2013 WL 9930743 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Alameda County

Douglas BELL,

v.

PLEASANTON NURSING AND REHABILITATION CENTER, et al.

No. HG12634342.
January 23, 2013.

[Filed Concurrently with Defendant's Notice of Motion and Motion to Strike Portions of the First Amended Complaint]
Date: March 5, 2013
Time: 2:30 p.m.
Dept.: 514
Action Filed: June 18, 2012
Trial Date: None

Defendant, Pleasanton Nursing and Rehabilitation Center's Notice of Demurrer and Demurrer to the First Amended Complaint; Memorandum of Points and Authorities in Support

Lewis Brisbois Bisgaard & Smith LLP, George E. Nowotny, SB#150481, Kevin L. Eng, SB#217248, Sean E. Wachtel, SB#265476, 221 North Figueroa Street, Suite 1200, Los Angeles, CA 90012, Telephone: (213) 250-1800, Facsimile: (213) 250-7900, for defendants, Pleasanton Nursing and Rehabilitation Center.

Assigned to: Judge: Hon. George C. Hernandez, Jr.

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on March 5, 2013 at 2:30 p.m., or as soon thereafter as counsel may be heard, in Department "514" of the above-entitled Court, located at 24405 Amado Street, Hayward ,CA 94544, Defendant, PLEASANTON NURSING AND REHABILITATION CENTER, will and hereby do demur to Plaintiff's Complaint, pursuant to *Code of Civil Procedure* § 430.10 (e) and (f) on the following ground:

FIRST CAUSE OF ACTION

• The first cause of action for **Elder Abuse** is uncertain and fails to state sufficient to maintain said cause of action;

• Plaintiff lacks standing to pursue the first cause of action pursuant to *Code of Civil Procedure* § 377.32.

SECOND CAUSE OF ACTION

• Plaintiff lacks standing to pursue the second cause of action pursuant to *Code of Civil Procedure* § 377.32.

This Demurrer is based on this Notice, the accompanying memorandum of points and authorities, the pleadings and papers already on file herein with this Court, and any other matter that may be presented prior to or at the time of the hearing of this matter.

DATED: January 18, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By:

GEORGE E. NOWOTNY

KEVIN L. ENG

SEAN E. WACHTEL

Attorneys for Defendants,

PLEASANTON NURSING AND REHABILITATION CENTER

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action arising out of care and treatment rendered to Decedent, JEAN LOIS BELL, during the residency from June 6, 2011 through September 26, 2011 at Defendant's licensed skilled nursing facility, PLEASANTON NURSING AND REHABILITATION CENTER, (hereinafter "Defendant"). On June 13, 2012, Plaintiff, DOUGLAS BELL filed the present lawsuit against Defendant alleging the following causes of action: 1) **Elder Abuse**/Neglect; 2) Professional Negligence; and 3) Wrongful Death.

In response to the Complaint, Defendant filed a demurrer and motion to strike, set to be heard on January 24, 2013. In response, Plaintiff filed a First Amended Complaint (hereinafter "FAC") on January 10, 2013, which contains the same inadequacies as the original Complaint. Plaintiff, DOUGLAS BELL's FAC alleges that Decedent was a resident of Defendant's facility from June 6, 2011 - September 26, 2011. (FAC ¶6). Plaintiff's FAC alleges, without substantial factual support, that Decedent required assistance with activities of daily living due to immobility, assistance with feeding, hydration, toileting, bathing, and maintenance of hygiene, monitoring and assistance due to a risk of falls, and protection and security of her personal property. (FAC ¶ 11(a-g)). Plaintiff contends that as a result of Decedent's **abuse** and/or neglect, Decedent suffered injuries including but not limited to a fracture, dehydration, malnutrition, a bedsore, and an infection. (FAC.¶ 15(a-d)).

Defendant maintains that the **Elder Abuse** cause of action is uncertain and/or fails to state facts sufficient to constitute a claim against Defendants. Further, Plaintiff has failed to comply with *Code of Civil Procedure* § 377.32 and therefore lacks standing to pursue both the first and second causes of action.

Based on the foregoing, Defendants respectfully requests that this Court sustain its demurrer to said causes of action without leave to amend.

II. THE COURT IS EMPOWERED TO SUSTAIN A DEMURRER TO A CAUSE OF ACTION

California *Code of Civil Procedure* § 430.10 states in relevant part that a "party againstwhom a complaint or cross-complaint has been filed may object, by demurrer 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; and (f) The pleading is uncertain." *See Code of Civil Procedure* §§ 430.10 (e) and (f). Section 430.50, in relevant part, states that "a demurrer to a complaint or cross-complaint may be taken to the whole complaint or cross-complaint or to any of the causes of action stated therein." *See Code of Civil Procedure* § 430.50(a).

