

2013 WL 1345773 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Sacramento County

Joan BOICE, by and through her Successor-in-Interest, Eric
Boice, and Eric Boice, and Mark Boice, individually, Plaintiffs,

v.

EMERITUS CORPORATION dba Emeritus at Emerald Hills, and Does 1 through 50, inclusive, Defendants.

No. 34-2009-00063714.
February 22, 2013.

Defendant's Trial Brief Regarding Standard of Proof for Damages Claimed for Elder Abuse

Lewis Brisbois Bisgaard & Smith LLP, Bryan Reid, SB# 156619, E-Mail: breid@lbbslaw.com, Rima M. Badawiya, SB# 204174, E-Mail: rbadawiya@lbbslaw.com, 650 East Hospitality Lane, Suite 600, San Bernardino, California 92408, Telephone: 909.387.1130, Facsimile: 909.387.1138.

Lewis Brisbois Bisgaard & Smith LLP, Kim M. Wells, SB# 232279, E-Mail: kwells@lbbslaw.com, 2850 Gateway Oaks Drive, Suite 450, Sacramento, California 95833, Telephone: 916.564.5400, Facsimile: 916.564.5444, Attorneys for Defendant Emeritus Corporation dba Emeritus at Emerald Hills (Erroneously Served as Emeritus Senior Living at Emerald Hills).

Trial Date: January 2, 2013

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant EMERITUS CORPORATION dba EMERITUS AT EMERALD HILLS respectfully submits this trial brief regarding the standard of proof required for plaintiff Joan Boice to establish causation of damages for elder abuse.

I. INTRODUCTION

This action arises from allegations made by plaintiffs Joan Boice, by and through her successor in interest, Eric Boice, Eric Boice, individually, Nancee Boice, and Mark Boice ("plaintiffs") that Joan Boice received inadequate care while she resided at the Emeritus Corporation ("Emeritus") residential care facility for the elderly known as Emeritus at Emerald Hills ("Emerald Hills").

In regard to the cause of action for elder abuse, the court has proposed a modification of California Civil Jury Instruction (CACI) 3905A that includes a preponderance of the evidence standard of proof for damages. Under this instruction, the jury would be requested to determine whether Joan Boice "more likely than not suffered" noneconomic damages.

This conflicts with authority establishing that the standard of proof for causation and damages in an elder abuse cause of action is clear and convincing evidence, not preponderance of the evidence. Division Five of the Second Appellate Court of Appeal addressed this issue in *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657. In *Perlin*, the appellate court held that "[l]iability under section 15657 includes as an element "causation," which, as all elements of liability, must be proved by clear and convincing evidence...." (*Id.* at p. 664, emphasis added.) Therefore, defendant requests that the jury be instructed to find all elements of an elder abuse cause of action by clear and convincing evidence.

Defendant proposes the following modification of CACI 3905A:

The following are the specific items of damages claimed by Joan Boice, if you find by clear and convincing evidence that any physical **abuse** or neglect of Joan Boice caused such harm: Past physical pain, mental suffering, disfigurement, physical impairment, grief, anxiety, humiliation, and emotional distress.

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

(*Perlin v. Fountain View Management, Inc.*, *supra*, 163 Cal.App.4th at p. 664; see also *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404, 407.)

II. ALL ELEMENTS OF AN **ELDER ABUSE CAUSE OF ACTION MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE**

This court proposed a modified version of CACI 3905A regarding noneconomic damages available under the **Elder Abuse** Act, which states:

The following are the specific items of damages claimed by Joan Boice, which she has more likely than not suffered:

Past physical pain, mental suffering, disfigurement, physical impairment, grief, anxiety, humiliation, and emotional distress.

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

(Emphasis added.)

There are two problems with the proposed language modifying CACI 3905A. First, as drafted, the instruction appears to presume that Mrs. Boice suffered such harm rather than asking the jury to make a finding of harm. Second, the proposed modification adds language to the 1.5 instruction requiring the jury to find causation for noneconomic damages by merely a preponderance of the evidence. However, the **Elder Abuse** Act requires a plaintiff to establish liability by clear and convincing evidence in order to recover enhanced remedies. (*Welf. & Inst. Code*, § 15657.) If the clear and convincing standard is met, then a plaintiff may receive enhanced remedies such as attorney fees and costs, punitive damages, and noneconomic damages for a decedent's pre-death pain and suffering. (*Id.* at § 15657, subd. (b); *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 779-780.)

“‘Clear and convincing’ evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.” (*In re David C.* (1984) 152 Cal.App.3d 1189, 1208.) This standard of proof is a heightened standard above a preponderance of the evidence standard. “A party required to prove something by a preponderance of the evidence ‘need prove only that it is more likely to be true than not true.’” (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567 quoting Judicial Council of Cal. Civ. Jury Instns. (2012) CACI No. 200.) A preponderance of the evidence instruction as to noneconomic damages is improper in light of the clear language of the **Elder Abuse** Act and cases interpreting the Act.

