2012 WL 8963774 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Maria A SANCHEZ, by and through Carlos Foy and Ricardo Sanchez, Plaintiffs,

v.

MILWOOD HEALTHCARE, INC. dba Maywood Acres Healthcare, Gary Proffett, M.D., Defendants.

No. 56-2012 00411328.
April 2, 2012.

Notice of Demurrer and Demurrer of Defendant Gary Proffett, M.D. to Plaintiff's Complaint; Memorandum of Points and Authorities; (Proposed) Order

Carroll, Kelly, Trotter, Franzen & McKenna, Mark V. Franzen (State Bar No. 079470), Dmitriy Cherepinskiy (State Bar No. 222311), Michael R. Pittman, 111 West Ocean Boulevard, 14th Floor, Post Office Box 22636, Long Beach, California 90801-5636, Telephone No. (562) 432-5855 / Facsimile No. (562) 432-8785, Attorneys for Defendant, Gary Proffett, M.D.

Judge Frederick Bysshe.

DEPARTMENT 41

Complaint Filed: February 14, 2012

Trial Date: None Set

DATE: May 1, 2012

TIME: 8:30 A.M.

RESERV.: 1689370

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 1, 2012, at 8:30 a.m., or as soon thereafter as counsel may be heard in Department 41 of the above-entitled Court located at 800 So. Victoria Ave., Ventura, California, Defendant, GARY PROFFETT, M.D. will demur to the Second, Third, and Fourth Causes of Action asserted in Plaintiff's Complaint.

This demurrer will be made and based upon this notice, the attached memorandum of points and authorities, the pleadings and records on file herein, and such further oral and/or documentary evidence as may be presented at the time of the hearing of this Demurrer.

DATED: March 28, 2012

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

By: <<signature>>

MARK V. FRANZEN

DMITRIY CHEREPINSKIY

MICHAEL R. PITTMAN

Attorneys for Defendant GARY PROFFETT, M.D.

DEMURRER TO PLAINTIFF'S COMPLAINT

Defendant Gary Proffett, M.D. demurs to Plaintiff's Complaint as follows:

1. Plaintiff's Second Cause of Action for **Elder** **Abuse** is uncertain and fails to state facts sufficient to maintain this Cause of Action.

2. Plaintiff's Third Cause of Action for Willful Misconduct is uncertain and fails to state facts sufficient to maintain this Cause of Action.

3. Plaintiff's Fourth Cause of Action for Negligence is uncertain and fails to state facts sufficient to maintain this Cause of Action.

DATED: March 28, 2012

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

By: <<signature>>

MARK V. FRANZEN

DMITRIY CHEREPINSKIY

MICHAEL R. PITTMAN

Attorneys for Defendant

GARY PROFFETT, M.D.

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I. ***INTRODUCTION***

On January 20,2012, plaintiff Maria A. Sanchez, by and through her Guardians Ad Litem, Carlos Foy and Ricardo Sanchez (hereinafter, "Plaintiff") brought this professional negligence action based upon the care and treatment rendered to Plaintiff at Maywood Acres Healthcare from January 19, 2011 through August 28, 2011 by Gary Proffett, M.D. (hereinafter, "Dr. Proffett" and/or "Defendant," to be used interchangeably), and Milwood Healthcare, Inc. d.b.a. Maywood Acres Healthcare (hereinafter, "Maywood Acres"). Plaintiff alleges the following causes of action: (1) Violation of Residents' Rights; (2) **Elder Abuse**; (3) Willful Misconduct; and (4) Negligence. Plaintiff's Second, Third, and Fourth Causes of Action are asserted against Dr. Proffett. Dr. Proffett will herein establish that Plaintiff's Second, Third, and Fourth causes of action are uncertain and fail to allege facts sufficient to state these causes of action against Dr. Proffett. Accordingly, Dr. Proffett respectfully requests that the Demurrer to Plaintiff's Second, Third, and Fourth causes of action be sustained without leave to amend.

II. ***PLAINTIFF'S COMPLAINT IS PROPERLY SUBJECT TO DEMURRER***

Code of Civil Procedure § 430.10 provides in relevant part:
The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

...

