2014 WL 5308240 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Patricia Ann PIERSKALLA, an individual and successor-in-interest to decedent, Cecelia Montgomery, Plaintiff,
v.
CITY OF THOUSAND OAKS, a public entity; MV Transportation, Inc., a California Corporation; and Does 1-50, Inclusive, Defendants.

No. 56201400450594.
May 23, 2014.

Date: June 6, 2014
[Reservation No. 1950064]
Time: 8:30 a.m.
Dept.: 20

Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants Mv Transportation and City of Thousand Oaks' Demurrer to Plaintiff's Complaint

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Hon. Tari Cody.

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TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

Plaintiff PATRICIA ANN PIERSKALLA, an individual and successor-in-interest to decedent CECELIA MONTGOMERY ("Plaintiff"), hereby submits the following Memorandum of Points and Authorities in Opposition to Defendants MV TRANSPORTATION, INC., and CITY OF THOUSAND OAKS (collectively "Defendants") Demurrer to Plaintiffs' Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Decedent Cecelia Montgomery ("Decedent") fell and broke her hip and suffered related serious injuries upon disembarking from a Thousand Oaks Dial-A-Ride, operated by Defendants. Decedent, ninety-one (91) years old, lived independently with the help of a caregiver. On August 9, 2013, Decedent boarded a Dial-A-Ride shuttle to the shopping center as she often did for beauty care. Instead of dropping Decedent off in her usual spot, the handicapped spaces in the corner near the beauty parlor, the driver stopped in the middle of the parking lot, which was a dangerous, unleveled place for Decedent to disembark.

Decedent was assisted off the vehicle by her caregiver. Other paratransit drivers knew Decedent and were very attentive to her needs, but the new driver did not assist Decedent despite Decedent's caretaker specifically telling the driver that Decedent was legally blind and recovering from recent heart problems. When the caregiver went to retrieve Decedent's oxygen and other medical supplies from the vehicle, she relied on the driver to stay with Decedent for the few seconds she gathered the belongings. Instead of assisting Decedent, the driver left and abandoned her. Immediately, while standing alone with her walker, Decedent fell due to the unstable place the driver had stopped and was seriously injured. As this proud older woman lay on the ground,

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bleeding, and crying for help, the driver stayed in her seat, even refusing to call 911, saying "I have a schedule. I have to go," leaving the scene with Decedent injured, bleeding, and crying for help on the hot parking lot surface.

Decedent suffered tremendously until her death, undergoing serious hip surgery with rods and pins placed within her to stabilize the weight-bearing articulating joint. She spent the remaining two months of her life divided between a skilled nursing facility and Los Robles Hospital, with her health spiraling downward until her death on October 1, 2013.

The Dial-A-Ride driver letting Decedent, a fragile, virtually blind nonagenarian with a walker, off on a downward-sloping and uneven surface, is negligent. Failing to gently stabilize her until the caregiver could help her walk to the beauty shop from the disembarking location is shocking. Abandoning Decedent while she was screaming for help on the hot pavement without calling 911 is despicable. As Defendants bears liability for violation of the **Elder Abuse** and Dependent Adult Civil Protection Act ("**Elder Abuse** Act") and for willful misconduct, Defendants' Demurrer fails as a matter of law and should be overruled in its entirety.

II. STANDARD OF REVIEW

It is axiomatic that pleadings in California are construed liberally. "The [language of the complaint] must be read not in isolation, but in the context of the facts alleged in the rest of [the palitniff's] complaint." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) As such, the complaint must be given a reasonable interpretation, reading it as a whole and its parts in their context." (*CrossTalk Production, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.)

Ordinarily, a demurrer should not be sustained unless the complaint liberally construed fails to state a cause of action on any theory. [Citations.] Material facts alleged in the complaint are treated as true for the purpose of ruling on the demurrer. [Citation.] Also taken as true are facts that may be implied or inferred from those expressly alleged. [Citation.] The complaint will ordinarily be upheld even though the facts are not clearly stated, or are intermingled with a statement of irrelevant facts. [Citations.] (*State ex rel. Bowen v. Bank of Am. Corp.* (2005) 126 Cal.App.4th 225, 239-240.)

Under these standards, Defendants' demurrer should be denied for the following reasons.

