2012 WL 10702963 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California,
Central District.
Ventura County

Estate of Theodore ROBINSON; and Matthew J. Robinson, an individual, Plaintiffs,
v.
Paul Edward MORIN, M.D., an individual; Joanne Beth Schilperoort, N.P., an individual; Channel Islands Family Medical Group, a business entity, form unknown; Channel Islands Urgent Care, a business entity, form unknown; Channel Islands Urgent Care Center & Family Practice, a business entity, form unknown; Channel Island Urgent Care & Family Practice, a business entity, form unknown; Channel Island Family Practice & Urgent Care, a business entity, form unknown; Does 1 through 50, inclusive, Defendants.

No. 56-2011-00404718-CU-MM-VTA.
July 5, 2012.

Plaintiffs' Opposition to Demurrer to Second Amended Complaint By Defendant Joanne Beth Schilperoort, N.P.

James R. Gillen, Esq., State Bar No. 68137, James R. Gillen, P.C., A Professional Law Corporation, 4300 Promenade Way, Suite 118, Marina del Rey, California 90292-6279, (310) 827-2001, Fax (310) 827-4293, for plaintiffs, Estate of Theodore Robinson; Matthew J. Robinson; Christina Robinson; Mark Robinson.

Honorable Mark S. Borrell.

[Filed concurrently with PLAINTIFFS' OPPOSITION TO MOTION TO STRIKE PORTIONS OF SECOND AMENDED COMPLAINT BY DEFENDANT JOANNE BETH SCHILPEROORT, N.P.]

Hearing:

Date: July 18, 2012

Time: 8:30 a.m.

Dept.: 43

Reservation No.: 1715490

COME NOW Plaintiffs ESTATE OF THEODORE ROBINSON; MATTHEW J. ROBINSON; CHRISTINA ROBINSON; MARK ROBINSON, and hereby submit their Opposition to Demurrer to Complaint, as follows:

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I.

INTRODUCTION

Plaintiffs MATTHEW J. ROBINSON, CHRISTINA ROBINSON; and MARK ROBINSON bring the herein Wrongful Death Action, due to the negligent and reckless acts and omissions of the herein named Defendants, which directly led to the death of their father, THEODORE ROBINSON ["DECEDENT"], who was an "**elder**" at the time of the herein incident. Said Defendants include PAUL EDWARD MORIN, M.D. ["MORIN"]; JOANNE BETH SCHILPEROORT, N.P. ["SCHILPEROORT"]; and medical facility, MORIN MEDICAL CORPORATION dba CHANNEL ISLANDS FAMILY PRACTICE & URGENT CARE ["CHANNEL ISLANDS"]. Likewise, Plaintiff ESTATE OF THEODORE ROBINSON brings a Survival Action, by Successor-in-interest CHRISTINA ROBINSON, due to the negligent and reckless acts and omissions of the herein named Defendants, which directly led to DECEDENT'S death. JAMES ROBINSON [formerly DOE 1], son of DECEDENT has been named a Nominal Defendant at present.

II.

STATEMENT OF RELEVANT AND ALLEGED FACTS.

On or abut August 14, 2010, DECEDENT, a 67-year old man, presented with various medical issues, including but not necessarily limited to, Parkinson's Disease, falling and urinary tract infections, as well as MRSA infections. Further, DECEDENT had a history of Microaspiration and Scoliosis, which makes it difficult to breathe and causes pulmonary restriction. DECEDENT also had a brain stimulator placed in 2000. [Plaintiffs' Second Amended Complaint (SAC) ¶14.] At said time, DECEDENT presented to Defendants at 2103 Pickwick Drive, Camarillo, California 93010, where he had previously been seen by Defendant MORIN for years. However, this time, DECEDENT was seen time by Defendant Nurse Practitioner SCHILPEROORT, who was not a physician. [SAC ¶15.] Apparently, Defendant SCHILPEROORT was acting at the direction, and under the authority, of Defendant MORIN.