(e) *The pleading does not state facts sufficient to constitute a cause of action.*

(f) *The pleading is uncertain.* As used in this subdivision, "uncertain" includes *ambiguous and unintelligible.*

(CAL. CIV. PROC. CODE § 430.10 (emphasis added)). Accordingly, when a complaint is defective, in whole or in part, and the defects appear on the face of the complaint, the defendant may object by demurrer. (Cal. Civ. Proc. Code § 430.50(a)). Not only does the demurrer test the sufficiency of the actual allegations in the complaint, but it also tests whether those facts are pled with sufficient certainty and particularity. (*Banerian v. O'Malley,* 42 Cal.App.3d 604 (1974)).

If under substantive law no liability exists, a demurrer is proper and it is not an **abuse** of discretion for a Judge to deny plaintiff leave to amend their complaint. (*Berkeley Police Assn. v. City of Berkeley*, 76 Cal.App.3d 931 (1977); see also *Lawrence v. Bank of America,* 163 Cal.App.3d 431 (1985)). In addition, in *Lee v. Interinsurance Exchange, 50* Cal.App.4th 694 (1996) the Court noted that:

> [I]t is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that plaintiff cannot state a cause of action.

(*Id.* at 724; see also *Kravitz v. Rusch*, 209 Cal.App.3d 957 (1989)).

III. *RULES GOVERNING DEMURRERS - ONLY FACTS ARE DEEMED TRUE NOT CONTENTIONS OR CONCLUSIONS*

The function of a demurrer is to test the sufficiency of plaintiff's pleading by raising questions of law. Only properly pleaded allegations of fact are accepted as true, as well as those facts which may be inferred from those expressly alleged, *but not contentions, deductions, or conclusions of fact or law. (Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985); *Marshall v. Gibson. Dunn & Crutcher*, 37 Cal.App.4th 1397, 1403 (1995)(Emphasis added).

Moreover, in *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal.App.3d 531 (1979), the Court noted:

> It is settled law that a pleading must allege facts and *not conclusions*, and that material facts must be alleged directly and not by way of recital. Also, in pleading, the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise. Those recitals, references to, or allegations of material facts which are left to surmise are subject to special demurrer for uncertainty.

(*Id.* at 537)(emphasis added)(internal citations omitted). It is especially important that plaintiff's directly plead material facts to support the cause of action where, as here, certain causes of action are created by statute. (See: *Covenant Care, Inc. v. Superior Court*, 32 Cal.4th 771, 790 (2004) [holding that statutory causes of action, *particularly those brought under the* ***Elder*** ***Abuse*** *Act*, require pleading with particularity]).

IV. *PLAINTIFF'S SECOND CAUSE OF ACTION FOR* ***ELDER*** ***ABUSE*** *IS UNCERTAIN AND FAILS TO STATE FACTS SUFFICIENT TO SUSTAIN A CAUSE OF ACTION FOR* ***ABUSE*** *OF A DEPENDENT ADULT*

Plaintiff's Second Cause of Action for **Elder** **Abuse** pursuant to the **Elder** Adult and Dependent Adult Civil Protection Act against Dr. Proffett fails to state sufficient facts and, as such, is impermissibly vague and unintelligible. Plaintiff is invoking California's **Elder** and Dependent Adult Civil Protection Act (*Welf. & Inst. Code, § 15600, et seq.*) in an attempt to recover damages and attorney's fees beyond the statutory limitations set forth by MICRA in what is, *essentially, an action for professional negligence* against Dr. Proffett. Plaintiff is prohibited from doing so, however, by statutes and prevailing case law.

In order to properly plead **elder** **abuse**, Plaintiff has to allege facts demonstrating that Defendant is guilty of something more than mere negligence. In *Delaney v. Baker*, (1999) 20 Cal. 4th 23, the California Supreme Court analyzed the plain language of the ***Elder*** *Independent Adult Civil Protection Act* ("EADACPA"), *Welf. & Inst. Code* § 15600, *et seq.* and determined that by the statute's terms:

There can be no claim for **abuse** of a dependent adult unless a plaintiff can "demonstrate by clear and convincing evidence that the defendant is *guilty of something more than negligence"* ... Section 15657.2 can therefore be read as making clear that the acts proscribed by Section 15657 do not include acts of *simple professional negligence*, but refer to the forms of **abuse** or neglect performed with some state of culpability greater than mere negligence.