III. ARGUMENT

Plaintiffs claims are well pled and Defendants' demurrer should be overruled. Alternatively, Plaintiff requests leave to amend if the Court sustains any portion of Defendants' demurrer.

A. Plaintiff has Adequately Asserted Facts Sufficient to State a Cause of Action for Elder Abuse and Defendants' Demurrer as to the Third Cause of Action Should be Overruled

The purpose of the **Elder Abuse** Act and Dependent Adult Civil Protection Act ("the **Elder Abuse** Act") is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of **abuse** and custodial neglect. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) The **Elder Abuse** Act defines **abuse** as "[p]hysical **abuse**, neglect, financial **abuse**, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" (Welf. & Inst. Code § 15610.07(a) (emphasis added); *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404.)

Plaintiff has successfully pled allegations that constitute neglect and abandonment under *California Welf. & Inst. Code* §§ 15610.57 and 15610.05. Additionally, Plaintiff has sufficiently pled that Defendants acted with recklessness, oppression, fraud, and/or malice. Specifically, Defendants acted with a deliberate disregard of the high probability that an injury will occur.

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1. Plaintiff has Pled the Necessary Facts to Constitute Neglect Under the California Welfare & Institutions Code § 15610.57

California *Welf. & Inst. Code* § 15610.57(a)(1), defines "neglect" as the negligent failure of any person having the care or custody of an **elder** or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise. California *Welf & Inst. Code* § 15610.57(b)(3) states that "neglect" includes "failure to protect from health and safety hazards."

Plaintiffs allegations have clearly stated that Defendants, having the care and custody of Decedent, failed to exercise the degree of care a reasonable person in a like position would exercise. Specifically, Defendants' conduct constituted neglect pursuant to California *Welf. & Inst. Code* § 15610.57, where, Defendants, a common carrier of **elderly** passengers, clearly failed to exercise the degree of care that a reasonable paratransit operator would exercise by exposing Decedent, an **elderly** woman with significant vision impairments and heart problems, to multiple health and safety hazards.

Under California Civil Code § 2100, common carriers owe to its passengers a higher duty of care, including one to act affirmatively to prevent harm. (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1050-51.) Defendants operated a common carrier targeted to **elderly** and dependent adults, including Decedent, who could not otherwise use public transportation and are particularly vulnerable to harm. A reasonable person in the position of providing transportation to an especially vulnerable group of people would exercise utmost care and act affirmatively to prevent harm, such as by rendering assistance to its passengers as necessary, parking in a safe place for passengers to disembark, and calling 911 for cases of medical emergencies. Plaintiff has sufficiently pled that Defendants' failure to exercise the utmost care in the operation of their paratransit vehicles was unreasonable and constitutes neglect pursuant to the **Elder Abuse** Act.

Specifically, Plaintiff has pled that "Defendants were hired as a common carrier to transport Decedent from her place of residence to the beauty salon in the shopping plaza located at 2899 Agoura Road, Westlake Village." (Complaint, ¶ 14). "Defendants... as common carriers of passengers, owed a duty of utmost care in the custody and safe travel of its **elderly** passengers, including Decedent. Such duty included, but not limited to: the duty to operate and manage the paratransit vehicle in such a careful manner as to protect the physical safety and well-being of the persons entrusted to their care by properly overseeing passengers; by exercising due care in hiring managers and employees, by properly training and supervising staff responsible for transportation of the **elderly**, and by taking whatever special actions and precautions were required to maintain safe travels of persons under their care, such as Decedent, whose age and medical conditions left her particularly vulnerable to harm." (Complaint, ¶ 21). Plaintiff has also alleged throughout her Complaint, "Defendants failed to drop Decedent off at her designated destination, the handicapped spots in the corner near the beauty parlor. Instead, Defendants recklessly parked in the middle of the driveway, which was not level and created a dangerous place for Decedent to disembark." (Complaint, ¶ 31(b).) "Defendants failed to assist Decedent as she disembarked from the Dial-A-Ride vehicle, despite knowledge that Decedent was visually impaired and was recovering from recent heart problems." (Complaint, ¶ 31(c).) Even though the caretaker and Decedent relied on Defendants to stay with Decedent, "Defendants did not stay with Decedent as her caregiver went to retrieve Decedent's oxygen and other medical supplies form the vehicle and abandoned her." (Complaint, ¶ 31(d).) "Defendants refused to call 911 or help Decedent after her fall, and left Decedent on the pavement injured, while she drove away." (Complaint, ¶ 31(e)).

