2012 WL 9457262 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Los Angeles County

Edward G. BORGONIA, Jr. as Administrator of the Estate of Irene Holzboog, Plaintiffs,
v.
ALTA LOS ANGELES HOSPITALS, INC. dba Norwalk Community Hospital; a California corporation; Alta Hospitals System, LLC, a California limited liability company; Bellagio Manor, Inc., a California corporation; D S Property Management, Inc., a California corporation; ANN Koshy, an individual; and Does 3 through 50, inclusive, Defendant,
Michael Holzboog, an individual, Charles Gonzales, an individual,
and Robert Lucero, an individual, Nominal Defendants.

No. VC057039.
December 6, 2012.

Plaintiff's Opposition to Defendants Alta Los Angeles Hospitals, Inc. and Alta Hospital System, LLC's Motion for Summary Judgment or in the Alternative for Summary Adjudication of Issues

Vickman & associates, James A. Vickman, Esq., (State Bar No. 128099), Martha Cohen, Esq., (State Bar No. 173639), 424 South Beverly Drive, Beverly Hills, California 90212-4414, (310) 553-8533 Facsimile (310) 553-0557, Attorney for Plaintiff Edward G. Borgonia, Jr.

Judge: Hon. Margaret M. Bernal.

[Complaint filed: August 23, 2010]

[Filed Concurrently With Plaintiff's Separate Statement of Disputed and Undisputed Material Facts, Declarations of David W. Trader, M.D., Angelique S. Campen, M.D., FACEP, Debbie Morikawa, RN, and James A. Vickman, Esq., Evidentiary Objections to Declaration of Joseph S. Englanoff, M.D., and [Proposed] Order Evidentiary Objections]

Date: December 20, 2012

Time: 1:30 p.m.

Dept: “C”

Trial Date: February 15, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Defendants Alta Los Angeles Hospitals, Inc. dba Norwalk Community Hospital (referred to herein as “NCH”) and Alta Hospitals Systems, LLC (referred to herein as “Alta Hospitals”) (and referred to collectively herein as “Alta”) seek summary judgment or alternatively summary adjudication of issues as to each of Plaintiff's claims on several grounds: (1) that Plaintiff's negligence, wrongful death and **elder abuse** claims all are time-barred under applicable statutes of limitations; (2) that Plaintiff cannot establish the requisite elements of negligence, wrongful death and negligence *per se* because Alta met the applicable standard of care in its treatment of the decedent, Irene Holzboog, and further that no act of Alta was the cause of any injury to her; (3) Plaintiff's **elder abuse** claim likewise lacks merit because Alta did not commit acts of **elder abuse** and neglect with respect to Ms. Holzboog; and finally (4) that either there was no contract between Ms. Holzboog and Alta or, if there was, it was not breached by Alta.

As an initial matter, Alta's motion should be summarily denied because the motion and supporting papers fail to comply with the requirement that Alta cite to and specifically identify the evidence on which they are relying to establish the nonexistence of any triable fact, as well as to individually paginate their evidentiary exhibits supporting the motion, as required by Cal. *Rules of Court* Rule 3.1350(d) and Cal. *Code Civ. Pro.* § 437c (b)(1). *See North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-31 (separate statement is to assist court in locating relevant evidence without having to dig through “a mound of paperwork filed with the court.”). If the Court opts not to deny the motion on this basis, then Plaintiff herein demonstrates that there is more than sufficient evidence to create triable issues of fact as to each of Plaintiff's causes of action, such that Defendants' motion must be denied in its entirety.

The record developed in this case, which includes substantial documentary evidence as well as deposition testimony of Alta witnesses, contains evidence that: (1) none of Plaintiff's claims are time-barred as a matter of law; (2) Alta did not satisfy the relevant standard of care in connection with its treatment and care of Ms. Holzboog; and (3) Alta engaged in acts constituting **elder abuse** and neglect with respect to Ms. Holzboog and did so recklessly, fraudulently, and with malice. Initially, Alta applies the incorrect statute of limitations to Plaintiff's wrongful death and negligence claims and then contends they are time-barred; however, neither claim is based on medical malpractice and both are subject to two-year statutes. Since these claims, along with Plaintiff's **elder abuse** claim, did not accrue until on or after Ms. Holzboog's death was discovered on September 4, 2008, none of these claims are time-barred.

Alta also has not satisfied its burden of showing the nonexistence of disputed material facts in connection with the merits of Plaintiff's negligence, wrongful death and **elder abuse** claims. Alta erroneously construes Plaintiff's negligence and wrongful death claims as ones for medical malpractice and thus argues that these claims fail because its medical treatment of Ms. Holzboog met the standard of care. Plaintiff's evidence is that Alta committed acts of **elder abuse** and neglect by (1) failing to properly assess and reassess Ms. Holzboog's medical condition and needs, (2) failing to provide her critical medical care and other services necessary to avoid physical harm and protection from health and safety hazards, (3) failing to notify either Ms. Holzboog's family or Bellagio Manor ("Bellagio"), the residential care facility for the **elderly** ("RCFE") where she then lived, of her elopement, (4) failing to competently notify the police of her elopement, and (5) failing to file a missing person's report or take other steps that would have ensured that a search for decedent immediately was undertaken. Further, the opinion of Alta's expert that the standard of care was met is incompetent and fails to consider significant portions of undisputed evidence that undermine and negate the expert's flimsy conclusions.