California courts rule that demurrer is proper where a complaint fails to state cause of action or where it discloses a defense that would bar recovery. *See Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1567 *as modified, rehearing denied.* In addition, while it is true that a demurrer admits all material facts that are poorly plead, California courts have consistently held that "conclusions of law or fact alleged are not considered in judging its sufficiency." *C&HFood Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1062; *see also Meggeff v. Donald* (1981) 123 Cal.App.3d 251,258.

III. PLAINTIFF LACKS STANDING TO PURSUE THE CAUSES OF ACTION ALLEGED IN THE COMPLAINT DUE TO THE FAILURE TO COMPLY WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 377.32

- *California Civil Procedure Code* § 377.30 provides: "A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest. and an action may be commenced by the decedent's personal representative of, if none, by the decendent's successor in interest.22

California Civil Procedure Code § 377.32 provides that the person who seeks to commence an action or proceeding or to continue a pending action or proceeding as the decedents successor in interest under this article, shall execute and file an affidavit or a declaration under penalty of perjury, stating a number of things, such as the decedents name, the date and place of decedent's death, and that no other person has a superior right to commence the action on behalf of the decedent. California *Code of Civil Procedure* § 377.32(a)(1)-(7). In addition to the foregoing, a **"certified copy of the decedent's death certificate shall be attached** to the affidavit or declaration." *California Code of Civil Procedure* § 377.32 (c).

In this case, Plaintiff appears to bring this action as Decedent's successors-in-interest. (FAC ¶1). However, Plaintiff has failed to attach Decedent's Death Certificate as required by Section 377.32 and has failed to execute and file an affidavit or declaration setting forth the specific requirements in order to commence this action. California *Code of Civil Procedure* § 377.32(a)(1)-(7).

Accordingly, Plaintiff has failed to show he has standing to initiate the current action on behalf of Decedent as the successor-in-interest, and therefore, the pending action with respect to the first and second causes of action on behalf of Decedent cannot be maintained. *See* California *Code of Civil Procedure* § 377.32.

Nonetheless, even if Plaintiff can somehow overcome the procedural defect indicated above, Plaintiff's cause of action for **Elder Abuse**/Neglect still fails for the reasons set forth below

IV. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION UNDER THE ELDER ABUSE ACT

The **Elder** and Dependent Adult **Abuse** Act established enhanced remedies under specific circumstances contained within the *Welfare & Institutions Code* § 15600, et seq. As the California Supreme Court explained, the Act's goal was to provide heightened remedies for "acts of ***egregious abuse*** against **elder** and dependent adults, while allowing acts of negligence in the rendition of medical services to **elder** and dependent adults to be governed by laws specifically applicable to such negligence." *Delaney v. Baker*, 971 P.2d 986, 991 (Cal. 1999). Thus, to recover these heightened remedies, a plaintiff must prove -- by clear and convincing- evidence - that a defendant committed physical **abuse** or neglect of an **elder** or dependent adult with "recklessness, oppression, fraud, or malice" *Welfare & Institutions Code* § 15657; *Delaney*, 971 P.2d at 991.

A plaintiff must also show that an employer "had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of their rights for safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." California *Civil Code* § 3294(b). If the defendant is a corporate employer, "the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of the officer, director, or managing agent of the corporation. *Welfare & Institutions Code* § 15657(c); California Civil Code § 3294(b).

Accordingly, based upon the provisions of *Welfare & Institutions Code* § 15657 and its incorporation of *Civil Code* § 3294(b), the elements of plaintiff's right to recovery pursuant to the **Elder** and Dependent Adult **Abuse** Act include:
(1) that plaintiff is an **elder** or dependent adult as defined by the act;

(2) that each defendant is liable for physical **abuse**, neglect, or fiduciary **abuse**;

(3) that each defendant has been guilty of recklessness, oppression, fraud or malice in the commission of the **abuse**;

(4) where each defendant is an employer, each defendant had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights for safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud or malice; and

(5) damage suffered by the Plaintiff as a result of the **abuse** or neglect.

Welfare & Institutions Code § 15657(c); *California Civil Code* § 3294(b); *Delaney*, 971 P.2d at 991 *see also Covenant Care, Inc. v. Sup. Ct.* (2004) 32 Cal.4th 771.