Defendant erroneously relies on *Carter* for the proposition that "Defendants' conduct in operating the Dial-A-Ride shuttle does not constitute 'neglect' or 'abandonment' as defined and contemplated by the **Elder Abuse** Act. (Demurrer at 6). As a threshold matter, the Carter decision is specific to health care providers where healthcare providers cannot be liable for **elder abuse** based on simple professional negligence. (*Carter,* supra, 198 Cal.App.4th at 406). When the medical care of an **elder** is at issue, the **Elder Abuse** Act's definition of "neglect" speaks not of the undertaking of medical services, but of the failure to provide medical care. (*Id.*)

In *Carter,* the trial court sustained the hospital's demurrer to the **elder abuse** claim finding that allegations did not constitute "neglect" where Plaintiffs allegations failed to indicate that the hospital denied services or withheld treatment but instead

actively undertook to provide treatment. (*Id.* at 408). The Court was clear that "these allegations indicate the Hospital did not deny services to or withhold treatment from Grant—on the contrary, the staff actively undertook to provide treatment intended to save his life." (*Id.*) The Carter court then continued that Plaintiffs' case failed because plaintiffs' "[u]se of such terminology [as fraudulently and recklessly] cannot cure [the] failure to point out exactly how or in what manner the [Hospital has] transgressed." [Citation.] (*Id.* at 410, fn. omitted).

Here, Plaintiff's case is factually distinguishable from the facts alleged in Carter. Defendants are not medical providers but operate as a common carrier targeted at the **elderly** and disabled persons population.

Moreover, even assuming *Carter* applies, unlike the plaintiff in *Carter,* Plaintiff has specifically pled how and in what manner Defendants have transgressed and does not make mere conclusory allegations but set forth ultimate facts in the complaint constituting neglect under the **Elder** **Abuse** Act. In fact, Plaintiff has alleged that the defendant: (1) had responsibility for meeting the basic needs of the **elder** or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the **elder** or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the **elder** or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the **elder** or dependent adult constituting oppression, fraud or malice, and with conscious disregard of the high probability of such injury constituting recklessness. (*Id.* at 406).

a. Defendants had responsibility for meeting the basic, transportation needs of Decedent

Plaintiff has adequately plead facts that Defendants had responsibility for meeting the basic needs of Decedent by operating the Thousand Oaks Transit Dial-A-Ride available to **elderly** and disabled individuals who are unable to use public transportation routes available to the general public. Paratransit services are crucial for the **elderly** to access essential services such as medical care and grocery shopping, and it allows an **elderly** person to live independently in their communities. In her Complaint, Plaintiff has alleged that "[i]n operation of Thousand Oaks Transit Dial-A-Ride, Defendants, and each of them, held themselves out to the general public, and to the Decedent, and other similarly situated, that their skilled paratransit drivers and vehicles provided door-to-door services and assistance." (Complaint, ¶ 15). Plaintiff has also pled that Defendants were "acting as 'care custodians' as defined in California *Welf. & Inst. Code* § 15610.17. Decedent was totally dependent upon her "care custodians" for safe transportation and assistance." (Complaint, ¶ 17).

b. Defendants knew of conditions that made Decedent unable to provide for her own basic needs

In her Complaint, Plaintiff has alleged facts that Defendants as skilled paratransit operators and drivers were told and knew that Decedent, an **elderly** passenger had severe vision problems, was recovering from recent heart issues, who required respiratory and breathing equipment, was unable to provide for her own basic needs. Specifically, Plaintiff has pled that "[a]t all relevant times, Decedent was 91 years old." (Complaint, ¶ 12). "Decedent's caregiver had told Defendants that Decedent was visually impaired and was recovering from recent heart problems." (Complaint, ¶ 24). Plaintiff has further pled that "[a]t all relevant times, Defendants, and each of them, knew that **elderly** passengers were in their custody and care, knew that the lives and health of their passengers were at risk whenever they failed to meet such duties, and knew that the failure to comply with such duties would result in injuries to their **elderly** passengers, including Decedent." (Complaint, ¶ 33).

c. Defendants Acted with Malice, Fraud, Oppression and Recklessness

As explained in detail below, Plaintiff has sufficiently pled facts that Defendants denied assistance and services necessary to meet Decedent's basic transportation needs with knowledge that injury was substantially certain to befall Decedent constituting malice, fraud, and oppression and with conscious disregard of the high probability of such injury constituting recklessness.