FACTUAL BACKGROUND

Plaintiff Edward G. Borgonia, Jr. (hereinafter "Plaintiff") has sued Alta in his capacity as the administrator of the Estate of the decedent, Irene Holzboog, who was Plaintiff's mother. Ms. Holzboog was sent to NCH, which is owned and operated by Alta Hospitals, on August 1, 2008 by Bellagio because her doctor, Dr. Richard Tafoya, who was a staff doctor at NCH as well as a "house doctor" at Bellagio [Separate Statement of Undisputed Material Facts ("SS"), ¶33] determined she was manifesting signs of altered mental status ("AMS") and required non-emergency treatment at NCH. [SS ¶34] At the time, Ms. Holzboog had been diagnosed as having dementia resulting from Alzheimers disease and was taking Aricept, a medication prescribed for dementia patients. [SS ¶35, 36] A representative of Bellagio contacted Kathy Navejas, a business development employee of Alta Hospitals, whose job included arranging transportation, at Alta's expense, of RCFE residents to one of the four hospitals owned and operated by her employer, including NCH. [SS ¶37] Ms. Holzboog already had been an in-patient at Hollywood Community Hospital ("HCH"), another Alta-owned facility twice that year, in February and June 2008 [SS ¶38], but on August 1, 2008 was sent to NCH, where she had never before been a patient.

Ms. Holzboog was transported to the hospital by an NCH van driven by non-medical personnel, and was neither accompanied by any attendant of Bellagio. nor met at the hospital by a family member. At NCH, Ms. Holzboog was not assessed by any hospital staff with respect to her dementia or age-specific concerns despite the fact that her NCH medical file contained documentation of her dementia diagnosis, and no medications were noted on her chart, despite the fact that her NCH file contained a record from Bellagio of all Ms. Holzboog's medications, including the dementia drug Aricept. [SS ¶39, 40. *See* Declaration of David W. Trader, M.D. ("Trader Decl."), ¶17] Nor did any NCH staff document or perform any assessments or interventions based on various behaviors manifested by Ms. Holzboog -- including without limitation (1) her inability to date her admissions forms or provide her place and year of birth, (2) her refusal to disrobe in order to wear a hospital gown, (3) her refusal to submit to certain medical procedures, (4) her inability to communicate in complete sentences, and, most significantly, (5) her restlessness and anxiety that increased as the day progressed, culminating in her constantly getting out of her assigned hospital bed, pacing back and forth, gesturing and looking toward the ER exit and, ultimately, eloping from the hospital without being stopped or detected by any NCH staff. [SS ¶¶ 41-46; Trader Decl. ¶ 18. *See also* Declaration of Debbie Morikawa, RN ("Morikawa Decl"), ¶¶ 5, 6, 9,10]

Although an NCH nurse called the Norwalk Sheriff's station to report that a patient had gone missing from the hospital, this report was false and deficient because the nurse - and had not been trained by NCH to competently and accurately report pursuant to any effective or written elopement policy in the ER [SS ¶41] -- failed to inform the Sheriff that a patient had eloped rather than left against medical advice, an entirely different type of departure [SS ¶48]. The nurse also did not ask the Sheriff to file a missing persons' report and did not provide the Sheriff with Ms. Holzboog's name. [SS ¶49] Nor did NCH communicate with Bellagio, the facility that had dispatched the decedent to NCH and was her legal residence, or any of Ms. Holzboog's family members to notify them that Ms. Holzboog had eloped from NCH. [SS ¶50 Morikawa Decl. ¶18]

After leaving Alta alone and without any hospital staff, or anyone else, Alta being immediately aware that she was gone, Ms. Holzboog's whereabouts and welfare were unknown to anyone for more than one month. It was not until September 4, 2008 that Ms. Holzboog was found dead behind a building within a few miles of NCH. By the time she was found, Ms. Holzboog had lost half her body weight. [SS ¶51]

Plaintiff contends that Alta's failures to take appropriate and necessary steps to properly assess Ms. Holzboog for conditions and behaviors that clearly indicated a risk of harm to herself including elopement, to provide services to keep her safe from health and safety hazards by closely supervising and monitoring her, and to promptly and timely advise Ms. Holzboog's family, Bellagio, the local police or various government agencies with responsibility for adult protective services that she had eloped, constitutes gross negligence as well as **elder** **abuse** and neglect and was committed recklessly and with malice and oppression.

LEGAL ARGUMENT

I. *ALTA FAILS ITS BURDEN OF PROVING THE NONEXISTENCE OF A TRIABLE ISSUE OF MATERIAL FACT WITH RESPECT TO ANY OF PLAINTIFF'S CLAIMS*

Alta's burden on moving for both summary judgment and summary adjudication is to show that, as a matter of law, Plaintiff cannot establish one or more of the elements of each challenged cause of action. Cal. *Code Civ. Pro.* § 437c(o)(l), (p)(2); *Aguilar v Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843. Only once Alta has made a *prima facie* showing of the nonexistence of *any* triable issue of material fact in connection with proof of the challenged claims does the burden shift to Plaintiff to demonstrate the existence of a triable fact question (although the burden of persuasion always remains with the moving party). *Id.* at 850-51. Alta's evidence, including the declaration of its expert Dr. Joseph Englanoff, is to be strictly construed by the Court, while evidence put forward by the Plaintiff is to be liberally construed. *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768. *See also Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64 (moving party's evidence strictly construed "to resolve any evidentiary doubts or ambiguities" in plaintiff's favor).

Since Alta has not met its burden of showing that *no* triable issue of material fact exists as to any of Plaintiff's claims, no further showing by Plaintiff is required. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468. However, if the Court determines that Alta has met its initial burden, Plaintiff herein demonstrates that there are myriad triable questions of material fact that preclude Alta from being entitled to judgment as a matter of law on any of Plaintiff's claims.

II. NONE OF PLAINTIFF'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

A. *Plaintiff's Negligence and Wrongful Death Claims Are Not Time-Barred Because They Are Not Based on Medical Malpractice and Were Timely Filed Within the Applicable Limitations Period*

Alta asserts that Plaintiff's negligence and wrongful death claims are time-barred under the statute of limitations contained in Cal. *Code Civ. Pro.* § 340.5 for claims against health care providers based on professional negligence in the rendering of any health care services. However, Plaintiff's wrongful death claim is based on Alta's acts of **elder** **abuse** and neglect and ordinary negligence.