A. Plaintiff Fails to Plead Facts Sufficient Amounting to Egregious Abuse or Neglect

The statutory definition of neglect is set forth at Section 15610.57, which states, in pertinent part, that "neglect" is the "negligent failure of any person having the care or custody of an **elder** or a dependent adultto exercise that degree of care-that a reasonable-person in a like position would exercise." *Welfare & Institutions Code* § 15610.57, subd. (a)(1).) Section 15610.57 then lists several examples that would constitute neglect, including: (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; (2) Failure to provide medical care for physical and mental health needs; (3) Failure to protect from health and safety hazards; and (4) Failure to prevent malnutrition or dehydration. *Id* at § 15610.57, subd. (b)(2)&(3).)

As the California Supreme Court instructed, neglect under the **Elder Abuse** Act "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." *Covenant Care, supra*, 32 Cal.4th at 783, 789 ("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.") (emphasis added). As such, the Court explained that "neglect speaks not of the undertaking of medical services, but of the failure to provide medical care." Id (emphasis added).

Recently, the California Court of Appeal outlined several factors that must be present for conduct to constitute neglect within the meaning of the **Elder Abuse** Act. *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406-07. The court explained that a plaintiff must show 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; (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 the high probability of such injury; and (4) the neglect caused the **elder** or dependent adult to suffer physical harm, pain, or mental suffering. *Id.*

Here, Plaintiff's allegations against Defendant fail to satisfy the heightened pleading requirement to maintain a cause of action for **Elder Abuse**. The allegations are pled in conclusory fashion, merely that Defendant "failed to provide medical care for decedent's physical heath needs, failed to protect decedent from health and safety hazards, failed to protect and secure decedent's personal property..." (FAC ¶ 11(a-g)). Plaintiff's FAC fails to adhere to the requirements set forth in Carter as the FAC fails to identify what or how Defendant denied and/or withheld services and further, how that alleged neglect caused Decedent to suffer injuries. Plaintiff, in the FAC attempted to cure this defect by adding the allegations at paragraph 13(a-e), however, they are plead in conclusory fashion. They fail to provide any supports to support Plaintiff's contention's and therefore are insufficient to sustain a claim for **Elder Abuse**. Moreover, the allegations do not pertain to the **reckless withholding** or **denial** of medical care, which is a requirement to sustain a cause of action for **Elder Abuse**. These allegations do not suffice to meet the pleading requirements for an **Elder Abuse** cause of action. Further, these allegations sound only in negligence as they relate to the undertaking of medical services.

Accordingly, the circumstances of this case- alleged negligent medical care-do not amount to egregious conduct necessary to support a cause of action for **Elder** **Abuse**. Delaney, 971 P.2d 986, 993 (explaining that "the **Elder** **Abuse** Act's goal was to provide heightened remedies for... acts of egregious **abuse** against **elder** and dependent adults"). Plaintiff's attempt to elevate a professional negligence claim into an **elder** **abuse** claim by peppering the FAC with conclusory allegations that Defendants' acts were willful and reckless must fail.

B. Plaintiff Fails to Plead Facts Sufficient to Show Recklessness, Oppression, Fraud, or Malice

In *Delaney*, the court explained that "recklessness" requires "culpability greater than simple negligence." 971 P.2d at 991. Specifically, the court described recklessness as a "deliberate disregard of the high degree of probability that an injury will occur." *Id* As such, "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.*

As the court in Carter further illustrated, conduct amounting to reckless neglect must be egregious, such as:
● Failing to provide an **elderly** man suffering from Parkinson's disease with sufficient food and water and necessary medication, leaving him unattended and unassisted for long periods of time and in his own excrement so that ulcers exposing muscle and bone became infected.

● Frequently leaving an 88-year-old woman with a broken ankle lying in finally, to a nursing home ombudsman.

● **Abusing**, beating, unlawfully restraining, and denying medical treatment to a 78-year-old man admitted to a skilled nursing facility.

• Failing to assist a 90-year-old, blind and demented woman with eating, using physical and chemical restraints to punish the **elder** and prevent her from obtaining help, and physically and emotionally **abusing** the **elder** by bruising her, withholding food and water, screaming at her, and threatening her.

Id at 405-06.

The circumstances of this case do not amount to "egregious" conduct as Carter illustrated. Plaintiff fails to provide any facts to demonstrate that Defendant "willfully and recklessly" caused Decedent to suffer any injuries.