(*Id.* at 31-32)(emphasis added). The legislative history supported the Court's interpretation, as it indicated that the **Elder** **Abuse** Act's goal was to provide heightened remedies for... "acts of *egregious* ***abuse***" against **elder**... adults..." (*Id.* at 35)(emphasis added). In the end, the Court stressed:

> Section 15657.2 can therefore be read as making clear that the acts proscribed by section 15657 do *not* include acts of simple professional negligence, but refer to forms of **abuse** or neglect performed with some state of culpability *greater than mere negligence.*

(*Id.* at 32)(emphasis added). Thus, as the above discussion has demonstrated, *mere professional negligence does not support a claim for **elder** **abuse**.* Therefore, **Elder** **Abuse** causes of action must be pled with *sufficient specificity and particularity.* In *Blegen v. Superior Court,* the Court held that conclusory language *may not be pleaded as a substitute for specific facts notifying a defendant of the basis upon which relief is sought. (Blegen v. Superior Court,* (1981) 125 Cal. App. 3d 959, 963).

Plaintiff has failed entirely to meet these basic pleading requirements as to Dr. Proffett. Here, with respect to Dr. Proffett, Plaintiff merely "supports" her Second Cause of Action with vague allegations containing the words "malice," "oppression," "fraud," and "recklessness" in the attempt to satisfy the specific pleading requirements in seeking enhanced damages under the **Elder** **Abuse** Act. (*See* Complaint, at ¶ 45, lines 26-27).

Elder **abuse** is defined by *Welf& Inst Code §* 15610.07 as:
(a) Physical **abuse**, neglect, **financial** **abuse**, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

The discussion below will demonstrate that Plaintiff has failed to properly plead a cause of action for **Elder** **Abuse** against Dr. Proffett under theories of *neglect* or *physical **abuse**.* Therefore, Plaintiff's cause of action for **Elder** **Abuse** against Dr. Proffett is uncertain and fails to state facts sufficient to maintain a cause of action.

A. Plaintiff Has Failed to Properly Plead that Dr. Proffett Neglected Her Under the Elder Abuse Statutes

1. Required Elements of Neglect Under the Elder Abuse Act

In the case of *Carter v. Prime Healthcare Paradise Valley, LLC,* 198 Cal. App. 4th 396 (2011), the Court set forth the factors *required to constitute neglect* within the meaning of the **Elder** **Abuse** Act. The *Carter* case is directly on point and sets forth the specific factors required to plead and establish a claim for "neglect" under the **Elder** **Abuse** Act. These factors must be satisfied to trigger the enhanced remedies available under the Act. The Court stated:

> The 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 [citations omitted]; (2) knew of conditions that made the **elder** or dependent adult unable to provide for his or her own basic needs [citations omitted]; 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... or with conscious disregard of such injury [citations omitted]. The 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 [citations omitted].

Carter v. Prime Healthcare Paradise Valley, LLC, 198 Cal. App. 4th 396,406-407 (2011)(Emphasis added).

2. Actively Undertaking To Provide Medical Treatment Does Not Constitute Neglect Under the Elder Abuse Act

The *Carter* Court stated that, "when medical care of an **elder** is at issue, 'the statutory definition of *'neglect'* speaks *not* of the *undertaking* of medical services, but of the failure to provide medical care ['statutory **elder abuse** may include egregious withholding of medical care for physical and mental health needs']." (*Id.* at 404-405)(Emphasis added). In addition, "to recover the enhanced remedies available under the **Elder Abuse** Act from a health care provider, a plaintiff *must prove more than simple or even gross negligence in the provider's care or custody of the **elder**.*" (*Id.* at 405). "In short, in order to obtain the Act's heightened remedies, a plaintiff must *allege conduct essentially equivalent to conduct that would support a recovery of punitive damages." (Id.*) Recklessness involves " 'deliberate disregard' of the 'high degree of probability' that an injury will occur" and *"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.)*(Emphasis added) Finally, "the facts constituting the neglect and establishing the causal link between the neglect and the injury *must be pleaded with particularity*, in accordance with the pleading rules governing statutory claims." (*Id.* at 407).

