2014 WL 7666909 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Orange County

Mildred KULLBOM, in and through her Guardian Ad Litem Betty J. MacKenzie, Plaintiffs,

v.

OCEANSIDE SENIOR HOME; Jessica Manor; Jhez Corporation; Joana Alimboyogen, an individual; Nida Jenkins, an individual; Christopher Holden, M.D., an individual; and Does 1 through 50, inclusive, Defendants.

No. 30-2014-00730376.
October 3, 2014.

Plaintiff's Combined Opposition to Defendant, Christopher Holden, M.D.'S Demurrer and Motion to Strike

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[*Assigned for all purposes to Hon. Peter Wilson, Dept.C-12*]

Date: October 9, 2014

Time: 2:00 p.m.

Dept: C-12

Complaint Filed: June 25, 2014

Trial Date: None

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

The Plaintiff, MILDRED KULLBOM, in and through her Guardian Ad Litem Betty J. Mackenzie, submit the following combined opposition to Defendant, CHRISTOPHER HOLDEN, M.D.'s Demurrer and Motion to Strike Portions of Plaintiff's Complaint.

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1. *INTRODUCTION*

This is a Negligence and **Elder Abuse** case brought under the provisions of *Welfare and Institutions Code* § 15600, et seq. against Defendants, JHEZ CORPORATION, OCEANSIDE SENIOR HOME, JESSICA MANOR, JOANA ALIMBOYOGEN, NIDA JENKINS, and CHRISTOPHER HOLDEN, M.D. (“Dr. HOLDEN”)for causing the Plaintiff, MILDRED KULLBOM (“Ms. KULLBOM”) to develop a pressure sore on her left buttock, and then improperly retaining Ms. KULLBOM as a resident when her pressure sore became greater than a Stage 2, in violation of Title 22 California *Code of Regulations (C.C.R.)* § 87615.

The facts alleged in the Complaint against Dr. HOLDEN, which for purposes of this demurrer must be taken as true, assert that Dr. HOLDEN failed to provide medical care and treatment to MILDRED KULLBOM's skin breakdown, and allowed it to worsen to an infected Stage 4 pressure sore. It is further alleged that Dr. HOLDEN knew that OCEANSIDE SENIOR HOME was not a licensed healthcare facility and the caregivers who worked at OCEANSIDE SENIOR HOME were not licensed to provide any medical care and treatment to its residents. Despite this knowledge, Dr. HOLDEN made orders for the caregivers to provide wound care to Ms. KULLBOM's pressure sore prior to it becoming a Stage 3, and failed to transfer her to a higher level of care when he assessed her pressure sore to be greater than a Stage 2, which is required by law.

By failing to order the appropriate licensed nurses to provide the wound care to her pressure sore, and by failing to transfer Ms. KULLBOM to a higher level of care when the pressure sore worsened beyond a Stage 2, Dr. HOLDEN withheld medical care and treatment from Ms. KULLBOM which caused her left buttock pressure sore to worsen to Stage 4.

The Plaintiff has at the very least set forth a *prima facie* case for reckless conduct and/or conscious disregard against Dr. HOLDEN, which takes this action beyond the realm of Professional Negligence, and within the scope and remedies of the **Elder** Adult and Dependent Adult Civil Protection Action (hereinafter "**Elder** **Abuse** Act").

While it obviously remains to be seen whether in fact the jury in this matter will find that the conduct of Dr. HOLDEN constitutes **elder** **abuse** or just simple negligence, it would be an **abuse** of judicial discretion at the pleading stages to dismiss the **Elder** **Abuse** and Willful Misconduct causes of action given the specific factual allegations set forth in the Complaint, and without even permitting the trier of fact to decide on the actual evidence to be submitted as to which theory they believe to be true, as it is within their exclusive domain to accomplish.

For the reasons set forth above, and more fully below, the Plaintiff has set forth a prima facie case for **Elder** **Abuse** and Willful Misconduct, and as such, Defendant's Demurrer must be overruled and concurrent Motion to Strike be denied.