The statute of limitations for wrongful death claims is two years. Cal. *Code Civ. Pro. §* 335.1 (applicable to "injury to, or for the death of, an individual caused by the wrongful act or neglect of another.") The general rule is that a cause of action accrues upon the occurrence of the last element essential to the cause of action under applicable substantive law. *See, e.g., Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897 (statute of limitations does not accrue until cause of action complete with all its elements, including injury). A claim for wrongful death accrues *on the date of death* (not on the date of the the wrongful act that caused the death). *Norgart v.Upjohn Co.* (1999) 21 Cal.4th 383, 404 ("it is only on the date of death that a wrongful death cause of action becomes complete with all of its elements ... "); *Boeken v. Philip Morris USA. Inc.* (2010) 48 Cal.4th 788, 807 (wrongful death action accrues on date of death regardless of time of pre-death injuries). According to the death certificate for Ms. Holzboog

issued by the State of California and the coroner's office, Ms. Holzboog's date of death was September 4, 2008. [SS ¶62] *See People v. Holder* (1964) 230 Cal.App.2d 50, 54 (date of death is a fact *proved prima facie* by death certificate); *In re Lenci's Estate* (1930) 106 Cal.App. 171, 174-75 (death certificate is *prima facie* evidence of facts therein stated). Thus, Plaintiff's cause of action for wrongful death accrued on September 4, 2008, was filed within the two year statute of limitations applicable to this claim, and is not time-barred.

Likewise, Plaintiff's negligence claim is governed by the same two-year statute of limitations and is not time-barred because it did not accrue until after Ms. Holzboog's death was discovered on September 4, 2008. Ms. Holzboog's claim is not based on Alta's professional negligence in the course of rendering health care services to her, but rather on Alta's multiple grossly negligent failures to both prevent and properly respond to Ms. Holzboog's elopement from NCH. Alta clearly was at least negligent, *inter alia*, in failing to notify either Bellagio or Ms. Holzboog's family of her elopement, failing to give the local police Ms. Holzboog's name and inform them that an **elder** with dementia had eloped, and failing to file a missing persons' report with the police for Ms. Holzboog. These acts of negligence which were substantial factors in causing Ms. Holzboog's injury and death were ordinary rather than professional negligence since they did not occur in the course of Alta's rendering of medical services to Ms. Holzboog. *Bellamy v. Appellate Department* (1996) 50 Cal.App.4th 797, 806 (not every negligent act or omission by a hospital causing a patient injury is professional negligence).

Also, a cause of action for negligence accrues upon the occurrence of the last essential element of the claim occurs. *Norgart*, 21 Cal.4th at 397; *Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 143. Damage to the plaintiff in the form of "appreciable and actual harm" is the last essential element of a cause of action for negligence. *Budd v. Nixen* (1971) 6 Cal.3d 195, 200 ("[t]he mere breach of a ... duty, causing only nominal damages, speculative harm, or the threat of future harm -- not yet realized -- does not suffice to create a cause of action for negligence."); *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 210 ("appreciable and actual harm" must be harm of the specific type that is recoverable as damages for negligence, *i.e.*, physical harm to a person). Here, since nothing was known of Ms. Holzboog's whereabouts or well-being after she eloped, there is no evidence of any appreciable physical harm to Ms. Holzboog until her body was discovered on September 4, 2011. *Davies v. Krasna* (1975) 14 Cal.3d 502, 514 (limitations period cannot commence to run before the plaintiff "possesses a true cause of action, by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.").

In addition, under the delayed discovery rule, a tort cause of action does not accrue for statute of limitations purposes until the plaintiff discovers or has reason to discover the existence of a complete cause of action with all of its elements, including harm. *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1150 (statute runs on occurrence of last element essential to cause of action except where manifestly unjust to deprive plaintiff of cause of action before he is aware of injury). Courts applying the discovery rule look to whether the plaintiff has an objective reason to understand that a type of wrongdoing has caused injury, and not merely a subjective suspicion. *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109-11 (statute of limitations does not commence running until Plaintiff "is aware of [his or] her injury and its negligent cause."); *E-Fab. Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308,1317-18 (when delayed discovery rule applies limitations period does not accrue until aggrieved party has notice of facts constituting the injury)

Here, application of the delayed discovery rule is necessary and appropriate because Plaintiff was not, and could not with the exercise of reasonable diligence, have been aware of any harm to the decedent until Ms. Holzboog's death was made known to her family on or about September 30, 2008 [SS ¶26], resulting in accrual of Plaintiff's negligence and **elder abuse** claims no earlier than that date. Although Alta contends that Plaintiff had actual or constructive knowledge of his claims as soon as the decedent's niece Debbie Mora was aware of Ms. Holzboog's disappearance on or about August 10 or 11, 2008, Alta apparently concedes that this event was not sufficient to trigger the statute of limitations (MS J at pp. 6-7), and thus alternatively argues that Plaintiff knew or should have known he had a claim against the hospital by the end of August 2008, by which time Plaintiff and his cousin had posted "missing person" fliers. [SS ¶25] Alta's contention that the Plaintiff's mere knowledge that his mother was missing and that she had last been seen at NCH was sufficient to put him on notice of a legal claim on Ms. Holzboog's behalf against NCH or Alta is illogical and has no legal basis. There is no evidence that, in August 2008, Plaintiff had any objectively

reasonable basis to know or to suspect: (1) any facts supporting any claim against Alta or NCH, (2) that NCH or anyone else was the cause of any harm to Ms. Holzboog or, indeed, (3) that in fact there had been any harm to Ms. Holzboog. *See Shivley v. Bozanich* (2003) 31 Cal.4th 1230,1237 (discovery rule most frequently applied to postpone accrual of cause of action when particularly difficult for plaintiff to understand or observe breach of duty); *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 6 (delayed discovery rule tolls statute of limitations during period when injury is difficult for plaintiff to detect). Indeed, despite their exercise of diligence in attempting to locate Ms. Holzboog, Plaintiff and his family were unable to obtain any facts about the circumstances of her disappearance (and, notably, Alta failed to provide them with any). All Plaintiff knew by mid-August was his mother was missing. This information was not sufficient to put Plaintiff on notice of any legal claim for harm to the decedent, against NCH, Alta or anyone else.