In the *Carter* case, the Court discussed the plaintiff's allegations in detail:
The plaintiff's allege that Grant died because the Hospital *did not administer the antibiotics* Grant needed to treat his pneumonia and *did not have the proper size endo-tracheal tube in the crash cart*, despite "false records" to the contrary. Plaintiff's also allege, however, that during this hospitalization, "bags containing fluids [were] being injected into [Grant]," and after "personnel treating [Grant] ... could not locate a common size endo-tracheal tube in the crash cart," they began "a search for an appropriate tube elsewhere in the hospital." 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. Although* the failure to infuse the proper antibiotics and the failure to locate the proper size endo-tracheal tube in time to save Grant's life might constitute professional negligence.

(*Carter v. Prime Healthcare Paradise Valley LLC,* 198 Cal. App. 4th 396, 408 (Cal. App. 4th Dist. 2011))(Emphasis added).

In this case, Plaintiff's essential factual allegations against Dr. Proffett are that he *negligently* prescribed the following medications to Plaintiff from January 19, 2011 through August 28, 2011 without properly obtaining her informed consent: "Ativan (anti-anxiety); Tegretol (anti-seizure medication used off-label to control unwanted behaviors); and Remeron (an anti-depressant). (Complaint, ¶ 14, lines 27-28, and 1). Specifically, Plaintiff alleges that "in early August Ricardo traveled out of the country for approximately 3 weeks. Upon his return he was shocked at her markedly changed appearance and demeanor. He found his mother, totally debilitated, slumped over in her wheelchair, drooling, with her head bowed, unresponsive to his voice and barely responsive to his touch. Ricardo also saw that her feet were swollen, and when staff removed her shoes, he could see a large wound on her left heel." (*Id.* at ¶ 15, lines 2-7). Further, Plaintiff alleges that "when she demonstrated unwanted behaviors, she was drugged as a substitute for needed care." (*Id.* at ¶ 31, lines 18-19). Plaintiff concludes that "such drugs caused obvious side effects, including lethargy and somnolence, which led her to be so sleepy and drugged that she had no interest in taking in food or fluids or she could not stay awake long enough to take in food or fluids." (*Id.* at ¶38, lines 24-27). Plaintiff alleges that she was "neglected" at Maywood Acres, however, Plaintiff fails to specifically plead facts to support a cause of action for **Elder Abuse** under a theory of "neglect" against Dr. Proffett. *All of Plaintiff's allegations assert that Dr. Proffett was providing medical care to Plaintiff, not withholding it.*

This is *not* a case of *denial* of services *by Dr. Proffett.* The decision to prescribe, or not prescribe, certain medications is a *medical decision.* It does *not,* and cannot, constitute neglect under California law. No *pattern of neglect has been alleged against Dr. Proffett in this action.* As in *Carter,* Dr. Proffett's actions *might* constitute professional negligence, but they do not rise to level required to sustain a theory of neglect under the **Elder Abuse** Act. Plaintiff has failed to meet the pleading requirement for a theory of "neglect" in this matter against Dr. Proffett.

B. Plaintiff Has Failed to Adequately Plead That Dr. Proffett Physically Abused Her Under the Elder Abuse Statutes

Plaintiff asserts the following main allegation against Dr. Proffett: without Plaintiff's informed consent, Dr. Proffett *negligently* prescribed the following medications to Plaintiff from January 19, 2011 through August 28,2011: "Ativan (anti-anxiety); Tegretol (anti-seizure medication used off-label to control unwanted behaviors); and Remeron (an anti-depressant). (Complaint, ¶ 14, lines 27-28, and 1). Plaintiff complains that she was *physically **abused*** because she was "subjected to a prolonged or continual deprivation of food or water as evidenced by her condition and lab reports on admission to St. John's Regional Medical Center." (*Id.* at ¶ 32, lines 3-4). However, there are no specific allegations as to what Dr. Proffett did, or did not do, with respect to Plaintiff's intake of food and water. Plaintiff improperly lumps "Defendants" together and does not specify who performed or did not perform what actions. Therefore, Plaintiff's Complaint is deficient.

(1) CACI Instruction 3106 Provides the Factual Elements for Physical Abuse under Welfare & Institutions Code § 15610.63, but Does Not Explicitly Define Physical Abuse

CACI jury instruction 3106 provides as follows:
Plaintiff claims that he was physically **abused** by the defendant in violation of the **Elder Abuse** and Dependent Adult Civil Protection Act. To establish this claim, plaintiff must prove all of the following:

(1) That the defendant *physically **abused*** plaintiff by [applicable grounds for **abuse**];

(2) That the plaintiff was 65 years of age or older / a dependent adult at the time of the conduct;

(3) That the plaintiff was harmed; and

(4) That the defendant's conduct was a substantial factor in causing the plaintiff's harm.