2. *THE FACTS PLED AGAINST DEFENDANT, DR. HOLDEN*

The Plaintiff's Complaint specifically alleges the following facts, which for purposes of a demurrer must be taken as true:

a) Dr. HOLDEN was in a joint venture with Defendants, JESSICA MANOR, OCEANSIDE SENIOR HOME, JHEZ CORPORATION, JOANA ALIMBOYOGEN, NIDA JENKINS, and DOES 1-20, to have all residents who reside at OCEANSIDE SENIOR HOME become his patient. (Complaint ¶ 43).

b) Upon Ms. KULLBOM's admission into OCEANSIDE SENIOR HOME, Defendants, JESSICA MANOR, OCEANSIDE SENIOR HOME, JHEZ CORPORATION, JOANA ALIMBOYOGEN, NIDA JENKINS, and DOES 1-20, contacted Dr. HOLDEN and had her become her primary care physician.

c) Dr. HOLDEN knew that Ms. KULLBOM had a history of Dementia and therefore unable to make medical decisions for herself. Dr. HOLDEN accepted Ms. KULLBOM as a patient without consulting with her Power of Attorney, Betty MacKenzie. In fact, Dr. HOLDEN did not make any contact with Ms. MacKenzie despite her numerous requests to speak with him regarding her mother's care throughout her admission. (Complaint ¶ 44).

d) At all times relevant to this action, Defendant, CHRISTOPHER HOLDEN, M.D., was Ms. KULLBOM's "care custodian" as defined in California *Welfare and Institutions Code* § 15610,17, and upon whom she depended in the manner and degree hereinafter alleged for the performance of his custodial duties. (Complaint ¶ 45).

e) While a resident at OCEANSIDE SENIOR HOME, Defendant, CHRISTOPHER HOLDEN, M.D., while acting as physician and care custodian for Ms. KULLBOM so neglected, abandoned, and **abused** her care, failed to protect her from health hazards, failed to provide care for her physical and mental health needs, failed to exercise the degree of care that a reasonable person in a like position would exercise, all such acts constituting reckless "neglect" as defined in *Welfare and Institutions Code* § 15610.57 and delineated in *Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32, 35, which resulted in Ms. KULLBOM developing a Stage 4 pressure sore on her sacral coccyx area. (Complaint ¶ 46).

f) On XX/XX/2013, Dr. HOLDEN saw Ms. KULLBOM at OCEANSIDE SENIOR HOME and noted that Ms. KULLBOM had right side hip excoriation. No wound care treatment was ordered for the pressure sore and Dr. HOLDEN made no orders

for OCEANSIDE SENIOR HOME to turn and reposition Ms. KULLBOM at least every two hours to relieve the pressure off of her skin breakdown despite knowing she was at high risk for skin breakdown. (Complaint ¶ 47).

g) On XX/XX/2013, Dr. HOLDEN saw Ms. KULLBOM at OCEANSIDE SENIOR HOME. He noted that she had a decubitus ulcer/pressure sore but failed to identify the location, or stage the pressure sore. No wound care treatment was ordered on this visit for the pressure sore and Dr. HOLDEN made no orders for OCEANSIDE SENIOR HOME to turn and reposition Ms. KULLBOM at least every two hours to prevent further skin breakdown. (Complaint ¶ 48).

h) By XX/XX/2013, Ms. KULLBOM's family had observed their mother with redness on her sacral coccyx area. On July 25, 2013, Dr. HOLDEN saw Ms. KULLBOM at OCEANSIDE SENIOR HOME but did not document that Ms. KULLBOM had a pressure sore or redness on her sacral coccyx. No wound care treatment was ordered on this visit for the pressure sore and Dr. HOLDEN made no orders for OCEANSIDE SENIOR HOME to turn and reposition Ms. KULLBOM at least every two hours to prevent further skin breakdown. (Complaint ¶ 49).

i) On XX/XX/2013, Dr. HOLDEN saw Ms. KULLBOM at OCEANSIDE SENIOR HOME. He noted Ms. KULLBOM with erythema rash and made an order to OCEANSIDE SENIOR HOME to treat the rash with Nystop topical powder every 12 hours. Dr. HOLDEN knew that OCEANSIDE SENIOR HOME is a RCFE with non-licensed caregivers who cannot provide skilled nursing care and continued to give orders to OCEANSIDE SENIOR HOME for wound care treatment. (Complaint ¶ 50).