B. Plaintiff's Elder Abuse Claim Did Not Accrue until September 30, 2008 and Thus Is Not Time-barred

Alta correctly states that the statute of limitations applicable to **elder abuse** claims is the two-year statute contained in Cal. *Code Civ. Pro.* § 335.1,[1] but argues that the claim accrued and the statute commenced to run on August 1, 2008, when Ms. Holzboog first presented at NCH and any act of **elder abuse** occurred. This proposition -- made without legal citation or support ignores the wealth of authority set forth above that (1) a cause of action under California law accrues when *all* elements of the claim are complete and ascertainable, including the element of damage, and (2) under the delayed discovery rule, the limitations period does not commence until Plaintiff discovers all elements of the cause of action, including appreciable physical harm. As discussed, Ms. Holzboog's body was not discovered and thus her death not known until September 4, 2008 and Plaintiff did not know of the decedent's death or that any actionable harm to her had occurred until as late as September 30, 2008. [SS ¶ 26]. Prior to that time, there is simply no evidence, disputed or otherwise, that Plaintiff or any of Ms. Holzboog's other family members had any reason to believe she had been harmed in any way or that NCH was the possible cause of any harm to her, and Alta cites to none. Indeed, Alta concedes as a matter of undisputed fact that Plaintiff was not informed of Ms. Holzboog's death until September 30, 2008. *Id.* Having failed to receive any notification from Alta that Ms. Holzboog eloped or, in fact, any information about his mother's circumstances, the mere fact that at some point in August 2008 Plaintiff and other family members learned Ms. Holzboog was no longer at NCH was not sufficient to put them on notice that they had any legal claim for harm to Ms. Holzboog caused by **elder abuse** or neglect by Alta or anyone else.

C. The Statute of Limitations Was Tolled By the Decedent's Dementia

Under Cal. *Code Civ. Pro.* § 352, the statute of limitations for claims of negligence and **elder abuse** is tolled during the time period that a person entitled to bring such actions is “insane,” a condition that includes such mental defects or deficiencies as dementia. *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1027 (one incapable of transacting business or understanding the nature and effect of his or her actions is “insane” within meaning of §352). *See also Benun v. Sup. Ct.* (2004) 123 Cal.App.4th 113, 127 (tolling provision of §352(a) applies to **elder abuse** claims). Ms. Holzboog's dementia and Alzheimer's disease thus tolled the statute of limitations governing any claims she would have had after eloping from NCH during the period of her disability and until her death on September 4, 2008. Ms. Holzboog lacked sufficient mental capacity to understand and appreciate either her legal rights or the risk of leaving the hospital in August 2008. [SS ¶ 60; Trader Decl. ¶¶19, 20] As a result, decedent's survival claims for negligence and **elder abuse** also are not time-barred because they did not accrue until at least the date of her death when her mental incapacity no longer was operative to toll the statute under Section 352.

III. ALTA'S NEGLIGENT TREATMENT OF MS. HOLZBOOG FELL FAR SHORT OF THE APPLICABLE STANDARD OF CARE AND DIRECTLY CAUSED HER DEATH

Alta proffers the opinion of Dr. Joseph Englanoff to establish that Alta met the standard of care in treating Ms. Holzboog and thus Plaintiff's negligence and wrongful death claims lack merit. As an initial matter, the premise for this argument -- that Plaintiff's claims are based on Alta's professional negligence and thus are foreclosed because the medical services actually rendered to the decedent by NCH met the applicable standard of care -- is incorrect. As discussed above, Plaintiff's claim for

the decedent's wrongful death arises from both Alta's ordinary negligence and acts of **elder abuse** and neglect, not from Alta's negligent act or omission in the course of rendering professional medical services to Ms. Holzboog. *Smith v. Ben Bennett. Inc.* (2005) 133 Cal.App.4th 1507, 1514. Rather, Alta is alleged to have failed to provide comprehensive services, including medical services, that were necessary to protect the decedent from health and safety hazards and physical harm and suffering.

However, even if Plaintiff's claims are properly construed as based on ordinary rather than professional negligence, there clearly are serious material factual disputes as to whether Alta met the standard of care owed to the decedent. The evidence shows that NCH's medical records for Irene Holzboog, authenticated by the hospital's custodian of records as a true copy of all medical records for decedent prepared at or near the time of the event, [2] indicate NCH had information that Ms. Holzboog had a dementia diagnosis and was taking Aricept at the time she went to NCH on August 1, 2008. [SS ¶1; Trader Decl. ¶ 17] Dementia is a progressive disease that worsens over time. [Declaration of Angelique S. Campen, M.D. ("Campen Decl."), ¶ 12; Trader Decl. ¶ 13] NCH's records and the deposition evidence show that neither Ms. Holzboog's medications nor dementia were noted in any of her records, including the nurses' assessment and the assessment purportedly done by Dr. Meeks, the attending physician who saw and treated the decedent. [SS ¶39; See Trafer Decl. ¶27; Campen Decl. ¶ 15] Indeed, Dr Meeks' assessment of the decedent provided as part of decedent's official NCH medical file in support of Alta's summary judgment motion was almost entirely blank and reflected no contemporaneous assessment of the decedent by Dr. Meeks, although curiously a different version of this same "Emergency Department Physician Record", completely filled out *after* Ms. Holzboog had eloped to make it appear as if Dr. Meeks had performed a full assessment of Ms. Holzboog when she arrived in the NCH emergency department, was produced as Ms. Holzboog's medical record early in this litigation. [SS ¶53; Trader Decl. ¶27]