At said time, DECEDENT was reported to be unable to state his medication dosage, and was otherwise complaining of back pain, but denied burning and frequency of urination. DECEDENT'S symptoms were being treated by antibiotics. After administering a shot of Toradol for pain, plus Motrin and Flexol, Defendants sent DECEDENT home. The next day, on August 15, 2010, DECEDENT passed away. [SAC ¶16.]

An **elderly** person such as DECEDENT, who has a chronic disease, requires a much more extensive work-up than what occurred on August 14, 2010. Patients with a history of falling typically have serious underlying conditions. DECEDENT'S fall history was clearly documented in the medical records of the herein Defendants as far back as 2003. Furthermore, DECEDENT was taking various prescription medications, but drug interaction was not taken into consideration by Defendants on August 14, 2010. [SAC ¶17.] Rather than simply administer a shot of Toradol, DECEDENT should have been taken to an emergency room, had x-rays, an EKG, and a comprehensive blood work-up. Pneumonia, Sepsis and other problems should have been ruled out. DECEDENT'S Certificate of Death, which was attached to Plaintiffs' Complaint as Exhibit 1, indicates DECEDENT died of cardio-respiratory failure, neurogenic bladder and Parkinson's Disease. However, DECEDENT'S chart does not indicate cardiac problems. [SAC ¶18.]

Defendants were negligent and reckless for failing to perform an adequate work-up and evaluation of DECEDENT, who had unexplained falling episodes, including not having made a conclusive determination as to whether DECEDENT had Septicemia. Had the work-up occurred, DECEDENT would have been hospitalized. If Defendants were unable to perform a full work-up, DECEDENT should have been transported to the Emergency Room for the work-up, including diagnostic testing, and ultimately, treatment. Notably, **elders** who fall require very thorough work-ups. Furthermore, infection in an **elderly** person cannot simply be observed. A blood test must be performed, and Pneumonia ruled out. None of this occurred on August 14, 2010, when DECEDENT presented to Defendants. [SAC ¶19.] As a direct and proximate result of Defendants' negligence,

recklessness and intentional conduct in failing to provide care, properly diagnose and render appropriate treatment, DECEDENT suffered and lost his life prematurely. [SAC ¶20.]

III.

A DEMURRER TO FIRST AMENDED COMPLAINT IS IMPROPER. AS FACTS SUFFICIENT TO STATE CAUSES OF ACTION HAVE BEEN PLED.

A Demurrer is a pleading used to test the legal sufficiency of other pleadings. That is, it raises issues of law -- *not fact* -- regarding the form or content of the Complaint. *[California Code of Civil Procedure* §§422.10, 589; see *Donabedian v. Mercury Ins. Co.,* 116 Cal.App.4th 968, 994, 11 Cal.Rptr.3d 45, 64 (2004) (citing text).] Notably, it is not the function of the Demurrer to challenge the truthfulness of the Complaint; and for purposes of the ruling on the Demurrer, all facts pleaded in the Complaint are assumed to be true. *[Aubry v. Tri-City Hosp. Dist.,* 2 Cal.4th 962, 966-967, 9 Cal.Rptr.2d 92, 95 (1992); *Serrano v. Priest,* 5 Cal.3d 584, 591, 96 CaL.Rptr. 601, 605 (*1971);Adelman v. Associated Int'l Ins. Co.,* 90 Cal.App.4th 352, 359, 108 Cal.Rptr.2d 788, 792 (2001).] The sole issue raised by a Demurrer is whether the facts pleaded state a valid cause of action, not whether they are true. No matter how unlikely or improbable, Plaintiffs' allegations must be accepted as true for the purpose of ruling on the Demurrer. *[Del E. Webb Corp. v. Structural Materials Co.,* 123 Cal.App.3d 593, 604, 176 Cal.Rptr. 824, 829 (1981).] The question of Plaintiffs' ability to prove these allegations, or possible difficulties in making such proof, is of no concern in ruling on the Demurrer. *[Committee on Children's Television, Inc. v. General Foods Corp.,* 35 Cal.3d 197, 213-214, 197 Cal.Rptr. 783, 793 (1983).] Further, Plaintiffs are entitled, at the pleadings stage, to assert claims in the alternative, regardless of their consistency: "We acknowledge a party is permitted -- sometimes encouraged -- to plead alternative and inconsistent theories in a given proceeding." *[International Billing Services, Inc. v. Emigh,* 84 Cal.App. 4th 1175, 1188, 101 Cal.Rptr.2d 532, 541 (2000).]