j) On November 20, 2013, Dr. HOLDEN received a written request from OCEANSIDE SENIOR HOME requesting that he write an order for a culture and sensitivity for Ms. KULLBOM's wound drainage. No other information was provided to Dr. HOLDEN about the change in condition, or the status of the pressure sore. Dr. HOLDEN did not follow up with OCEANSIDE SENIOR HOME to find out more information regarding Ms. KULLBOM's change in condition prior to making an order, but instead just blindly followed the request and made an order for a wound culture and sensitivity. (Complaint ¶ 51).

k) On XX/XX/2013, Dr. HOLDEN saw Ms. KULLBOM at OCEANSIDE SENIOR HOME. He noted Ms. KULLBOM had a Stage 3 pressure sore on her left buttock. At this point, Ms. KULLBOM had a prohibited health condition and was no longer a candidate to reside at a RCFE pursuant to 22 *C.C.R.* § 87615. As a physician who sees patients at RCFE, Dr. HOLDEN knew or should have known that Ms. KULLBOM can no longer reside at OCEANSIDE SENIOR HOME because of her Stage 3 and had a duty to order the transfer of Ms. KULLBOM to a higher level of care so that she can receive the treatment she required to treat her pressure sore. (Complaint ¶ 52).

l) As Ms. KULLBOM's primary care physician, Dr. HOLDEN was responsible for her care and treatment at OCEANSIDE SENIOR HOME and failed to provide her with the appropriate care and treatment to promote her health, and failed to transfer to a higher level of care when her pressure sore progressed beyond a Stage 2 on November 23, 2013 to receive proper treatment and care. (Complaint ¶ 53).

m) In failing to transfer Ms. KULLBOM knowing she had a prohibited Stage 3 pressure sore, Ms. KULLBOM's pressure sore worsened to an infected Stage 4 with necrotic tissue. (Complaint ¶ 54).

For the reasons set forth below, Defendant's Demurrer should be overruled and concurrent Motion to Strike be denied.

3. *THE FACTS IN A COMPLAINT MUST BE ACCEPTED AS TRUE FOR PURPOSES OF RULING ON A DEMURRER*

A Complaint must state "the facts constituting the cause of action, in ordinary and concise language." California *Code of Civil Procedure* § 425.0(a). Although the general rule requires statutory causes of action to be pleaded with particularity (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790), the plaintiff need only set forth the essential facts of the case with reasonable precision and particularity sufficient to acquaint the defendant with the nature of the claim. *Youngman v. Nevada*

Irrigation Dist. (1969) 70 Cal.2d 240, 245. "The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff." *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 879.

For purposes of ruling on a demurrer, the Court must view the facts in a Complaint as true. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. For the purpose of testing the sufficiency of a cause of action, the demurrer admits the truth of all material facts property pleaded. *Serrano v. Priest (*1971) 5 Cal.3d 584, 591. No matter how unlikely or improbable, the plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

4. *THE PLAINTIFF HAS PLED SUFFICIENT FACTS TO ASSERT A CLAIM FOR ELDER ABUSE AGAINST DR. HOLDEN*

A. *Dr. Holden Does Not Have to be a "Care Custodian" to be Liable Under the Elder Abuse*

Welfare and Institutions Code § 15657 provides in relevant part:
"Where it is proven by clear an convincing evidence that a defendant is liable for physical **abuse** as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this **abuse**, the following shall apply, in addition al all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs...

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

Welfare and Institutions Code § 15610.57(a) specifically 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.*" (Emphasis added). Neglect includes the failure to prevent malnutrition, the *failure to provide medical care for physical* and mental *health needs* and the *failure to protect against health and safety hazards. Welfare and Institutions Code* § 15610.57 (b)(4),(2), and (3) respectively. (Emphasis added).

The Defendant incorrectly asserts that Dr. HOLDEN cannot be liable under the **Elder Abuse** Act because he never provided "custodial care" to the Plaintiff. This is an incorrect assertion of the law. "Custodial care" is not an element for liability under the **Elder Abuse** Act as set forth above.