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2. Plaintiff has Pled the Necessary Facts to Constitute Abandonment Under the California Welfare & Institutions Code § 15610.05

California *Welf. & Inst. Code* § 15610.05 defines "abandonment" as the desertion or willful forsaking of an **elder** or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody. It is quite telling that Defendants contends that Defendants' alleged conduct does not constitute abandonment as defined but failed to give any reasoning or cite any authority supporting this proposition.

Here, in fact, Plaintiff has pled sufficient facts constituting abandonment. As pled, Defendants not only failed their duty towards Decedent by failing to affirmatively protect her from health and safety hazards, but deserted Decedent while she was a passenger in their care and custody. (*Riggins v. Pacific Greyhound Lines* (1962) 203 Cal.App.2d 125, 128, quoting *Parker v. City & County of San Francisco* (1958) 158 Cal.App.2d 597, 603, "The duty of due care does not necessarily end when the passenger alights safely from the carrier's vehicle; it ends only 'when the passenger is discharged into a relatively safe space.'")

Specifically, Plaintiff has pled that "[t]he parking lot driveway where Defendants stopped was next to a drainage culvert, which was not level and created a dangerous place for Decedent to wait as she disembarked from the Dial-A-Ride." (Complaint, ¶ 23.) "Despite the fact that Decedent's caregiver had told Defendants that Decedent was visually impaired and was recovering from recent heart problems, Defendants did not assist her after she was helped off the vehicle. Instead of staying with Decedent while her caregiver went to retrieve Decedents' oxygen and medical supplies from the vehicle, Defendants abandoned Decedent. Decedent immediately fell due to the unstable place the driver had stopped. As Decedent laid on the ground, injured, bleeding, and crying for help, the driver stayed in her seat, refused to call 911, saying "I have a schedule. I have to go," and left her injured and lying on the hot parking lot surface." (Complaint, ¶ 24.)

Based on the facts Plaintiff has pled, a jury could reasonably find that under the circumstances, a reasonable person would have continued to provide care and custody to Decedent by staying with Decedent as she waited for her belongings to be retrieved and by calling 911 once Decedent had broken her hip and laid in the middle of the parking lot pavement crying and bleeding. Refusing to stay with Decedent while she stood on uneven grounds and leaving her on the hot pavement constitutes desertion and willful forsaking of an **elder**. As such, Plaintiff has sufficiently pled facts constituting "abandonment" under the **Elder Abuse** Act.

3. *Plaintiff has Pled Sufficient Facts that Defendant Has Been Guilty of Recklessness, Oppression, Fraud or Malice in the Commission of Abuse*

To recover the enhanced remedies available under the **Elder Abuse** Act, a plaintiff must show reckless, oppressive, fraudulent or malicious conduct. (*Welf. & Inst. Code* § 15657.2; *Delaney v. Baker* (1999) 20 Cal.4th 23,32.) Enhanced remedies are available only for " 'acts of egregious **abuse**' against **elder** and dependent adults." (*Id.* at 35.) Plaintiff has sufficiently pled facts that a jury could reasonably find are acts of egregious **abuse** against an **elder** and warranting heightened remedies under the **Elder Abuse** Act.

a. Recklessness

"Recklessness" refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur. (*Delaney v. Baker,* (1999) 20 Cal.4th 23, 31.) Recklessness, unlike negligence, involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action... with knowledge of the serious danger to others involved in it." (*Id.* at 31-32.)