Nor were there any notations made in decedents' file or any assessments or reassessments of her done as required, based on the multiple objective indicia of Ms. Holzboog's cognitive deficits: (1) she could not date her admissions forms or provide her birthdate and place of birth; (2) she refused to disrobe; (3) she refused certain medical procedures ordered by the staff; (4) she was unable to communicate in complete sentences; (5) she was unable to list her medications or state that she was taking any despite the fact that the hospital had documents showing she was taking Aricept for dementia along with at least five other medications; and (6) as the afternoon progressed, she clearly was restless and indicated a desire to leave the hospital by repeatedly disregarding the verbal commands of the ER nurses and getting out of her bed, pacing back and forth, and looking and gesturing toward the door to the emergency area until, finally, she eloped. [SS ¶41 -46] NCH's failure to document decedent's aberrant behavior, to recognize decedent's risk for harm and elopement, or to reassess her as the day progressed was a gross deviation from the standard of care. [SS ¶7; Campen Deck ¶¶23, 24; Trader Decl. ¶ 17, ¶ 18; Morikawa Deck ¶ 4-6, 10, 17]

Further examples of NCH's departure from the standard of care were the facts, reflected in the undisputed evidence, that: (1) the two emergency room nurses failed to provide any attention to Ms. Holzboog for some 15 minutes while attending to other patients despite the fact that she had dementia and was disobeying their orders to stay in bed and indicating a desire to elope; (2) the nurse who called the Norwalk police did not provide Ms. Holzboog's name or that she was an at-risk individual; (3) the quality risk assessment officer at NCH who later inquired about the report to the Norwalk Sheriff, upon finding that the Sheriff had no record of Nurse Del Valle's call, still failed to report Ms. Holzboog as a missing person, nor ask that a search be undertaken or confirm that a police search had been undertaken, or even provide Irene Holzboog's name [SS ¶55]; and (4) NCH did not contact Bellagio to report Ms. Holzboog missing or to inquire as to her next of kin who could be reached. [SS ¶ 50; Morikawa Deck ¶ 14, 18]

This entire course of conduct reflects a gross deviation from the standard of care, which would have required (1) identification of Ms. Holzboog as an **elder** with dementia who required a far greater level of supervision than she received; (2) periodic reassessments of Ms. Holzboog's competence and needs, (3) close monitoring and direct supervision -- including moving Ms. Holzboog closer to the nursing station, calming her with a mild sedative, and ultimately the use of soft restraints if all else failed to keep her from wandering -- to protect her from health and safety hazards including elopement, and (4) an urgent, immediate and competent response to the elopement. [SS ¶¶ 16-18; Trader Deck ¶ 18; Morikawa Deck ¶¶2-10, 14]

A. Alta's Expert's Opinion is Conclusory and Incompetent and Deserves No Weight

The testimony of Alta's expert Dr. Joseph Englanoff should be given no weight by the Court because it is utterly lacking in evidentiary value. As detailed in Plaintiff's objections to Dr. Englanoff's declaration filed herewith, his testimony lacks foundation and completely ignores significant undisputed material facts reflected both in Alta's own records and in the admissions of their employees which, if properly considered, would eviscerate his conclusion that the appropriate standard of care was met as to the decedent. *Hernandez v. City of Encinitas* (1994) 28 *Cal.App.4th* 1048, 1078 (expert testimony should have been excluded and objections thereto sustained where expert testimony was contrary to facts and based on incomplete data).

Dr. Englanoff simply concludes, with no analysis, explanation or authoritative support, and in reliance on only selective portions of the evidence, that the standard of care was met in connection with each action taken by NCH with respect to Ms. Holzboog. However, the expert ignores *undisputed* facts reflecting that Ms. Holzboog: (1) had a diagnosis of dementia for which she was taking Aricept; and (2) exhibited in the course of her stay at NCH the increasingly anxious and aberrant behaviors described above, which are wholly *inconsistent* with Dr. Englanoff's unsupported conclusions that "the decedent's behavior and demeanor ... did not require the staff to consider or enact any type of restrictions on her movement within the emergency department as there was no objective indication to the staff that the decedent was a danger to herself (Englanoff Decl. ¶ 20.a) and that "[t]here was not any objective indicia available to the hospital staff on August 1, 2008 that the decedent lacked the capacity to make decisions or to take actions in her own self-interest at the time she was transported to the emergency department as she appropriately cooperated with the ongoing medical work-up and did not unreasonably refuse any of the care provided." (Englanoff Decl. ¶ 20.c) Englanoff's deliberate omission of critical undisputed facts from the record used as the basis for Dr. Englanoff's opinion renders his testimony unreliable and an improper basis for summary judgment. *Rio Linda Unified School Dist. v. Sup. Court* (1997) 52 Cal.App.4th 732, 740 (moving party must set forth all evidence on point, not just that favorable to it); *Turner v. Workmen's Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 (expert's opinion is "no better than the facts upon which it is based.").

Further, Dr. Englanoff nowhere explicitly sets forth the standard of care applicable to a hospital such as NCH and the ways in which the Alta Defendants supposedly satisfied that standard. When considering expert testimony on the applicable standard of care, the trier of fact must be able to determine the bases for the expert's opinion that the standard was met. *Kelly Wilkinson v. Workers' Comp Appeals Bd* (1977) 19 Cal.3d 491, 498 n. 3 (expert opinion must rest upon relevant facts and must consist of something more than a legal conclusion); *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 308 (expert testimony that was conclusory because it said nothing more than that what was done was within the standard of care was insufficient). A declaration such as Dr. Englanoff's that contains a "boilerplate and generic conclusion" that one acted within the applicable standard of care is insufficient to support summary judgment. *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 173 ("conclusory statements" are insufficient to furnish bases for grant of summary judgment); *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 (expert's declaration that merely concluded defendant's conduct fell within the standard of care without any reasons therefor "does not establish the absence of a material fact issue for trial, as required for summary judgment.").