Accordingly, Plaintiffs FAC does not state facts sufficient to show that Defendant acted with a "deliberate disregard of the high degree of probability that an injury will occur." *See Delaney, supra*, 971 P.2d at 991. Plaintiff cannot establish that Defendant is guilty of any wrongdoing. And even if Plaintiff could establish some wrongdoing, which Plaintiff cannot, at best they can only establish "incompetence, unskillfulness or inadvertence," which is insufficient to show recklessness since such conduct merely gives rise to negligence. *See Delaney*, 971 P.2d at 991. There are no facts alleged to show with "clear and convincing evidence," that Defendant acted with "intentional, willful," or of a "despicable or injurious nature." *Delaney*, 971 P.2d at 991. Again -- at most -- these alleged acts or omissions or alleged give rise to professional negligence.

Further, Plaintiffs attempt to elevate a professional negligence claim into one for **Elder** **Abuse** must therefore fail. As such, when, as here, the FAC gives rise to only negligence conduct, it is insufficient to support an **Elder** **Abuse** cause of action.

C. Plaintiff's Claim for Financial Abuse is Insufficient

It appears that in addition to Plaintiffs claim for **Elder Abuse** - Neglect, Plaintiff is also making a claim for **financial elder** - **abuse**. (FAC ¶ 15(c)(claiming the loss of at least $700.00 in cash and other personal property)). However, Plaintiff's allegations regarding **financial elder abuse** are completely insufficient. *California Welfare and Institutions Code* Section 15610.30 states, in pertinent par that **financial abuse** of an **elder** and/or dependent adult occurs- when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult **for a wrongful use or with intent to defraud, or both.**

(3) Takes, secretes, appropriates, obtains, retains, or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult **by undue influence,** as defined in Section 1575 of the Civil Code. *Welf. & Inst.* § 15610.30(a)(1-3)(emphasis added).

Here, Plaintiffs FAC merely states in conclusory fashion that Decedent lost at least $700.00 in cash as well as other personal property. It is entirely uncertain if this is Plaintiff's attempt to plead a claim for **Financial Elder Abuse**, and if so, the allegations are entirely insufficient. Plaintiffs allegations wholly fail to demonstrate that Defendant was involved in any manner with the loss of Decedent's money and furthermore, the FAC fails to allege that Defendant allegedly took the money for a wrongful use, with an intent to defraud, and/or by undue influence.

Moreover, as will be discussed below, to the extent that Plaintiff is claiming that an employee of Defendant wrongfully appropriated property of Decedent, the criminal act of burglary would be outside the course and scope of employment and therefore, Defendant would not be responsible for the acts of the individual.

1. Defendant Is Not Liable for Criminal Acts of Employees

Respondeat superior is a legal doctrine that holds an employer vicariously liable for the wrongful acts committed by an employee within the scope of his or her employment. *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967. The doctrine is an exception to the general tort principle that liability is based on fault. Respondeat superior liability rests on “a deeply rooted sentiment” that it would be unjust for an employer to avoid responsibility for injuries occurring in the course of its business activities. *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 615.

Respondeat superior liability is a deliberate allocation of risk made in the interests of public policy. *Hinman v. Westinghouse Elec. Co.* (197-0) 2 Cal.3d 956, 959. For the doctrine of respondeat superior to apply, the plaintiff must prove that the employee's tortious conduct occurred within the scope of employment. *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721. California has established a two-prong test to decide whether an employee is acting within the scope of employment. Generally, an employer will be liable for an employee's wrongful act if the act (1) was required or incident to the employee's duties; or (2) was reasonably foreseeable to the employer. *See Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal.App.3d 133, 140; *see also Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967. Neither of those is applicable to the present situation.

The determining factor in ascertaining whether an employee's act falls within the scope of his or her employment for respondeat superior liability is not whether the act was authorized by the employer, benefited the employer, or was performed specifically for the purpose of fulfilling the employee's job responsibilities. Rather, the question is whether the risk of such an act is typical of or broadly incidental to the employer's enterprise. *Lisa M. v. Henry Mayo Newhall Mem. Hosp.* (1995) 12 Cal.4th 291, 297; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003. It is inconceivable that criminal acts, such as burglary could be considered typical or even broadly incidental to the employer's enterprise.

In deciding whether an employee's conduct is within the scope of employment for respondeat superior purposes, the court asks whether the conduct is a risk inherent in or created by the enterprise, meaning, was the conduct so "unusual or startling" in the context of that enterprise that it would be unfair to include the resulting loss in the employer's costs of doing business? *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004. Here, the answer is a resounding yes! Criminal acts must be considered "unusual" or "startling." It would be wholly unfair and inconsistent with the overriding policy considerations to impose liability on the employer for the acts committed in this action.

