their custodial obligations" (Id. at 34.) As the Supreme Court explained, "one of the primary purposes of section 15657 [is] to protect **elder** adults through the application of heightened remedies from being recklessly neglected at the hands of their custodians, which includes the nursing homes or other health care facilities in which they reside. (Id. at 42, italics added.) On revisiting the Act in *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 the Supreme Court stated it even more expressly: "statutory **elder abuse** include neglect as defined in Section 15610.57 (Welf. & Inst. Code, §15657), which in turn includes negligent failure of an **elder** custodian to provide medical case for [the **elder's**] physician and mental health needs." (Covenant Care, Inc. v. Superior Court, supra, 32 Cal.4th 771, 783, int. quots. and cits. omit, italics added.)

The Courts of Appeal have uniformly followed suit in acknowledging that liability in the case of an institutional provider requires an inpatient relationship which gives rise to custodial duties. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198

Cal.App.4 th 396 (responsibility for meeting basic patient needs); Country *Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426 at 432 (claims based on custodial neglect of SNF patient); *Benun v. Superior Court* (2004) 123 Cal.App.4th 113 at 123 (custodial obligations of nursing home); and *Smith v. Ben Bennett, Inc.,* (2005) 133 Cal.App.4th 1507 at 1522 (SNF patient the "custodian of an **elder**". As the Second District stated: "**Elder** **abuse** claims are unique...because they are based on custodial neglect rather than professional negligence." (*Country Villa Claremont Healthcare Center, Inc. v. Superior Court, supra,* 120 Cal.App.4th 426, 432.)

Because there was no custodial relationship there is no possible recovery for **elder** **abuse** - no authority would sanction any potential dependent **abuse**/neglect claim for Rangel, a discharged former inpatient, merely because he returned to its premises and/or because he was taking medication given to him after his discharge.

CONCLUSION

The Supreme Court has restricted tort recovery for a person's self-inflicted harm such as suicides. Unfortunate as such losses may

be, in the absence of a "special relationship", which here requires an inpatient under the care of the facility physicians, there can be no recovery under any theory. In the event the court believes **elder** could stand alone, it too fails regardless, and as a matter of law, for lack of custodial relationship. The demurrer to the SAC should be sustained without leave to amend. Alternatively, the individual causes of action are flawed as above - the demurrer should be sustained as prayed.

DATED: January *15,* 2014

SCHMID & VOILES

By

BRADLEY C. CLARK, ESQ.

JULIA E. MURRAY, ESQ.

Attorneys for Defendant,

TRADITIONS PSYCHOLOGY GROUP, INC. DBA TRADITIONS BEHAVIORAL HEALTH

Footnotes

1 All evidentiary references are to Exhibit "A" unless otherwise indicated.

2 A copy of the court's minute order is attached as Exhibit "B". While not entirely clear because the court took the matter under submission, it appears the court felt dependent adult **abuse** (5 th COA), which it ruled was not factually pleaded, could potentially be asserted.

3 References to "**elder** **abuse**" are for brevity, and are intended to be synonymous with "dependent adult" **abuse**.

4 The California Supreme Court reaffirmed the requirement in the context of the **elder** **abuse** act, that such statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc., v. Superior Court* (2004) 32 Cal.4th 771 at 790 citing *Lopez v. Southern Cal. Rapid Trans. Dist.* (1985) 40 Cal.3d 780, 795.)

End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works.