Defense cites two cases for her basic proposition that Plaintiffs must plead **Elder Abuse** with particularly, with which Plaintiffs do not generally disagree, albeit Defendant's authority is misinterpreted and otherwise, inapplicable. Defendant cites *Carter v. Prime Healthcare Paradise Valley,* 198 Cal.App.4th 396, 407, 129 Cal.Rptr.3d 895 (2011), a Fourth District case, ostensibly to support its assertion that **Elder Abuse** must be pled differently because it statutory. [Demurrer, 5:28-6:1-3.] However, attention must be given to the context in which the *Carter* decision was made. The underlying decision to which *Carter* was citing, *Moore v. Regents of University of California,* 51 Cal.3d 120, 793 P.2d 479 (1990), is instructive, wherein *Moore* stated: "Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. Accordingly, we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. [Citations omitted.] We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law." [*Id.*] Hence, specifically with respect to **Elder Abuse** pleading, it is *not,* as Defendant misrepresents, that a new standard whereby the veracity of facts pleaded are challengeable; but rather, that while facts properly pleaded are regarded as true and the Complaint is in total afforded a "reasonable interpretation" in context, the Court does not assume conclusions of fact or law. Such is the long-standing standard for Demurrers in this context. Defendant's apparent contention that facts properly pled are not taken as true is patently false and suspiciously misleading.

IV.

PLAINTIFFS HAVE PROPERLY PLED AN ELDER ABUSE CLAIM.

A. *"Care Custodian"*

Plaintiffs' **Elder Abuse** claim is based upon *California Elder Abuse and Dependent Adult Civil Protection Act (EADACPA);* that is, *California Welfare & Institutions Code* §15600, et seq., otherwise known as the *Elder Abuse Act,* and relevant case law interpreting same. Pursuant to *California Welfare & Institutions Code* §15610.07, "**abuse** of an **elder** or a dependent adult" means: (a) Physical **abuse**, *neglect,* financial **abuse**, *abandonment,* isolation, abduction, *or other treatment with resulting*

physical harm or pain or mental suffering, or (b) the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering." [Emphasis added.] [SAC ¶24.] Section 15610.57 defines "neglect" to include: *failure to provide medical care for physical and mental health needs: AND/OR* 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.] [SAC ¶25.]

First, Section 15610.57, in defining "neglect," which is one qualifying aspect of **Elder Abuse**, provides that a person can be held liable for failing to provide medical care OR if said person has care *or* custody of an **elder**, failing to exercise reasonable degree of care. Thus, Defendant's assertion that she must be deemed to be DECEDENT'S care custodian is false, as is apparent by even a cursory reading of Section 15610.57.

Furthermore, even if one considers "neglect" as defined in Section 15610.57, as perpetrated by a person having the "care or custody" of an **elder**, Section 15610.17 brings Defendant and CHANNEL ISLANDS, where Defendant was employed and was acting within the scope of her employment at the time the alleged acts and omissions occurred, into the definition. Specifically, Section 15610.17 defines a "care custodian" as "an administrator or an *employee* of any of the following public or *private facilities* or agencies, or *persons providing care or services for* ***elders*** or dependent adults, including members of the support staff and maintenance staff:... (b) *Clinics."* [Emphasis added.] [*See* SAC ¶27.] Plaintiffs have alleged the herein incident took place at the "CHANNEL ISLANDS" facility, located at 2103 Pickwick Drive, Camarillo, California 93010, which was a "clinic," as defined by Section 15610.17, and that Defendant was employed by Defendant Dr. MORIN and said clinic at the time of the herein incident. [f*See* SAC ¶¶5,27.] Further, upon asserting these facts, Plaintiffs go on to allege Defendant's status as a care custodian: "... Defendants herein, including DOES 1-50, and each of them, were care custodians within the definition of *California Welfare & Institutions Code* §15610.17." [SAC ¶¶27-28.] Such that, Defendant's contention that Plaintiffs have not asserted Defendant's status as a care custodian [Demurrer 7:15-23] is false, and in any event, Plaintiffs have shown herein that Section 15610.57 does not require Defendant to have been a care custodian. Rather, a person can be held liable for failing to provide medical care OR if said person has care OR custody of an **elder**, failing to exercise reasonable degree of care. Thus, Defendant's assertion that she must have been DECEDENT'S care custodian misrepresents the statute.