When an employee substantially deviates from his or her duties for personal purposes, the employer is not vicariously liable for the employee's actions. *Hinman v. Westinghouse Elec, Co.* (1970) 2 Cal.3d 956,960; *Delfino v. Agilent Technols., Inc.* (2006) 145 Cal.App.4th 790, 813 (employer not liable for employee' misuse of employer's computer system's to send threatening e-mails that were unrelated to his employment); *Kephart v. Genuiuty, Inc.* (2006) 136 Cal App.4th 280, 294 (employee who committed intentional assault with personal vehicle for personal reasons was not acting in scope of employment, even though he used his personal vehicle shortly thereafter for business trip); *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal.App.3d 947, 957.

Moreover, recently, the Calfornia Supreme Court redefined the scope of respondeat superior liability. *In Lisa M. v. Henry Mayo Newhall Mem. Hosp.* (1995) 12 Cal.4th 291, 298, the court held that "an intentional tort gives rise to respondeat superior liability only if it was engendered by the employment." The simple fact that "the employment brought tortfeasor and victim together in time and place is not enough." *Id.* at 298. Instead, the plaintiff must show the following:
That the incident leading to injury was an outgrowth of the employment;

That the risk of tortious injury was inherent in the working environment; or

That the risk of tortious injury was typical of or broadly incidental to the enterprise the employer has undertaken. *Id.*

In *Lisa M.*, the court emphasized that an employer is not strictly liable for all actions of its employees during working hours. Moreover, an employer will not be held vicariously liable for an employee's malicious or tortious conduct that substantially deviates from the employment duties and is for personal purposes. *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal.App.3d 718, 721. Accordingly, the employee is not acting within the scope of employment in the following circumstances:
If the employee "inflicts an injury out of personal malice, not engendered by the employment" (*Carr v. Wim. C. Crowell Co.* (1946) 28 Cal.2d 652, 656);

If the employee acts on "personal malice unconnected with the employment" (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 621); or

If the employee's actions are not an "outgrowth" of the employment (*Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652).

If an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties before or after the offense will not give rise to a cause of action against the employer under the doctrine of respondent superior. *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal.App.3d 133, 140.

Presently as plead, Plaintiff have provided no facts to demonstrate that Defendant should be held liable for the alleged criminal act of burglary. Therefore, Defendant's demurrer should be sustained.

D. Plaintiff's Claim for Elder Abuse Must State Facts That Show Involvement by an Officer, Director, or Managing Agent of a Corporate Defendant

To state an **Elder Abuse** claim, a Plaintiff must allege facts showing that an officer, director, or managing agent of Defendant was involved in the **abuse**, authorized the **abuse**, ratified the **abuse**, or hired the person who did the **abuse** with advance knowledge of the persons unfitness and hired him or her with a conscious disregard of the rights and safety of others. *Welfare & Institutions Code* § 15657(c) provides:
"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." Subdivision (b) of section 3294 of the Civil Code provides:

"An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had **advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of rights or safety of others or authorized or ratified the wrongful conduct of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice.** With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Emphasis added).

Plaintiffs' FAC contains no allegations regarding the required element of authorization, ratification or advanced knowledge by Defendant's officers, directors, or managing agents.

In *Romo v. Ford Motor Company* (2002) 99 Cal.App.4th 1115, the Court held that in order to prove that a corporation acted with malice, a Plaintiff must provide *enough evidence to permit a* **"clear and convincing** inference that within the corporate hierarchy *authorized persons acted despicably in willful and conscious disregard of the rights or safety of others." (Id.* at 1141) Furthermore, in order to satisfy the "managing agent requirement," a plaintiff may provide "evidence showing the information in the possession of the corporation and the structure of the management decision making (sic) that permits an inference the information in fact moved upward to a point where corporation policy was formulated." *(Id.)* Most importantly, the Court held that the "inferences cannot be based on mere speculation." *(Id.)* At no point does Plaintiff plead any facts to permit a clear and convincing inference that the managing agents even had knowledge of the alleged wrongdoings alleged in the Complaint. Plaintiffs fail to provide any information to support their allegation that authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others."

Therefore, for the reasons stated above, moving Defendant requests this Court sustain its demurrer to the first cause of action.

V. CONCLUSION

Based on the foregoing reasons, Defendant, PLEASANTON NURSING AND REHABILITATION CENTER respectfully request Defendant's demurrer to Plaintiff's FAC be sustained as set forth in the attached Notice or alternatively as the Court deems appropriate, without leave to amend.

DATED: January 18, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By:

GEORGE E. NOWOTNY

KEVIN L. ENG

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