While the jury instruction sets forth the elements of physical **abuse** under the statute, *it does not specifically define physical **abuse***. In the Use Notes of CACI jury instruction 3106, the Judicial Council has instructed that the definitions of physical **abuse** contained in *Welfare & Institutions Code* section 15610.63 *should be applied.* As discussed in detail below, the *only possible definition of physical **abuse** applicable to this case to Dr. Proffett is where a chemical restraint or psychotherapeutic medication was given for punishment.*

(2) Based upon the Use Notes to CACI Jury Instruction 3106, the Definitions of 'Physical Abuse' Are Contained in California Welfare & Institutions Code § 15610.63

The Use Notes of CACI jury instruction 3106 explicitly refer to California *Welfare & Institutions Code* section 15610.63 for the definition *of "physical **abuse**."* Physical **abuse** is defined as follows:
'Physical **abuse**' means any of the following:

(a) Assault, as defined in Section 240 of the Penal Code.

(b) Battery, as defined in Section 242 of the Penal Code.

(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.

(d) Unreasonable physical constraint, or prolonged or continual deprivation of food and water.

(e) Sexual assault...

(f) Use of a physical or *chemical* restraint or *psychotropic medication* under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the **elder** or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon. CACI Instruction 3106 (Emphasis added).

(a) Dr. Proffett Did Not Commit A Criminal Assault Upon Plaintiff

California *Penal Code* section 240 provides that "an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (*Id.*) Plaintiff has *not* pled that Dr. Proffett committed an assault upon her to meet the definition of physical **abuse** as contemplated by *Welfare & Institutions Code* section 15610.63(a). There are no allegations to support that Dr. Proffett committed a criminal assault upon Plaintiff when he prescribed her medications. Therefore, this definition of physical **abuse** is *not* applicable to this case.

(b) Dr. Proffett Did Not Commit A *Criminal* Battery Upon Plaintiff

California *Penal Code* section 242 provides as follows: "A battery is any *willful and unlawful use of force or violence upon* the person of another." (Id.)(Emphasis added). Plaintiff has not pled that Dr. Proffett willfully and unlawfully used force or violence against her. In fact, Plaintiff has not even alleged that Dr. Proffett was physically present when the alleged incident took place. Therefore, this definition of physical **abuse** under *Welfare & Institutions Code* section 15610.63(b) is *not* applicable to this case.

(c) Dr. Proffett Did Not Assault Plaintiff With a Deadly Weapon

Plaintiff has *not* pled that Dr. Proffett committed an assault upon her to meet the definition of physical **abuse** as contemplated by *Welfare & Institutions Code* section 15610.63(c). There are no allegations to support that Dr. Proffett committed a criminal assault with a deadly weapon or force likely to create great bodily injury. Therefore, this definition of physical **abuse** is *not* applicable to this case.

(d) Plaintiff Was Not Unreasonably *Physically* Restrained or Deprived of Food or Water By Dr. Proffett

"Physical **abuse**" is also defined as an "unreasonable physical constraint, or prolonged or continual deprivation of food or water." (Cal. Welf. & Inst. Code § 15610.63(d)). In this case, Plaintiff has not pled that Dr. Proffett *physically restrained her*. In addition, Plaintiff has not pled that she was deprived of food or water by Dr. Proffett. Plaintiff's allegations do not specify who was allegedly depriving her of food and water. Plaintiff inappropriately lumps all "defendants" together, and alleges "Defendants acted intentionally when they chose to ignore Sanchez's need for more food and hydration than she was taking in." (Complaint, ¶ 35, 13-14). Therefore, Dr. Proffett did not physically restrain Plaintiff or withhold food or water from her. This definition of physical **abuse** provided by *Welfare & Institutions Code* section 15610.63(d) is *not* applicable to this case.

(e) *Dr. Proffett Did Not Commit a Sexual Assault Upon Plaintiff*

Welfare & Institutions Code section 15610.63(e) defines physical **abuse** as "sexual assault." (*Id.*) Plaintiff has not alleged or pled that Dr. Proffett committed a sexual assault upon her, and therefore, this definition of physical **abuse** is *not* applicable to this case.