In *Perlin v. Fountain View Management*, *supra*, 163 Cal.App.4th 657, the decedent had **knee replacement** surgery and received rehabilitation at defendant skilled nursing facility. (*Id.* at p. 659.) The decedent developed a wound on her leg and subsequently died from **pneumonia**. (*Ibid.*) The decedent's successors in interest sued defendant for negligence, willful misconduct, fraud, constructive fraud, intentional infliction of emotional distress, **elder abuse**, and wrongful death. (*Ibid.*) At trial, the jury returned a verdict in favor of plaintiffs on the **elder abuse** cause of action. (*Ibid.*) Plaintiffs then moved for almost \$800,000 in attorney

fees pursuant to [section 15657](#). (*Id.* at p. 663.) They argued that they were entitled to attorney fees under [section 15657](#) because the jury found by clear and convincing evidence that one or more of defendant's employees acted recklessly in the medical or custodial care of the decedent and because the parties had stipulated that defendant ratified the acts and omissions of its employees. (*Ibid.*)

At the plaintiffs' request, the trial court in *Perlin* instructed the jury with a modified version of CACI 3105, which told the jury to decide the issue of causation under the preponderance of the evidence standard. (*Perlin, supra*, 163 Cal.App.4th at p. 664, fn. 8.) The jury had two verdict forms for causation, one by a preponderance of the evidence and the other by clear and convincing evidence. (*Ibid.*) The jury found causation under a preponderance of the 1.9 evidence standard, but was unable to reach a verdict for causation under the clear and convincing evidence standard. (*Id.* at p. 657.) The trial court denied plaintiffs' motion for attorney fees finding that the jury's determination was insufficient. (*Id.* at p. 663.)

The Court of Appeal in *Perlin* affirmed the judgment and held “that in order to recover attorney fees under [Welfare and Institutions Code section 15657](#) ([section 15657](#)), part of the Act, the plaintiff must establish by clear and convincing evidence a defendant's liability for neglect, and because causation is an element of liability, the plaintiff must prove such causation under the clear and convincing evidence standard.” (*Perlin, supra*, 163 Cal.App.4th at p. 660.) The appellate court held that the element of causation must be proved by clear and convincing, not preponderance of the evidence. (*Id.* at p. 666.) According to the court, “[section 15657](#)'s requirement of proof of liability by clear and convincing evidence includes a required showing of causation by clear and convincing evidence....” (*Id.* at p. 664, fn. 6.) The court explained that, “[l]iability” under [section 15657](#) includes as an element ‘causation,’ which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees.” (*Id.* at p. 664, emphasis added.) Therefore, to qualify for additional remedies under the [Elder Abuse](#) Act, “the Legislature has required proof of liability under a heightened standard of proof--proof by clear and convincing evidence.” (*Ibid.*, emphasis added.)

The *Perlin* court rejected plaintiffs' argument that the clear and convincing evidence standard applies only to the showing of recklessness, oppression, fraud or malice in the commission of neglect and not to the other elements of the underlying wrong such as causation. (*Perlin, supra*, 163 Cal.App.4th at p. 665.) The court explained that the [Elder Abuse](#) Act creates an independent cause of action and therefore “plaintiffs' failure to obtain a verdict establishing causation--one element of liability--by clear and convincing evidence, precludes an award of attorney fees.” (*Id.* at p. 667.)

Additionally, in *Carter v. Prime Healthcare Paradise Valley LLC, supra*, 198 Cal.App.4th 396, the appellate court identified the factors that a plaintiff must allege and prove to trigger the enhanced remedies available under the [Elder Abuse](#) Act. According to the court, a plaintiff “must allege (and ultimately prove by clear and convincing evidence) facts establishing 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 (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness).” (*Id.* at p. 406, internal citations omitted, emphasis added.) Additionally, a “plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the [elder](#) or dependent adult to suffer physical harm, pain or mental suffering.” (*Id.* at p. 407, emphasis added.)

Carter also explained that “[t]he [Elder Abuse](#) Act makes certain enhanced remedies available to a plaintiff who proves [abuse](#) of an [elder](#), i.e., a “person residing in this state, 65 years of age or older.” In particular, a plaintiff who proves “by clear and convincing evidence” both that a defendant is liable for physical [abuse](#), neglect or [financial abuse](#) (as these terms are defined in the Act) and that the defendant is guilty of “recklessness, oppression, fraud, or malice” in the commission of such [abuse](#) may recover attorney fees and costs. On the same proof, a plaintiff who sues as the personal representative or successor in interest of a deceased [elder](#) is partially relieved of the limitation on damages imposed by [Code of Civil Procedure section 377.34](#) and may

recover damages for the decedent's pre-death pain and suffering.” (*Carter v. Prime Healthcare Paradise Valley LLC, supra*, 198 Cal.App.4th at p. 404, internal citations omitted, emphasis added.)

Therefore, plaintiffs must prove that defendant caused Joan Boice to suffer the alleged harm by clear and convincing evidence before they may recover noneconomic damages on her behalf. The jury instruction regarding noneconomic damages should properly reflect this standard of proof.

III. CONCLUSION

To prevail on their **elder abuse** cause of action, plaintiffs must prove by *clear and convincing evidence* that defendant committed reckless neglect that caused Joan Boice to suffer harm. All elements of an **elder abuse** cause of action must be proved by clear and convincing evidence.

Therefore, instead of the court's proposed modification of CACI 3905A, defendant requests the following modified language for CACI 3905A:

The following are the specific items of damages claimed by Joan Boice, if you find by clear and convincing evidence that any physical **abuse** or neglect of Joan Boice caused such harm: Past physical pain, mental suffering, disfigurement, physical impairment, grief, anxiety, humiliation, and emotional distress.

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

(*Perlin, supra*, 163 Cal.App.4th 657, 664; see also *Carter v. Prime Healthcare Paradise Valley LLC, supra*, 198 Cal.App.4th at pp. 404, 407.)

DATED: February 22, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: <<signature>>

Bryan R. Reid

Rima M. Badawiya

Kim M. Wells

Attorneys for Defendant EMERITUS CORPORATION dba EMERITUS AT EMERALD HILLS