It is the California Supreme Court's holding -- not the Fourth District (*Carter v. Prime Healthcare Paradise Valley, LLC,* 198 Cal.App.4th at 406) as cited by Defense - which is the controlling law regarding liability in **Elder Abuse** actions when the conduct of health care professionals is involved. That is, the California Supreme Court in *Delaney* specifically stated that the ***Elder Abuse*** *Act* applied to actions for "neglect" by those responsible, "regardless of their professional standing." [Emphasis added.] *[Delaney v. Baker,* 20 Cal.4th 23, 34, 82 Cal.Rptr.2d 610 (1999).] Further, the *Delaney* Court went on to observe that the statutory definition quoted in *California Welfare & Institutions Code* §15610.57 and used in Section 15657 concerns "the more fundamental 'failure to provide medical care for physical and mental health needs' [citations omitted]" *[id.]* - as opposed to Professional Negligence, which is the sub-standard rendering of medical care. Notably, the provision of "medical care" is certainly within the purview of Defendant's responsibilities as a Nurse Practitioner acting as an agent of physician Defendant MORLN, as is attending to "physical and mental health needs." Defendant apparently confuses the purpose and intent of the ***Elder Abuse*** *Act*, erroneously believing it to provide an escape hatch for health care providers, while affording heightened remedies only against other "neglect" actors. Rather, the Statute creates an obvious framework to impose more severe punishment for a protected class -- that is, **elders** and dependent adults -- "regardless of [ ] professional standing" of the actor meting out the neglect.

> Defendants contend, as noted, that the term 'based on ... professional negligence,' used in section 15657.2, applies to any actions directly related to the professional services provided by a health care provider. The adoption of such a position would produce an anomalous result. It would make the determination as to whether the "recklessly neglectful" custodians of an **elderly** person were subject to section 15657 turn on the custodian's licensing status: A custodian who allowed an **elder** or dependent adult in his or her care to be become malnourished would be subject to 15657's heightened remedies only if he or she was *not* a licensed health care professional. There is no indication that the Legislature intended this anomaly. *[Delaney v. Baker,* 20 Cal.4th 23, 35, 82 Cal.Rptr.2d 610, 617-618 (1999).]

Thus, it is abundantly clear that Section 15610.17 contemplated Defendant, a clinic employee rendering care or services to an **elder**, within the definition of care custodian, and the California Supreme Court in *Delaney* included such care custodians, who also happen to be health care providers, as potential litigants in **Elder Abuse** actions. The California Supreme Court further articulated these principles in *Covenant Care, Inc.:*

It is true that statutory **elder abuse** includes 'neglect as defined in Section 15610.57,' 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 Delaney, 'neglect' within the meaning of Welfare and Institutions Code 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.' 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.' [Emphasis added.] [Citations omitted.] *[Covenant Care, Inc. v. Superior Court,* 32 Cal.4th 771, 783, 86 P.3d 290, 296-297 (2004).]