(f) The Psychotherapeutic Medications Allegedly Administered to Plaintiff Were Not Given For A Period Beyond That For Which the Medication was Ordered, Nor Were The Medications Administered for a Purpose Not Authorized by Dr. Proffett

Due to the fact that Dr. Proffett was Plaintiff's attending physician, *Welfare & Institutions Code* section 15610.63(f)(2) and (3)'s definitions of "physical **abuse**" do *not* apply to this case. There is *no* allegation that Plaintiff was administered psychotherapeutic medications for a period beyond that for which the medication was ordered pursuant to the instructions of a physician. Further, there are no allegations that psychotherapeutic medications were administered for any purpose not authorized by the physician. Therefore, the definitions of physical **abuse** provided by *Welfare & Institutions Code* section 15610.63 (f)(2) - (3) do *not* apply to this case.

(3) *Plaintiff Has Not and Cannot Allege That Dr. Proffett Used A Chemical Restraint or Psychotherapeutic Medication for Punishment*

As set forth in detail above, *none* of the other definitions of "physical **abuse**" under the **Elder Abuse** statutes apply to this case. The *only possible* definition remaining is as follows: "Use of a physical or chemical restraint or psychotropic medication... (1) for punishment." (Cal. Welf. & Inst. Code § 15610.63(f)(1))(Emphasis added).

Plaintiff has not, and cannot, allege that Dr. Proffett prescribed Plaintiff medications for punishment. Nothing in the Complaint indicates that Dr. Proffett intended to punish Plaintiff in any manner. Therefore, Plaintiff has failed to meet the pleading requirement for a theory of"physical **abuse**" in this matter against Dr. Proffett.

C. Plaintiff's Allegations Against Dr. Proffett, *If Anything,* Amount to Professional Negligence, Not Elder Abuse

The aforementioned allegations point to *professional negligence,* and not to a *level culpability that would allow punitive damages. (Benun v. Superior Court,* 123 Cal.App. 4th 113, 123 (2004)).

The California Supreme Court, in addressing the issue at hand *directly,* stated:
It is true that statutory **elder abuse** includes "neglect as defined in Section 15610.57" (Welf. & Inst. Code, § 15657), which in turn includes negligent failure of an **elder** custodian "to provide medical care for [the **elder's**] physical and mental health needs." But as we explained in section 15610.57 covers an area of misconduct distinct from "professional negligence." *As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the "failure of those responsible for attending to the basic needs and comforts of **elderly** or dependent adults,* regardless of their professional standing, to carry out their custodial obligations." (*Delaney,* supra, 20 Cal.4th at p. 34.) Thus, the statutory definition of "neglect" speaks not of the undertaking of medical services, but of *the failure to provide medical care.* Notably, the other forms of **abuse**, as defined in the Act-- physical **abuse** and fiduciary **abuse** are forms of intentional wrongdoing also distinct from "professional negligence." (*Delaney,* supra, at p. 34.)

(*Covenant Care, Inc. v. Superior Court,* 32 Cal.4th 771, 783 (2004)(emphasis added)).

In the case at hand, *Plaintiff has not alleged that Dr. Proffett failed to provide "the basic needs and comforts of **elderly** or dependent adults"* at Maywood Acres. As discussed in detail above, Plaintiff essentially alleges that Dr. Proffett negligently prescribed medications to Plaintiff without properly obtaining her informed consent. At most, as against Dr. Proffett, this is

an allegation of medical malpractice. Ordering prescription medications for an approximate period of seven months does *not* amount to **elder abuse**. Nothing pled by Plaintiff with regard to Dr. Proffett amounts to *egregious* ***abuse***, as is required by law. Plaintiff has failed to sufficiently establish a claim for **elder abuse**, and it is therefore, merely a disguised professional negligence claim with the caption of **elder abuse**. To acknowledge Plaintiff's characterization of **elder abuse** would be to imply that *any* **elderly** patient who was prescribed medications that they later allege to be incorrect *would be the victim of "****elder abuse****."* Such a premise cannot be acceptable. Plaintiff cannot characterize the entire action as **elder abuse** in order to circumvent the MICRA protections envisioned by the Legislature.