The records from Ms. Holzboog's June 2008 visit to Hollywood Community Hospital ("HCH"), also owned and operated by defendant Alta Hospitals (which records Dr. Englanoff states he reviewed in the course of forming his opinion but notably fails to cite), show that Ms. Holzboog -- less than two months before her August 1, 2008 visit to NCH -- displayed many of the same symptoms and behaviors as she showed at NCH. [See SS ¶55] The HCH staff assessed and reassessed Ms. Holzboog, extensively recorded their observations, and concluded that Ms. Holzboog's clear cognitive deficiencies and disoriented behavior put her at risk for harm and warranted a one-to-one sitter. [SS ¶55; Trader Deck ¶¶11,12]

B. Alta's Negligence Towards and Neglect of Ms. Holzboog Proximately Caused Her Injuries and Death

Alta contends that its negligent treatment and **elder** neglect and **abuse** of Ms. Holzboog were not "substantial factors" causing her injury and death. Since Plaintiff's claim is not based on professional negligence in the rendering of health care services,

Alta's attempt to impose the proximate causation analysis applicable in medical malpractice cases must be rejected. (MSJ at p. 11,ll. 3-14) Here, the only issue is whether Plaintiff can show it was more probable than not that the acts of these Defendants was a more than insignificant factor in causing the decedent's harm. *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029. Legal causation generally is a question of fact that cannot be resolved on summary judgment unless, as a matter of law, the facts admit only of one conclusion and no reasonable person could find the defendants' conduct was a substantial factor in causing harm. *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666; *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687.

To demonstrate the complete absence of facts showing causation, Alta relies solely on the wholly conclusory and unreasoned opinion of Dr. Englanoff that "[t]o a reasonable degree of medical probability, no act or omission attributable to the Alta defendants caused or contributed to the decedent's demise."(Englanoff Decl. ¶ 21) However, it is clear that the actions of NCH personnel *were* a substantial factor in causing decedent's injuries including her death, and certainly there is a factual dispute with respect to this issue sufficient to preclude summary judgment. According to Plaintiff's experts, Alta's acts clearly were a substantial contributing cause of Ms. Holzboog's injuries and death. [Trader Decl. ¶¶19, 20] Had Ms. Holzboog been properly assessed, monitored and supervised at NCH, she would not have been able to elope from the NCH ER. After Ms. Holzboog eloped -- and only because she eloped -- she was deprived of nutrition, hydration, vital medications, and the critical medical care she had been sent to the hospital to receive. Her elopement thus was a substantial factor in causing her injuries and death. [SS ¶ 56; Campen Decl. ¶¶22, 26-32; Morikawa Decl. ¶¶ 9, 19, 10[at p.20]) Since there clearly is a dispute as to a material fact on the issue of causation, summary judgment is precluded. *Gordon v. Havasu Palms. Inc.* (2001) 93 Cal.App.4th 244, 251-55 (disagreement between opposing parties' experts created triable factual issue as to causation).

IV. ALTA'S TREATMENT OF DECEDENT CONSTITUTES ELDER ABUSE AND NEGLECT AND PLAINTIFF CAN SHOW BY CLEAR AND CONVINCING EVIDENCE SUCH ACTS WERE RECKLESS, MALICIOUS AND OPPRESSIVE

A. Alta's Treatment of Ms. Holzboog Constitutes Elder Abuse and Neglect

The purpose of the **Elder Abuse** Act is to protect vulnerable and dependent adults from physical **abuse** and neglect by those charged with their care and well--being, and to encourage the private civil enforcement of this law by providing enhanced remedies. *Delaney v. Baker* (1999) 20 Cal.4th 23, 33. Alta insists that neglect of an **elder** under the Act by a health care provider must be characterized by a complete failure to provide, or a complete withholding of, medical care, and then uses this specious argument as a predicate for asserting that, because NCH provided satisfactory medical care to Ms. Holzboog, the hospital could not possibly as a matter of law be found liable for any form of **elder abuse**. Aside from the fact that, as discussed above, Alta did not meet the applicable standard of care, Alta deliberately and disingenuously twists the holding in the *Covenant Care* case and conflates professional negligence by a health care provider with **abuse** and reckless neglect by one who provides care for an **elder**, and ignores the broad sweep of the **Elder Abuse** Act, which clearly embraces the various serious deficiencies in NCH's treatment of and care for Ms. Holzboog. See *Covenant Care, Inc. v. Sup. Ct.* (2004) 32 Cal.4th 771, 786 ("[t]hat statutory **elder abuse** may include the egregious withholding of medical care for physical and mental health needs is not determinative.... such **abuse** is at most incidentally related to the provider's professional health care services.").

A contention similar to Alta's -- that a health care provider cannot be liable for **elder abuse** and neglect unless there is a showing of the complete withholding of medical care -- specifically was rejected by the court of appeal in *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, wherein the appellate court vacated the grant of summary judgment on plaintiff's **elder abuse** claim. The plaintiff contended that the defendant's failure to adhere to a particular skin care plan for a dependent adult was neglect under *Welf. & Inst. Code* § 15600 *et seq.*. The appeals court rejected defendant's argument that under *Covenant Care*, a care facility can be liable for **elder** or dependent **abuse** only if there is a total absence of care, and held that it reasonably could be deduced from the evidence that defendant's failure to follow a care plan for the decedent reflected a deliberate disregard for the high degree of probability that such action or inaction would cause injury. 144 Cal.App.4th at 272-73. The *Sababin* court opined that even "[i]f some care is provided, that will not necessarily absolve a care facility of dependent **abuse** liability. For example, if a care facility knows it must provide a certain type of care on a daily basis but provides care only sporadically, *or*

is supposed to provide multiple types of care but only provides some of those types of care, withholding of care has occurred." *Id.* at 273 (emphasis added).