B. *Carter v. Prime Healthcare Paradise Valley. LLC*

It is notable to mention that even if the Fourth District *Carter* case is applicable herein, Plaintiff has nonetheless pleaded according thereto. First, in *dicta*, *Carter* "distill [ed]" several factors constituting **Elder Abuse**; to wit, that Defendant,

1) *"had responsibility for meeting the basic needs of the **elder** or dependent adult, such as nutrition, hydration, hygiene or medical care"*, Plaintiffs alleged as much in Paragraph 5 of their SAC: "Defendant SCHILPEROORT was either an employee or agent of Defendant MORIN, as well as of said business entities and/or DOES 1-50, and each of them, and/or *was otherwise responsible for the medical care and treatment of DECEDENT* in her capacity as a Nurse Practitioner under the supervision and auspices of Defendant MORIN." [Emphasis added.];

2) *"knew of conditions that made the **elder** or dependent adult unable to provide for his or her own basic needs"*, Plaintiffs alleged as much in Paragraphs 16 and 17 of the SAC: "At that time, DECEDENT was *reported to be unable to state his medication dosage*, and was otherwise complaining of back pain.... DECEDENT'S symptoms were being treated by antibiotics.... DECEDENT'S *fall history was clearly documented in the medical records of the herein Defendants* as far back as 2003. Furthermore, DECEDENT was taking various prescription medications, but drug interaction was not taken into consideration by Defendants on August 14, 2010." In addition, Paragraph 14 states: DECEDENT had "*Parkinson's Disease, falling and urinary tract infections, as well as MRSA infections.... [A] history of Microaspiration and Scoliosis, which makes it difficult to breathe and causes pulmonary restriction. [and] ... a brain stimulator placed in 2000."* Additionally, Paragraph 42 states: "... DECEDENT alleges that a *'disabled person.' such as himself*, was substantially more vulnerable than other members of the public to the conduct of Defendants, including DOES 1-50, because of *poor health or infirmity, restricted mobility* or disability, and that DECEDENT actually suffered substantial physical and emotional damage resulting from said Defendants' conduct, even death."

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"*, Plaintiffs alleged in Paragraph 19 of their Complaint: "Defendants were negligent and reckless for failing to perform an adequate work-up and evaluation of DECEDENT, who had unexplained falling episodes, including not having made a conclusive determination as to whether DECEDENT had Septicemia. Had the work-up occurred, DECEDENT would have been hospitalized. If Defendants were unable to perform a full work-up, DECEDENT should have been transported to the Emergency Room for the work-up, including diagnostic testing, and ultimately, treatment. Notably, **elders** who fall need a very thorough work-up. Furthermore, infection in an **elderly** person cannot simply be observed. A blood test must be performed,

and Pneumonia ruled out. None of this occurred on August 14, 2010, when DECEDENT presented to Defendants." In addition Paragraph 34 states: "Hence, Defendants, including DOES 1-50 knew or should have known there was a strong possibility that their failure to undertake a comprehensive medical work-up and/or their failure to transfer DECEDENT to a hospital for a comprehensive medical work-up; and/or their administration of improper treatment in the form of a Toradol shot, would harm DECEDENT, as well as Plaintiff MATTHEW ROBINSON."

As shown, Plaintiff pled more than sufficiently under each of the *Carter* categories.

C. *Plaintiffs Have Alleged DECEDENT Was Unable to Provide For His Needs*

Plaintiffs clearly allege DECEDENT was a "senior male with medical issues, including but not necessarily limited to, Parkinson's Disease, falling and urinary tract infections, as well as MRSA infections. Further, DECEDENT had a history of Microaspiration and Scoliosis, which makes it difficult to breathe and causes pulmonary restriction. DECEDENT also had a brain stimulator placed in 2000." [SAC ¶14.] In addition, Plaintiffs alleged "DECEDENT was a 'disabled person' as contemplated by *California Civil Code* §3345, 1761(g) and (g)(2), due to his inability, at the time the herein-described events occurred, to care for himself, perform manual tasks, walk and work." [SAC ¶38.] These allegations in no way assert DECEDENT presented to CHANNEL ISLAND(S) "on his own."

Furthermore, Defendants had seen DECEDENT at CHANNEL ISLANDS "for years" [SAC ¶15], and as such, had easy access to DECEDENT'S medical chart, which specifically outlined his disabilities and medical condition. Defendant's failure to avail herself of DECEDENT'S detailed and lengthy history at CHANNEL ISLANDS is not akin to a pleadings' failure. If Defendant was not aware of DECEDENT'S condition, it is because she failed to review his chart and make herself aware prior to sending DECEDENT away without proper medical treatment.