It is apparent that Plaintiff is attempting to take advantage of her advanced age at the time of the incident to make a claim for **elder abuse** when, by all accounts, this is really a claim for professional negligence. Allowing Plaintiff to proceed on a theory of dependent adult **abuse** is not supported by the intent of the statute, case law, or common sense. Accordingly, Defendant's Demurrer to Plaintiff's Second Cause of Action for **Elder Abuse** should be sustained without leave to amend.

V. *PLAINTIFF'S SECOND CAUSE OF ACTION FOR WILLFUL MISCONDUCT IS UNCERTAIN AND FAILS TO STATE SUFFICIENT FACTS TO CONSTITUTE A CLAIM*

The concept of Willful Misconduct is well defined in California law. "Willful or wanton misconduct is *intentional* wrongful conduct, done either with the knowledge that serious injury to another will probably result, or with a *wanton* and *reckless* disregard of the possible results." (*Nu v. Consolidated Rock Prod. Co.*, (1985) 171 Cal. App. 3d 681 quoting *O'Shea v. Claude C. Wood, Co.* (1979) 97 Cal. App. 3d 903, 912 (superceded on other grounds)(Emphasis added). The following elements must be established or ordered to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge of injury is a probable, as opposed to possible, result of the danger; and (3) conscious failure to act to avoid the peril. (*Nazar v. Rodeffer* (1986) 184 Cal. App. 3d 546, 552)(abrogated on other grounds). Unlike negligence, the pleading requirements for willful misconduct require specificity. (4 Witkin, California Procedure, *Pleadings*, §570 (4th Ed., 1997)).

In this case, Plaintiff has completely failed to satisfy the elements of a cause of action for willful misconduct with respect to Dr. Proffett. In her willful misconduct cause of action and in her Complaint as a whole, Plaintiff improperly lumps all defendants together as "Defendants." (*See e.g.* Complaint, ¶ 53.) Plaintiff fails to allege *what acts* Dr. Proffett committed in the commission of the alleged acts which *rose above mere negligence*, as a cause of action for willful misconduct requires. Plaintiff's Complaint fails to allege facts showing that Dr. Proffett had actual or constructive knowledge that the "wrongful conduct" would *probably* cause Plaintiff peril. The facts, *as alleged*, rise to the level of professional negligence, if anything, *not* willful misconduct.

Moreover, Plaintiff has failed to state any facts which support the proposition that Dr. Proffett's conduct was reckless, oppressive, fraudulent, or malicious. It is well-established that conclusions of fact are insufficient and a complaint is deficient when it merely includes language that the conduct of a defendant is reckless, malicious, and/or fraudulent, yet has no facts which demonstrate such conduct. (*See e.g.* Complaint, ¶ 56).

Case law relating to punitive damages allegations provides authority on this point. For instance, in a negligence action which includes a prayer for punitive damages, conclusory allegations that simply characterize Defendant's conduct as "intentional, willful, and fraudulent" are insufficient and are subject to a motion to strike. (*Smith v. Superior Court*, (1992) 10 Cal. App. 4th 1033, 1042).

The California Supreme Court held as follows:

> In order to obtain the remedies available in Section 15657, a plaintiff must demonstrate by clear and convincing evidence that the defendant is guilty of something more than negligence; he or she must show recklessness, oppression, fraudulent and malicious conduct. The latter three categories involve

> "intentional", "willful", or "wrongdoing" of a "despicable" or "injurious" nature. (*Delaney v. Baker* (1999) 20 Cal. App. 4th 23).

There are no facts demonstrating Dr. Proffett had "actual or constructive knowledge" of any peril or probability of injury to Plaintiff, or conscious failure to act to avoid the peril. In other words, *there are absolutely no facts substantiating any of the elements of the willful misconduct cause of action against Dr. Proffett.* In this case, Plaintiff's essential factual allegations against Dr. Proffett are that he *negligently* prescribed the following medications to Plaintiff from January 19, 2011 through August 28, 2011 without properly obtaining her informed consent: "Ativan (anti-anxiety); Tegretol (anti-seizure medication used off-label to control unwanted behaviors); and Remeron (an anti-depressant). (Complaint, ¶ 14, lines 27-28, and 1). Specifically, Plaintiff alleges that "in early August Ricardo traveled out of the country for approximately 3 weeks. Upon his return he was shocked at her markedly changed appearance and demeanor. He found his mother, totally debilitated, slumped over in her wheelchair, drooling, with her head bowed, unresponsive to his voice and barely responsive to his touch. Ricardo also saw that her feet were swollen, and when staff removed her shoes, he could see a large wound on her left heel." (*Id.* at ¶ 15, lines 2-7). Further, Plaintiff alleges that "when she demonstrated unwanted behaviors, she was drugged as a substitute for needed care." (*Id.* at ¶ 31, lines 18-19). Plaintiff concludes that "such drugs caused obvious side effects, including lethargy and somnolence, which led her to be so sleepy and drugged that she had no interest in taking in food or fluids or she could not stay awake long enough to take in food or fluids." (*Id.* at ¶38, lines 24-27). Plaintiff's contentions are blanket statements, unsupported by any specific acts allegedly conducted by Dr. Proffett, and are mere unsubstantiated conclusions. Therefore, the allegations set forth are helplessly vague, ambiguous and overbroad.