Thus, Alta's status as a health care provider does not insulate it from liability for **elder** **abuse** and neglect based on the hospital's acts of reckless neglect and abandonment of the decedent, including their deprivation of a certain type and level of care and services *(e.g.*, medical care for her mental health needs, protection from health and safety hazards, assistance with personal hygiene and protection from malnutrition) necessary to avoid Ms. Holzboog's physical harm or mental suffering. (*Welf. & Inst. Code* §§15610.07 (a), (b), 15610.35 (a), (b, (e), (f))[3] The record establishes that Alta neglected and abandoned Ms. Holzboog by, among other things, (1) failing to properly assess and reassess her mental health condition and safety needs based upon her documented diagnosis of dementia and her behaviors, which were apparent to NCH staff, reflecting apparent cognitive deficiencies; (2) failing to protect Ms. Holzboog from health and safety hazards by constant and consistent monitoring and supervision so that she would not harm herself in ways that could and should have been anticipated, such as by eloping; (3) failing to file a competent and accurate missing person's report with the police or even make sure that the police had the decedent's name; and (4) failing to contact her last caregivers at Bellagio Manor, her legal residence, and failing to ensure contact was made with members of Ms Holzboog's family whose names were on file with Bellagio and could easily have been obtained had Alta made the bare minimum effort to respond competently to Ms. Holzboog's elopement. [SS ¶50] Each of these acts clearly constitutes **elder** **abuse** and neglect as those terms are defined in the **Elder** **Abuse** Law. *See, e.g., Sababin,* 144 Cal.App.4th at 272-73 (failure to monitor and document dependent adult's symptoms is **elder** neglect even if other types of medical care provided).

B. The Alta Defendants Are Liable for Elder Abuse As Decedent's Custodial

Caregivers Regardless of Who Had Physical Custody of Her When She Eloped Likewise, Alta's contention that Plaintiff must show Defendants had a "custodial relationship" with the decedent to be found liable under the Act attempts to import a requirement into this law that simply does not exist. As a preliminary matter, employees or administrators of 24 hour health facilities such as NCH are defined as a "care custodians" under the Act, and thus are expressly deemed to be providers of custodial care. *Welf & Inst. Code* §15610.17 Further, the Act requires only that an act of **abuse** or neglect, including abandonment, be committed by one having care OR custody of an **elder**. A health care provider, such as hospital or a doctor, may be liable for acts of **elder** **abuse** and neglect without any showing that such actor provided residential custodial care for the **elder**. *See Mack v. Soung* (1999) 80 Cal.App.4th 966, 974 (anyone with care *or* custody of **elder** who fails to provide care for physical and mental health needs may be liable for neglect, including health care professionals who do not exercise custodial care of patient).[4]

NCH clearly *both* had physical custody of Ms. Holzboog at the time she eloped, and was providing care for her most basic needs when Alta's acts of **elder** **abuse** and neglect commenced on August 1, 2008. Alta provided Ms. Holzboog with a bed and a meal ¶[SS ¶11], planned to admit her to the hospital [SS ¶57], and never actually discharged Ms. Holzboog from the hospital's care -- she was still wearing a hospital bracelet when her body was found. [SS ¶58] So while there is no requirement that Alta had to have had physical custody of the decedent at all times to be liable for **elder** **abuse**, Alta in fact was providing care for *and* had custody of Ms. Holzboog as contemplated and provided for by the **Elder** **Abuse** Act, at the time of the alleged acts of **elder** **abuse** and neglect.

C. Plaintiff Can Show Alta's Neglect of Decedent was Reckless, Oppressive, and Malicious by Clear and Convincing Evidence

The question of whether an **elder** **abuse** defendant's conduct was sufficiently culpable to merit imposition of heightened remedies under the Act usually is an issue for the trier of fact. *Delaney,* 20 Cal.4th at 41. Here, Plaintiff has adduced sufficient evidence to create a triable question of fact as to whether these Defendants committed acts of **elder** **abuse** and neglect with the requisite recklessness, oppression, fraud and malice.[5] The undisputed evidence clearly permits a reasonable inference to

be drawn of a high probability that Alta's acts of **elder abuse** and neglect were committed recklessly and with malice, and oppression.[6] *Intrieri v. Sup. Ct.* (2004) 117 Cal.App.4th 72, 84 (evidence of **elder abuse** defendant's conduct viewed in light most favorable to plaintiff supports reasonable inference to be drawn by jury that defendant displayed conscious disregard for plaintiff's safety, precluding summary judgment).

Among the undisputed facts are that Alta: (1) strategically employed a marketing program pursuant to which they solicited Ms. Holzboog and other RCFE residents to be patients in Alta hospitals and induced such visits with free transportation, yet elected not to employ a written elopement policy or any other requirement applicable to the emergency department that staff make assessments specific to **elders** or dementia patients or be trained to determine and respond to the specific needs of such patients [SS ¶¶37,47, 56]; (2) nonetheless elected not to employ institutional policies and procedures that required age-specific and dementia assessments and and care, staff training to recognize dementia and elopement risk, or implementation of emergency procedures through which upper level managers were promptly notified of urgent and fast-moving situations, such as that involving decedent [SS ¶¶ 37, 39, 47, 58; Morikawa Decl. ¶¶4, 7, 8] (3) failed repeatedly over several hours to properly assess and record the decedent's obvious cognitive deficiencies, confusion and escalating disorientation, resistence to various procedures and, critically, her documented diagnosis of dementia [Morikawa Decl. ¶¶4, 5]; (4) failed to intervene by providing greater and individualized supervision which the standard of care called for, despite obvious objective and documents signs that Ms. Holzboog had cognitive deficiencies and was at risk of harm to herself including by trying to elope [Trader Decl. ¶¶13,17,18; Campen Decl. ¶¶23, 24]; (5) failed to generate a comprehensive emergency department physicians' assessment contemporaneous with Ms. Holzboog's stay in the ER as required (and then created a new document after the fact) [SS ¶¶52]; (6) made a deficient and knowingly false report to the police indicating that the decedent had not actually eloped but had merely left against medical advice, and then -- upon learning on or about August 8, 2008 that there was no police record of the initial report from the NCH ER -- again failed to report Ms. Holzboog's elopement or even her name to the police [SS ¶49]; and (7) failed to ensure that either Ms. Holzboog's family or Bellagio were notified of the facts surrounding her elopement, in clear violation of their legal obligations to do so. [SS ¶50] This abundant, indisputable evidence is more than sufficient to support a reasonable inference that these Defendants engaged in this course of conduct with a knowing and deliberate disregard, both before and after Ms. Holzboog eloped from the hospital, for the high probability that Ms. Holzboog would face serious injury or death and with conscious and craven indifference to her safety and well-being.