Plaintiff has sufficiently pled that Defendants acted recklessly with a deliberate disregard of the high probability that an injury will occur. Specifically, Defendants made a conscious choice to leave Decedent to stand alone with her walker on uneven grounds in the middle of the parking lot, with the knowledge of the serious danger of fall by Decedent, a fragile, 91 year old with health and vision problems. Moreover, Defendants' conscious decision to drive away without rendering any aid to the fallen and injured Decedent, was despicable conduct and done with knowledge of the serious danger to Decedent. By leaving her on the hot pavement with a broken hip, Defendants not only delayed any medical aid to the fragile **elderly** woman, but left her vulnerable to any additional traffic injuries in the middle of the parking lot. These acts are undeniably done with deliberate disregard of the high degree of probability that an injury will occur.

b. Oppression, Fraud and Malice

Plaintiff has adequately pled that Defendants acted with knowledge that injury was substantially certain to befall the **elder** or dependent adult constituting oppression, fraud or malice and warranting the **Elder Abuse** Act's heightened remedies.

In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal. 4th 771, 789; Compare Welf. & Inst.Code, § 15657 [requiring "clear and convincing evidence that a defendant is liable for" **elder abuse** and "has been guilty of recklessness, oppression, fraud, or malice in the commission of the **abuse**"] with Civ. Code, § 3294, subd. (a) [requiring "clear and convincing evidence" that the defendant has been guilty of oppression, fraud, or malice].) "Oppression" has been defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code § 3294(c)(2).) "Malice" is "conduct which is intended by defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294(c)(1).)

Defendants knew or should have known that parking next to a drainage culvert instead of the requested handicapped spots near the beauty salon was unreasonably dangerous and would expose their **elderly** and disabled passengers to the risk of fall or other accidents. Moreover, Defendants knew that refusing to call 911 and leaving an injured and bleeding **elderly** woman in the middle of the parking lot pavement would aggravate her injuries in the delay in medical care and subject her to dangers in parking lot traffic. These acts were oppressive, being done in conscious and despicable and subjecting Decedent to cruel and unusual hardship in conscious disregard of her rights.

Additionally, this despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of Decedent, is sufficient to constitute malice. In order to justify an award of punitive damages on the basis of a "conscious disregard of another's rights or safety", the plaintiff must establish that the defendant was aware of the probable dangerous consequence of his conduct, and that he willfully and deliberately failed to avoid those consequences. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896.)

Here, Plaintiff has sufficiently pled that Defendants were aware of the probable dangerous consequences of leaving a blind, **elderly** woman alone on uneven parking lot grounds, and nonetheless, willfully and deliberately left her. Moreover, Defendants were aware of the probable dangerous consequences of delaying medical aid to an injured **elderly** woman, yet willfully and deliberately refused to call 911 and abandoned her in the middle of a parking lot lying on the hot pavement. As such, Defendants acted with conscious disregard of Decedent's rights and safety.

4. As a Common Carrier, Defendants Were Care Custodians of Decedent and Decedent was in Their Care and Custody at the Time She Sustained her Injuries

The statute defining "neglect" applies broadly and generally to anyone having "care or custody" of an **elder**. (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974.) As such, Decedent was in the care and custody of Defendants at the time of her injuries.

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Defendants wrongfully contend that Defendants acting as Dial-A-Ride shuttle operators simply did not have care or custody of Decedent at the time of the incident. (Demurrer at 8-9.) The *California Welf. & Inst. Code* § 15610.17(y) states that the definition of a "care custodian" includes "any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to **elders** or dependent adults". In other words, "care custodians" are simply administrators and employees of public and private institutions that provide "care or services for **elders** or dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974.)

Clearly, in the operation of Thousand Oaks Dial-A-Ride, Defendants were providing social services to the **elderly** and dependent adults who do not have means for transportation and are care custodians pursuant to California *Welf. & Inst. Code* § 15610.17. It is irrelevant that Decedent was accompanied by her caretaker at the time of the incident. She was nevertheless a passenger in the care and custody of Defendants who were providing transportation services to her.

Additionally, Defendants were hired as a common carrier by Decedent and had care and custody of Decedent while she was a passenger on the Dial-A-Ride Shuttle. California Supreme Court has established that a common carrier in the business of transporting the general public has a duty to a specific group: its passengers, and that these passengers who have accepted the offer of transportation have placed themselves in the care and custody of the public transit. (*Lopez v. S. Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 799 (emphasis added).) "The duty of due care does not necessarily end when the passenger alights safely from the carrier's vehicle; it ends only 'when the passenger is discharged into a relatively safe space."' (*Riggins v. Pacific Greyhound Lines* (1962) 203 Cal.App.2d 125, 128, quoting *Parker v. City & County of San Francisco* (1958) 158 Cal.App.2d 597, 603.) A common carrier's that ejects a passenger at a place other than the designated destination and in doing so subjects the passenger to reasonably foreseeable injury, violates a common carrier's affirmative duty to prevent harm to its passengers. (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1051.)