Based on the foregoing, it is clear that the allegations set forth in Plaintiff's Complaint, standing alone, are insufficient to state a cause of action for willful misconduct. *If Plaintiff's allegations amount to anything at all, they amount to professional negligence- a cause of action which is already being alleged in the Fourth cause of action.* Therefore, this Court should sustain Defendant's demurrer to Plaintiff's Third cause of action for Willful Misconduct without leave to amend.

VI. *PLAINTIFF'S FOURTH CAUSE OF ACTION FOR NEGLIGENCE IS UNCERTAIN AND FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM*

Pursuant to *Code of Civil Procedure §§* 430.10(e) and 430.10(f), the fourth cause of action is uncertain and fails to state sufficient facts to constitute a claim in its label and character. Specifically, the cause of action is labeled: "Negligence." However, the allegations in this cause of action clearly sound in professional negligence, and should be both labeled and treated as such. The purpose of *Code of Civil Procedure* § 430.10 is for all parties to be able to clarify the actual causes of action alleged at the outset of litigation.

Civil Code § 3333.1(c)(2) defines "Professional Negligence" as follows:

> "Professional Negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licenced and which are not within any restriction imposed by the licensing agency or licensed hospital.

In California, courts have not hesitated to disregard the label put on an action when the gravamen of the claim is clearly different. (*See e.g., Flowers v. Torrance Memorial Hospital & Med. Ctr.,* 8 Cal. 4th 992 (1994) (holding that, notwithstanding how a claim is labeled, a claim for negligence against a healthcare professional is a claim for professional negligence); and *Cobbs v. Grant,* 8 Cal.3d 229 (1972) (holding that a claim based on the failure to obtain informed consent is one for negligence, notwithstanding a "battery" label).

Here, Plaintiff labels her fourth cause of action "Negligence" while it is clear that this claim, as applied against Dr. Proffett -- *a health care provider* -- arises out of his services as a health care provider, and therefore, is a professional negligence claim. Plaintiff's Complaint *admits Dr. Proffett is a health care provider*. The Complaint states Dr. Proffett "is a physician licensed to practice in the State of California (License No. XXXXXX).... He was also assigned as Sanchez' 'attending physician' during Sanchez' residency at Maywood." (Complaint, ¶ 5, lines 24-28). As Plaintiff's attending physician, Dr. Proffett was, at all times, rendering professional services to Plaintiff. One reason why Plaintiff labels her claim "Negligence" is to "plead around" and deprive this Defendant from the proper statutory protections of MICRA, including California *Civil Code* §§i 3333.1 and 3333.2, and California *Code of Civil Procedure §§* 667.7 and 425.13. *Plaintiff's attempt is unwarranted and improper.*

As it is currently pled, Plaintiff's Fourth cause of action is uncertain. It is a claim for *professional negligence* and it must be pled as such. Therefore, Dr. Proffett respectfully requests the Court to sustain demurrer to this cause of action, and issue a ruling that the Fourth cause of action, as against Dr. Proffett, despite its label, is one for professional negligence and only professional negligence. As it is currently pled, Plaintiff's Fourth cause of action is improper, and Dr. Proffett's demur to this cause of action should be sustained without leave to amend.

VII. *CONCLUSION*

Based upon the foregoing, Defendant Gary Proffett, M.D. respectfully requests that the Court sustain this demurrer without leave to amend as to the Second, Third, and Fourth causes of action asserted in Plaintiff's Complaint.

DATED: March 28, 2012

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

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