V. ALTA'S ADMISSIONS AGREEMENT WITH DECEDENT WAS A CONTRACT THAT ALTA CLEARLY BREACHED

Hospital admissions agreements are routinely construed as contracts, as to which an action for breach may lie. The cases cited by Alta state only that actions against *doctors* arising out of the negligent treatment of patients must sound in tort. The negligent failure to exercise reasonable care and skill in undertaking to perform a professional services contract is a tort as well as a contract. *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1435. Alta also ignores abundant case law construing hospital admissions agreements as contracts. *See, e.g., Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1387 (breach of contract claim based on hospital admissions agreement); *Whiteside v. Tenet Healthcare Corp.* (20021 101 Cal.App.4th 693, 698 (construing hospital admissions agreement as contract).

As discussed above, Alta neither met the requisite standard of care nor was excused from performing its contract with Ms. Holzboog due to her elopement. The decedent's elopement was the direct *result* of Alta's failure to fulfill its contractual duties to provide the promised care and services (including to have a family member notified promptly of her admission to the hospital, and to receive care in a safe setting and a safe discharge), rather than an excuse for nonperformance of Alta's duties under the agreement. [SS ¶59]

VI. PLAINTIFF CAN PROVE THE ELEMENTS OF HIS NEGLIGENCE *PER SE* CLAIM

Alta also relies on the flawed Englanoff declaration in an attempt to establish that the hospital's multiple violations of laws and regulations designed to protect patients like Ms. Holzboog did not establish Defendants' breach of the standard of care. Violation of a statute intended to protect a certain class of persons from specific types of injury creates a presumption that the standard of care was breached, and evidence of such negligence *per se* may establish conduct amounting to **elder abuse** neglect under the Act. *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1246.

Among the various regulations applicable to hospitals such as NCH that Alta violated is Title 22 Cal Code Regs. § 70213(e), which states that nursing service policies and procedures "shall be developed and implemented which establish mechanisms for rapid deployment of personnel when any labor intensive event occurs which prevents nursing staff from providing attention to all assigned patients, such as multiple admissions or discharges, or an emergency health crisis." NCH clearly had no such policy. [Morikawa Decl. ¶¶5,6,14] The two NCH emergency department nurses testified that they were busy with multiple ER patients and people in the waiting area, and thus left Ms. Holzboog unattended and unsupervised as she repeatedly got of of bed and made her attempts to elope, before successfully doing so. [SS ¶53] Had NCH either implemented or adhered to such a policy or procedure, Ms. Holzboog would have been provided the appropriate level of care and attention.

CONCLUSION

The record in this case overwhelmingly demonstrates that there are significant disputed material facts relating to Alta's conduct, breaches of duty and compliance with the correct and applicable standard of care which preclude the grant of summary judgment or partial summary adjudication on any and all of Plaintiff's claims. Thus, for the reasons set forth herein, Plaintiff respectfully requests that the Court deny Alta's motion for summary judgment or alternatively partial summary adjudication in its entirety.

RESPECTFULLY REQUESTED,

DATE: December 6, 2012

VICKMAN & ASSOCIATES

By: <<signature>>

MARTHA COHEN, ESQ.

Attorney for Plaintiff Edward G. Borgonia, Jr. as Administrator for the Estate of Irene Holzboog

Footnotes

1 Alternatively, since the **Elder Abuse** Act itself does not contain a specific statute of limitations, Plaintiff's **elder abuse** claim arguably may be governed by the three year statute of limitations for "an action upon a liability created by statute" contained in Cal. *Code Civ. Pro.* § 338(a).

2 *See* Declaration of Custodian of Records from Norwalk Community Hospital Oleg Korsakov attached to Notice of Lodging of Documents in Support of Defendants' Motion for Summary Judgment, Exhibit C.

3 "Abandonment" is the desertion or willful forsaking of an **elder** by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody. *Welf. & Inst. Code* § 15610.05 "Neglect" is the negligent failure of any person having care or custody of an **elder** to exercise that degree of care that a reasonable person in a like position would exercise, such as by failing to provide medical care for physical and mental health needs, failing to assist in personal hygiene, failing to prevent malnutrition, and failing to protect an **elder** from health and safety hazards. *Welf. & Inst. Code* §15610.5.

4 Moreover, that the Act authorizes liability for **elder abuse** to be imposed on one who does not provide direct care for or personally have custody of an **elder** is evidenced by the fact that the Act directly contemplates the liability of noncustodial corporate employers

who direct and ratify the conduct of direct caregivers and custodians, via the requirement that Civil Code §3294 be satisfied in order to impose punitive damages on the employer. *Welf. & Inst. Code* § 15657(c).

5 Although Alta makes much of Plaintiff's burden to show sufficiently culpable conduct by "clear and convincing evidence", this simply requires a showing of a high probability that a fact is true. CACI No. 201; *In re Angelia P.* (1981) 28 Cal.3d 908, 919. The clear and convincing evidence standard does not oblige Plaintiff to "prove" his case for punitive damages at the summary judgment stage. *American Airlines. Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049. The Court need only keep the higher standard in mind as it evaluates the evidence presented on summary judgment. *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118-19.

6 Recklessness involves a deliberate disregard of a high degree of probability that injury will occur or the conscious choice of a course of action with knowledge of serious danger to others; "malice" and "oppression" both involve despicable conduct carried on with a willful and conscious disregard of the rights or safety of others or that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 405.

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