This very issue was addressed by the Court in *Mack v. Soung* (2000) 80 Cal.App.4th 966. In *Mack*, the defendant physician, Dr. Soung, claimed he cannot be held liable under the **Elder Abuse** Act because he was not the plaintiff's custodian or caretaker. *Id.* at 973. The Court held that a physician can be held liable under the **Elder Abuse** Act and that plaintiffs had sufficiently stated a cause of action against Dr. Soung for **Elder Abuse**. *Id.* at 968.

The Defendant here erroneously contends, like Dr. Soung did, that the **Elder Abuse** Act only applied against health care providers who had custodial care of the **elder**. *Id.* at 973; see Defendant's moving paper at page 6.

The *Mack* Court rejected defendant's claim and explained:
"The Act was expressly designed to protect **elders** and other dependent adults who 'may be subjected to **abuse**, neglect, or abandonment ...' (§ 15600, subd. (a).) Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the **elderly** are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an **elder** ... for any condition.' (Italics added.) 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for **elders** or dependent adults,' including nursing homes, climes, home health agencies, and similar facilities which house the **elderly**. (§ 15610.17.) The Legislature thus recognized that both classes of professionals--health practitioners as well as care custodians--should be charged with responsibility for the health, safety and welfare of **elderly** and dependent adults. This recognition is made explicit in the 'reporting' section of the Act which states that '[a]ny person who has assumed full or intermittent responsibility for care or custody of an **elder** or dependent adult, whether or not that person receives compensation, including ... any **elder** or dependent adult care custodian, health practitioner,... is a mandated reporter.' (§ 15630, subd. (a), italics added.)" *Id.* at 974.

The Court found that the statute defining "neglect" is not restricted to just care custodians. Instead it applies to anyone having "care or custody" of an **elder**. *Id.*

As the Court has made clear in its holding, a physician can be held liable under the **Elder Abuse** Act for "neglect".

B. *Dr. Holden Committed Elder Abuse Neglect by Withheld Necessary Medical Care and Treatment to Ms. Kullbom's Pressure Sore and Failing to Transfer Her to a Higher Level of Care in Accordance With the Law When Her Pressure Sore Became Greater Than a Stage 2.*

As set forth above, defines "neglect" is 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."

In *Mack v, Soung, supra,* the plaintiff alleged that the defendant nursing home and Dr. Sound concealed the existence of the bedsore of the decedent from the family until the pressure sore became a Stage 3. It was further alleged that Dr. Soung not only concealed the pressure sore but consistently opposed the decedent's hospitalization. When the decedent's medical condition worsened, Dr. Soung abandoned her as her physician without further notice. *Id.* at 969.

The Court concluded it had "no trouble concluding that a doctor who conceals the existence of a serious bedsore on a nursing home patient under his care, opposes her hospitalization where circumstances indicate it is medically necessary, and then abandons the patient in her dying hour of need commits neglect within the meaning of the Act." *Id.* at 973.

The facts alleged in Plaintiff's Complaint is similar to the facts alleged in *Mack v. Soung,* where the Court found there were sufficient facts to support an **Elder Abuse** cause of action. The Plaintiff alleged in her Complaint that Dr. HOLDEN knew Betty MacKenzie was Ms. KULLBOM's Power of Attorney and had a duty to consult with her regarding the care of Ms. KULLBOM. (Complaint ¶ 45). Dr. HOLDEN refused to speak with Ms. MacKenzie regarding the care of her mother throughout her admission at OCEANSIDE despite many requests. (Complaint ¶ 45).

Dr. HOLDEN knew that Ms. KULLBOM had developed skin breakdown as early as April 24, 2013, and again on May 30, 2013, and July 25, 2013 but did not make any orders for wound care, or order that the caregivers turn and reposition Ms. KULLBOM every two hours to prevent further skin breakdown. (Complaint ¶ 48).

Knowing that OCEANSIDE SENIOR HOME was a non-licensed facility that was not authorized to provide wound care, Dr. HOLDEN made an order for the caregivers to provide wound care to Ms. KULLBOM, which placed her health and safety at risk. (Complaint ¶ 51 and 52).