D. *Recklessness & Failure to Provide Medical Care*

The purpose of the ***Elder Abuse*** *Act* is to protect a particularly vulnerable portion of the population, of which DECEDENT was a member throughout the time the herein alleged acts and omissions on the part of Defendant took place, from mistreatment in the form of **abuse**, neglect and deprivation of services necessary to prevent harm. Within the meaning of the ***Elder Abuse*** *Act*, "recklessness," 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. (*Mack v. Soung,* 95 Cal.Rptr.2d 830, 80 Cal.App.4th 966 (App. 3 Dist. 2000) review denied.] The *Delaney* Court defined recklessness as "deliberate disregard of the high degree of probability that an injury will occur." *[Delaney v. Baker,* 20 Cal.4th at 31.] "It is enough that they "realize or, from the facts which [they] kn[o]w, should realize that there is a strong probability that harm may result, even though though [they] hope[] or even expect [] that [their] conduct will prove harmless." [*Shell Oil Co. v. Winterthur Swiss Ins. Co.,* 12 Cal.App.4th 715, 742, 15 Cal.Rptr.2d 815 (1993).]

When Defendant failed to perform an adequate work-up and evaluation of DECEDENT, and further failed to facilitate transfer to the Emergency Room for diagnostic testing, and ultimately, treatment so as to address DECEDENT'S falls, back pain, and inability to communicate his medication regimen all within the context of his known history of MRSA (Staph) infections, Microaspiration and Scoliosis, which makes it difficult to breathe and causes pulmonary restriction, she acted recklessly. [SAC ¶¶14-19.] Clearly, Defendant knew *or should have known* there was a strong possibility that her refusal to provide medical care to meet DECEDENT'S physical needs, including failure to undertake a comprehensive medical work-up and/or her failure to transfer DECEDENT to a hospital for a comprehensive medical work-up and treatment, would harm DECEDENT. •.. [SAC ¶34.]

Additionally, Plaintiffs added the following factual allegations to the SAC so as to expand upon Defendant's failure to provide medical care to the **elder**, DECEDENT, as necessitated by the Court at the earlier Demurrer hearing on the **Elder Abuse** cause of action:
Defendants merely administered pain medication, wholly failing to address DECEDENT'S medical condition -- back pain, including a history of Parkinson's Disease, falling, urinary tract infections, MRSA infections, Microaspiration, Scoliosis, breathing difficulty, pulmonary restriction and brain stimulator implant - and sent DECEDENT on his way, which act, in effect, constituted a failure to undertake medical care. Said deprivation of care by Defendants herein, including DOES 1-50, and each of them, directly and proximately caused DECEDENT'S death. Said acts and omissions fall squarely within the purpose and intent of the *California* ***Elder Abuse*** *Act*, and constitute recklessness, neglect, abandonment and deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering, which specifically include failure to undertake medical care, as opposed to negligent rendering of medical services. [SAC ¶30.]

In addition to the foregoing, the following is alleged, which acts and omissions on the part of Defendants further constitute **Elder Abuse**: [SAC ¶42.]

DECEDENT did not have the capacity to make an informed decision regarding administration of a Toradol injection. [SAC 1143.]

In addition, Defendants withheld information from DECEDENT that was vital to making an informed decision. Specifically, Defendants never provided DECEDENT with the contra indications for administration of a Toradol shot. Specifically, Toradol can cause serious side effects, including congestive heart failure; kidney failure; pain or tightness in the chest; vomiting blood; difficulty in swallowing or breathing; asthma, wheezing, shortness of breath; allergic reactions; fainting or seizures; anaphylactoid reactions; and/or gastrointestinal bleeding, among others, leading to death. The **elderly** are at higher risk for most serious side effects. Notably, DECEDENT, 67 years old at the time, had a documented history of Parkinson's Disease, falling, urinary tract infections, MRSA (Methicillin-resistant Staphylococcus aureus) infections (virulent staph infections), Microaspiration and Scoliosis, which makes it difficult to breathe and causes pulmonary restriction, as well as a brain stimulator, among other conditions. [SAC ¶¶44.]