Plaintiff has alleged that Defendants were care custodians of Decedent starting at the time she embarked the Dial-A-Ride, and she remained in Defendants' care and custody up until the accident occurred and Defendants' abandoned her on the hot parking lot surface crying for help. Indeed, Plaintiff's complaint has pled that "Defendants were hired as a common carrier to transport Decedent from her place of residence to the beauty salon in the shopping plaza located at 2899 Agoura Road, Westlake Village." (Complaint ¶ 14.) "Defendants... as common carriers of passengers of passengers, owed a duty of utmost care in the custody and safe travel of its

Therefore, Plaintiff has sufficiently pled that Defendants were the care custodian of Plaintiff and had care and custody of Decedent at the time she fell, broke her hip, and was left lying on the hot pavement.

B. Plaintiff has Sufficiently Pled her Cause of Action for Willful Misconduct and Defendants' Demurrer as to the Second Cause of Action Should be Overruled

Plaintiff has sufficiently pled facts that Defendants' acts constitutes a willful misconduct cause of action. California Courts has stated that willful misconduct is not a separate tort but "an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care" (*Berkley v. Dowds* (2007) 152 Cal. App. 4th 518, 526 citing *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 360.)

If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it wilful misconduct, and apply to it the consequences and legal rules which we use in the field of intended torts.' (*Mahoney v. Corralejo* (1974) 36 Cal. App. 3d 966, 973.) Therefore, 'when conduct falls sufficiently below the acceptable norm to become grossly deficient, we characterize it as imbued with bad intent...' Stated another way if the conduct is so dangerous and reckless and anti-social as to warrant the same sanctions as one who intentionally injures another, then intent is inferred from the conduct. (*Id.*) Willful misconduct does not invariably entail a subjective intent to injure. (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714 (disapproved of on other grounds by, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th

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826).) It is sufficient that a reasonable person under the same or similar circumstances would be aware of the highly dangerous character of his or her conduct. (*Id.*)

Defendants wrongfully states that "Plaintiff has not alleged that Defendants intended to harm the decedent nor has Plaintiff alleged facts, as oppose to conclusions or contentions that indicate Defendants 'acted in conscious disregard of the probability of injury to Decedent." (Demurrer at 10.) As detailed above, Plaintiff has successfully pled a that Defendants acted so dangerously, recklessly and despicably as to warrant the same sanctions as one who intentionally injures another.

Defendant's refusal to stay with Decedent while Decedent's caregiver went to retrieve Decedent's oxygen and other medical supplies from the vehicle was sufficiently lacking in consideration for the rights of Decedent and indifferent to the consequences it may impose.

Moreover, Defendants' refusal to call 911 or help Decedent after her fall, and driving away leaving Decedent on the pavement injured is clear heedlessness to an extreme with absolute indifference to what would happen to Decedent. As such, Defendants' demurrer to willful misconduct should be overruled.

IV. LEAVE TO AMEND SHOULD BE GRANTED SHOULD ANY PORTION OF THE DEMURRER BE SUSTAINED

Even if there were grounds to sustain the demurrer, Plaintiff must be granted leave to amend because "[l]ierality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) "[A] demurrer should not be sustained without leave to amend if there is a reasonable possibility that a defect in the complaint can be cured by amendment." (*Call v. Kezirian* (1982) 135 Cal.App.3d 189, 195.) Indeed, it has been held an **abuse** of discretion for a court to deny leave to amend where there is any reasonable possibility that plaintiff can state a cause of action. (*See Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) With regard to each of the issue raised, Plaintiff can plead additional facts and cure any defect.

V. CONCLUSION

For the reasons set forth above, the Court should overrule Defendants' demurrer in its entirety. In the alternative, if the Court finds that there is any ground for sustaining the demurrer, Plaintiff should be granted leave to amend.

Date: May 23, 2014

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