When Dr. HOLDEN assessed her pressure sore as Stage 3 on November 23, 2013, Dr. HOLDEN knew this was a prohibited condition in a RCFE, yet failed to transfer Ms. KULLBOM to a higher level of care so that she can receive the appropriate medical attention required to treat her pressure sore. (Complaint ¶ 53-54). As a result, Ms. KULLBOM's pressure sore worsened to an infected Stage 4 with necrotic tissue. (Complaint ¶ 55).

The facts alleged above and in Plaintiff's Complaint, demonstrate that Dr. HOLDEN failed to use the reasonable degree of care in caring for Ms. KULLBOM.

C. *The Plaintiff Pled Facts Sufficient to Show That Dr. Holden Acted With Recklessness and Malice in Conscious Disregard for Ms. Kullbom's Health and Safety Because He Knew There Was a High Probability of Harm if He Did Not Provide Appropriate Care to Ms. Kullbom's Pressure Sore*

"A defendant acted with 'recklessness' if he/she knew it was highly probable that his/her conduct would cause harm and he/she knowingly disregarded this risk. 'Recklessness' is more than just the failure to use reasonable care." See California Civil Jury Instructions (CACI) 3113.

Similar to the jury instruction of "recklessness", "malice" means that defendant "acted with intent to cause injury or that defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences." See California Civil Jury Instructions (CACI) 3114.

In *Delaney v. Baker* (1999) 20 Cal.4th 23, our Supreme Court elucidated on what constitutes recklessness within the meaning of the statute:
"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. 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.

The Plaintiffs have alleged overwhelming facts to show that the Defendant acted with conscious disregard under the definition of "recklessness" and "malice" of Ms. KULLBOM's health and safety by Dr. HOLDEN's repeated neglect in providing any care and treatment to the pressure sore prior to October 2013, and did not transfer her to a higher level of care on November 23, 2013 when it was clear that she had a Stage 3 pressure sore and needed medical attention.

In *Intrieri v. Superior Court of Santa Clara County* (2004) 117 Cal.App.4th 72, plaintiffs filed a petition for writ of mandate challenging the trial court's order granting a nursing home's motion or summary adjudication of the **elder abuse** cause of action. *Id.* at 75-76. The Court found that based on the facts presented, a triable question of fact existed and issued a peremptory writ of mandate directing the trial court to vacate its summary adjudication on the **elder abuse** cause of action. *Id.* at 76.

In *Intrieri, supra,* 117 Cal.App.4th 72, a skilled nursing facility had on numerous occasions failed to take any action to address a resident's pressure sores. It made no changes to the resident's care plan even after complaints by the resident's son, and further failed to follow a new care plan developed by an outside physician hired by the resident's son. The infection of the pressure sores that resulted eventually led to amputation of the resident's right toe, and thereafter her right leg below the knee.

The Court held as follows:

Finally, we find that petitioners' evidence was sufficient to create a triable question of fact as to whether Guardian's conduct with respect to Mrs. Intrieri's pressure sores constituted a reckless failure to provide medical care for her physical health needs. Petitioners' evidence showed that Peter Intrieri observed pressure sores developing on Mrs. Intrieri after her readmission to Guardian following her hip surgery, that he complained to the physician assigned by Guardian to care for Mrs. Intrieri, and that nothing was done for her. A month later, the pressure sores had grown much worse, but Guardian made no changes to Mrs. Intrieri's care plan and Peter Intrieri hired an outside physician who developed a new care plan. When Guardian staff failed to follow the new care plan, Peter Intrieri confronted the staff but again, nothing was done. Mrs. Intrieri developed infected pressure sores on her right foot that eventually led to amputation of her right toe and then her right leg below the knee. It may be reasonably inferred from this chain of events that Guardian acted with reckless neglect in caring for Mrs. Intrieri.

Accordingly, *we conclude that triable questions of fact exist as to the reckless neglect element of the cause of action for* ***elder abuse***, and therefore summary adjudication should not have been granted. (Emphasis added).

In *Sababin v. Superior Court (Covina Rehabilitation Center)* (2006) 144 Cal.App.4th 81, *the Court held that there are triable issues of fact whether defendants acted with recklessness, malice, and oppression when there are facts to support that the defendant neglected to follow defendant's care plan for the resident. Id.* at 90.