DECEDENT was entitled to be seen, and needed to be seen, by a physician, that is, Defendant MORIN, who ostensibly was aware of DECEDENT'S complex medical history and thus, would have been able to make a more definitive diagnosis, including referring DECEDENT to emergency care for a necessary and proper medical work-up in light of DECEDENT'S presenting symptoms. [SAC ¶45.]

Defendant SCHILPEROORT never took a full and complete medical history of DECEDENT, including but not limited to DECEDENT'S medical conditions that were chronic in nature, prior to administering the Toradol shot, or, in fact, at any time. DECEDENT'S extremely complex medical condition was beyond her competency as a Nurse Practitioner to diagnose. [SAC ¶46.]

As a result of Defendants' acts and omissions, proper care and treatment was withheld, constituting **Elder Abuse**, and improper care and treatment was administered by virtue of the Toradol shot, constituting Professional Negligence. Due to the fact the improper care and treatment, that is, the Toradol shot, was administered without informed consent, such constitutes Medical Battery. [SAC ¶47.]

Before a patient is administered a Toradol shot, it must be determined whether the patient the patient has, among other issues, kidney disease, asthma, dehydration and/or a cardiac condition, yet there is no indication Defendants ever took a medical history at the time DECEDENT presented. In fact, DECEDENT had a history of urinary tract infections, as well as Microaspiration and Scoliosis, which makes it difficult to breathe and causes pulmonary restriction. [SAC ¶48.]

Before a patient is administered a Toradol shot, it must be determined whether the patient has an infection, since Toradol can hide some of the signs of infection, such as pain and fever, and may lead a patient to believe he or she is better or that the infection is not serious. DECEDENT had a documented history of urinary tract infections, as well as MRSA (Methicillin-resistant Staphylococcus aureus) infections (virulent staph infections). DECEDENT, who had Parkinson's Disease, was reported at the time, that is, on August 14, 2010, to be unable to state his medication dosage, and was otherwise unable to assist in his medical care and treatment, such that it was incumbent upon Defendants to determine at the time whether DECEDENT had an infection of any sort prior to administration of the Toradol shot, which they wholly failed to do. Otherwise, Defendants failed to facilitate referring DECEDENT to a higher level of care where such determination regarding infection could be made. [SAC ¶49.]

Before a patient is administered a Toradol shot, it must be determined what other medications a patient is taking. DECEDENT, who had Parkinson's Disease, was reported at the time, that is, on August 14, 2010, to be unable to state his medication dosage, and was otherwise unable to assist in his medical care and treatment, such that it was incumbent upon Defendants to determine at the time what specific medications were being taken by DECEDENT prior to administration of the Toradol shot, which they wholly failed to do. Otherwise, Defendants failed to facilitate referring DECEDENT to a higher level of care where such determination regarding medications could be made. [SAC ¶50.]

Furthermore, Toradol can slow down elimination of other medicines from the body, which affects they way such medications work. Interactions amongst medications, if said interactions are deemed safe and appropriate, must be closely managed and monitored, which requires that the medical provider be aware of all medications. Notably, it was documented that DECEDENT was unable to state his medication dosage, and thus, was otherwise unable to assist in his medical care and treatment. Thus, Defendants wholly failed to assess DECEDENT'S daily medication regimen for drug interaction prior to administration of the Toradol shot. [SAC ¶51.]

Toradol, a potent nonsteroidal anti-inflammatory drug [“NSAID”], has been identified as causing increased risk of a serious cardiovascular thrombotic event, myocardial infarction, and stroke, which can be fatal, especially in **elderly** patients. A myocardial infarction is obstruction of the blood supply to the heart, typically by thrombus (blood clot) or embolus (traveling intravascular mass/clot), causing local death of the heart tissue. In fact, DECEDENT, an **elder**, died of cardio-respiratory failure. *[See* Exhibit 1.] [SAC ¶52.]

Toradol is contraindicated in patients with advanced renal impairment and in patients at risk for renal failure due to volume depletion. DECEDENT had a history of urinary tract infections, as well as MRSA (Methicillin-resistant Staphylococcus aureus) infections (virulent staph infections). In fact, a cause of death indicated for DECEDENT, an **elder**, was neurogenic bladder. *[See* Exhibit 1.] [SAC ¶53.]

Toradol must be adjusted for patients 65 years of age or older, because the **elderly** are more sensitive to the adverse side effects of NSAIDs, including Toradol. Specifically, extra caution and reduced dosages must be used when treating the **elderly** with Toradol, with the lower end of the Toradol dosage range utilized for patients over 65 years of age. DECEDENT was 67 years old at the time of the alleged incident, however, there is no indication in the medical record that Defendants did, in fact, adjust the Toradol dosage for DECEDENT. [SAC ¶54.]

Furthermore, the California Supreme Court has held that a *health care provider* engaging in recklessness toward an **elder** within the meaning of *Welfare & Institutions Code* § 15657 is subject to the heightened remedies of the *EADACPA*, and is not subject to the limitations of Section §15657.2, which apply only to professional negligence actions. *[Delaney v. Baker*, 20 Cal.4th 23, 82 Cal.Rptr.2d 610 (1999).] The **abuse** and neglect specified in §15657, in other words, is something other than, and mutually exclusive of, “professional negligence,” as that term is used in §15657.2. Thus, the ***Elder Abuse*** *Act* expressly includes a “health care provider” within the possible litigants in an **Elder Abuse** claim. Is Defendant SCHILPEROORT, a Nurse Practitioner, seriously contending she is not a “health care provider”?

Defendants citation to *Benun v. Superior Court*, 123 Cal.App.4th 113, 120, 20 Cal.Rptr.3d 26 (2004) is pure fantasy. There is no such ruling in the opinion that Plaintiffs must demonstrate the alleged acts/omissions were undertaken as a care custodian and not a healthcare provider. [Demurrer, 7:22-24.]

V.

PLAINTIFFS WERE GIVEN LEAVE TO SUPPORT THEIR PUNITIVE DAMAGES' CLAIM.

It was Plaintiffs' understanding that they were given leave not only to amend their cause of action for **Elder Abuse**, but also to other substantiate a claim for Punitive Damages, and that, as such, the claim for Medical Battery, which correctly requests Punitive Damages is appropriate.

VI.

PLAINTIFFS HAVE PLED SUFFICIENTLY TO SUPPORT A CAUSE OF ACTION FOR MEDICAL BATTERY.

An action for Medical Battery can be brought when a provider performs a medical procedure without the patient's consent. *[CACI* Jury Instruction No. 530, Medical Battery.] Plaintiffs clearly alleged DECEDENT did not give consent: “Defendants performed a medical procedure, that is, administration of a Toradol shot, without DECEDENT'S consent, who, due to his medical condition, was otherwise unable to give consent.” [Emphasis added.] [SAC ¶83.] Hence, Plaintiffs' pleading is compliant with a cause of action for Medical Battery; that is, lack of consent. Defendants' attempt to muddy the waters by asserting a failure to provide “informed consent” merely constitutes Medical Negligence fails to acknowledge Plaintiff has pled both lack of consent, as demonstrated in Paragraph 83, as well as a lack of informed consent. Defendants' assertions, yet again, grossly misrepresent Plaintiffs' pleadings and compliance with the requisite causes of action.

VII.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant's Demurrer. However, if the Court grants Defendant's Demurrer, Plaintiffs request that it also grant Plaintiffs Leave to Amend and file a Second Amended Complaint. However, since the Court assumes all facts alleged in Plaintiff's Complaint to be true, and since Plaintiff has otherwise properly pled all Causes of Action as demonstrated above, Defendant's Demurrer should be denied.

DATED: July 5, 2012

JAMES R. GILLEN, P.C.

By <<signature>>

James R. Gillen

Attorney for Plaintiffs

ESTATE OF THEODORE ROBINSON; MATTHEW J. ROBINSON; CHRISTINA ROBINSON; MARK ROBINSON

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