In *Sababin v. Superior Court,* 144 Cal.App.4th 81, the plaintiff was admitted into defendant's nursing facility from an acute hospital with sores, ulcers and *Methcillin resistant staph aureus* (MRSA). The plaintiff died two months later due to infection to a sacral decubitus skin ulcer. The patient's care plan indicated that the defendant employees would monitor her skin on a daily basis for redness or breakdown and report to a physician for a treatment order in the event of skin problems. *Id.* at 85. Later throughout the plaintiff's admission at Covina, the plaintiff's pressure ulcer worsened. Defendant Covina had no documentation of those conditions, nor had a physician been notified for a treatment order. *Id.*

Based on these facts, the Court in *Sababin v. Superior Court,* 144 *Cal.App.4th* 81, found that it was:

> "reasonably deducible that Covina's employees neglected to follow the care plan by failing to check Renteria's skin condition on a daily basis and failing to notify a physician of the need for a treatment order. If this inference is true, there is a triable issue as to whether Covina's employee's conduct was neglect under section 15610.57 because they failed to provide Renteria with medical care for physical needs and to protect her from health and safety hazards. Moreover, when the evidence and inferences are liberally construed, we easily conduct that there is a triable issue as to whether Covina's employees acted with recklessness, oppression or malice. *A trier of fact could find that when a care facility's employees ignore a care plan shows deliberate disregard of the high degree of probability that she will suffer injury.*" *Id.* at 90. (Emphasis added).

Although *Intrieri, supra,* and *Sababin, supra,* are holdings that govern the court's review on summary judgment motions, it is argued that summary judgment motions are held to a higher standard of review. If a plaintiff in opposing a motion for summary judgment need only show an inference of reckless conduct even after discovery has been conducted, then the Plaintiff in opposing a Demurrer should not be held to a higher standard and be required to make its case in her Complaint. The Plaintiff *need only plead sufficient facts to place the Defendant on notice of an* ***Elder Abuse*** *cause of action against him,* and be allowed to proceed through discovery to make her case.

As alleged in the Plaintiff's Complaint and as set forth above, there are sufficient facts to at least support an inference of reckless conduct against Dr. HOLDEN; however, the Defendant is mistaken if he believe that the Plaintiff must also at this pleading stage *prove* the **Elder Abuse** claim against him. That is what discovery and trial is for. As to whether or not a jury will actually agree that the Defendant is guilty of **Elder Abuse** is not for this Court to determine at this time.

Based on the foregoing, the Defendant's challenge to the Plaintiff's First Cause of Action for **Elder Abuse** must fail, and this Demurrer be overruled and Motion to Strike the **Elder Abuse** cause of action and punitive damages language be denied. Plaintiff have alleged sufficient facts for **Elder Abuse** and entitled to enhanced remedies under *Welfare and Institutions Code* § 15657.

5. ***PLAINTIFF HAS PLED SUFFICIENT FACTS TO SHOW THAT PR. HOLDEN ACTED WITH MALICE, WHICH SUPPORTS A CLAIM FOR PUNITIVE DAMAGES UNDER CIVIL CODE § 3294***

Under *Civil Code* § 3294, punitive damages in an action for the breach of an obligation may be awarded when it is shown by clear and convincing evidence that, (1) the defendant is guilty of oppression, fraud or malice and (2) employer had advance knowledge of the employee's unfitness, or ratified the employee's conduct, or was personally guilty of oppression, fraud, or malice.

As set forth above and in the Plaintiffs' Complaint, the Plaintiffs pled sufficient facts showing that Defendant acted in conscious disregard of Ms. KULLBOM's health and safety. Similar to recklessness, “malice”, which is required for punitive damages, is defined as “despicable conduct that is carried on by the defendant with a willful and conscious disregard of the rights and safety of others.” *Civil Code* §3294(c)(l).

The elements of a cause of action under the **Elder Abuse** Act are statutory and reflect the Legislature's intent to provide enhanced remedies to encourage the private, civil enforcement of laws against **elder abuse** and neglect. See *Delaney v. Baker* (1999) 20 Cal.4th 23, 33. Therefore,
“[w]here it is proven by clear and convincing evidence that a defendant is liable for physical **abuse** as defined in Section 15610.63, neglect as defined in Section 15610.57, or financial **abuse** as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this **abuse**, in addition to all other remedies otherwise provided by law: (a) The court shall award to the plaintiff reasonable attorney's fees and costs.” *Welfare and Institutions Code* § 15657; *Man-on v. Superior Court* (2003) 108 Cal.App.4th 1049, 1058.

In *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal. 4th 771, 776, the California Supreme Court held that California *Code of Civil Procedure* § 425.13, which disallows pleading of punitive damages in a complaint or other pleading until the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim, does not apply to punitive damage claims in actions alleging **elder abuse**.

The prayer for attorney's fees and punitive damages are pursuant to *Welfare and Institutions Code* § 15657, et seq., and the California Supreme Court decision of *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, which clearly and without question authorizes such pleading in the Plaintiffs' Complaint.

6. ***THE PLAINTIFF HAS SET FORTH A PRIMA FACIE CASK FOR WILLFUL MISCONDUCT AGAINST DR. HOLDEN.***

The California Supreme Court has recognized that Willful Misconduct is a separate cause of action. Willful Misconduct is “a tort separate and distinct from negligence and involves different principles of liability and different defenses.” *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965 citing *Palazzi v. Air Cargo Terminals, Inc.* (1966) 244 Cal.App.2d 190. Willful Misconduct implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible result, or the intentional doing of an act with a wanton and reckless disregard of its consequences. *Williams v. Carr* (1968) 68 Cal.2d 579, 584.

To recover under the theory of Willful Misconduct, the plaintiff must show that the defendant had: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge of the peril. *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690.

As defined in *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689, "willful or wanton misconduct travels under several other names. Its aliases include "serious and willful misconduct", or "wanton misconduct, "reckless disregard," "recklessness," and combinations of some or all of these, similar to the definitions imposed under the Dependent **Abuse** cause of action. The terms are interchangeable because they all identify the same-thing - "an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care." *Id.* As such, since Plaintiff set forth sufficient facts to state a claim for **Elder Abuse**, the Plaintiff set forth sufficient facts to state a claim for willful misconduct accordingly.

As a result, if the Court finds that the Plaintiff has pled sufficient facts for a cause of action for **Elder Abuse**, the Court must also find the Plaintiff has pled sufficient facts for a cause of action for Willful Misconduct.

Based on the above alleged facts, Defendant's Demurrer to Plaintiffs Fifth Cause of Action for Willful Misconduct should be overruled.

7. *THE PLAINTIFF REQUEST LEAVE TO FILE A FIRST AMENDED COMPLAINT SHOULD THE COURT FIND THAT PLAINTIFF HAS FAILED TO PLEAD SUFFICIENT FACTS TO SUPPORT PLAINTIFF'S CAUSES OF ACTION,*

California *Code of Civil Procedure* § 576 states: "Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order." Even on the eve of trial, there is a strong policy in favor of the liberal allowance of amendments. See, *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296. And, "*it is an **abuse** of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.*" *Aubury v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967. (Emphasis added.)

Since the filing of the Complaint, Plaintiffs have discovered additional facts supporting Plaintiff's cause of action for eider neglect against Dr. HOLDEN. The Plaintiff will suffer great prejudice if the Court does not grant leave to amend in that it will dispose of meritorious claims for acts.

8. *CONCLUSION*

At this pleading stage, the Plaintiff has pled sufficient facts with particularity to place the Defendant on notice as to what is being alleged against him. The burden of the Plaintiff at the Demurrer stage is not to prove the allegations, but to plead sufficient facts for notice. Based on the foregoing, it is respectfully requested that Defendant's Demurrer to Plaintiff's first cause of action for **Elder Abuse** and Fifth cause of action for Willful Misconduct be overruled and Defendant's Motion to Strike attorney fees and costs, and punitive damages be denied.

DATED: October 2, 2014

MORAN LAW

<<signature>>

Lisa Trinh Flint

Attorneys for Plaintiff, MILDRED

KULLBOM, in and through her Guardian Ad Litem, Betty MacKenzie

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