2012 WL 7089012 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California,
Central District.
San Diego County

Eke WOKOCHA, individually, by and through his Guardian ad Litem/legal-personal representative Kathleen O'Bannon, Plaintiffs,

v.

SHARP MEMORIAL HOSPITAL dba Sharp Rehabilitation Center, a business entity; Amanda Hill, Otr/L, individually; John Jahan, M.D., individually; and Does 1-50, Defendants.

No. 37-2010-00083678-CU-PO-CTL.
November 6, 2012.

Defendant, Sharp Memorial Hospital dba Sharp Rehabilitation Center's Motion for Nonsuit, or in the Alternative, Directed Verdict on Eadacpa Claims

Lotz, Doggett & Rawers, LLP, Jeffrey S. Doggett, Esq., State Bar No. 147235, Patrick F. Higle, Esq., State Bar No. 222585, 101 West Broadway, Suite 1110, San Diego, California 92101, Telephone (619) 233-5565, Facsimile (619) 233-5564, Attorneys for Defendant, Sharp Memorial Hospital dba Sharp Rehabilitation Center.

Judge: Hon. John S. Meyer.

Trial Date: October 9, 2012

Time: 9:00 a.m.

Dept.: 61

Action Filed: 01/14/2010

COMES NOW, Defendant, SHARP MEMORIAL HOSPITAL ("SHARP") and hereby submits the following motion for nonsuit, or in the alternative, motion for directed verdict, in connection Plaintiff's claims for violation of Welfare *& Institutions Code* Section 15657 and enhanced remedies.

I. *INTRODUCTION*

This is a case involving the alleged dropping of the Plaintiff while he was at Sharp Rehabilitation Center who is now suffering complications from quadriplegia. Plaintiff had undergone spinal laminectomy surgery at Scripps Green Hospital, which also involved the biopsy of a spinal cord tumor, several days prior to being admitted to and allegedly dropped at Sharp Rehabilitation Center by an occupational therapist and her assistant.

II. *AUTHORITY*

Plaintiff's Complaint contains a cause of action for Dependent **Abuse**/Neglect, pursuant to *Welfare & Institutions Code* Section 15657, the **Elder Abuse** and Dependent Adult Civil Protection Act ("EADACPA"). Because Plaintiff has failed to produce any

evidence or make any offer of proof regarding essential elements necessary to obtain “enhanced remedies” under the EADACPA and because the conduct at issue is a based on allegations of a “reckless” failure to protect the Plaintiff from safety hazards against licensed health care providers who are also being sued in their capacity as “care custodians”, SHARP moves for nonsuit of the EADACPA claim and the enhanced remedies prior to submission of the matter to the jury on special verdict. For purposes of this motion, Defendant has waited until conclusion of both the Opening Statement and the presentation of Plaintiff's evidence in the case-in-chief and finds nothing that is reasonably capable of supporting any 16 adverse finding under the claims presented for recovery of “enhanced remedies” pursuant to the EADACPA.

On a motion for nonsuit, “the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give to the plaintiff's evidence all the value to which it is legally entitled,... indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor.” *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830,838-839. The court is required to evaluate the evidence in the light most favorable to the plaintiff, and any determination granting nonsuit cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff, a judgment for the defendant is required as a matter of law.” *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839. Granting of a nonsuit following opening statement is disfavored, and generally, if entertained is best determined after presentation of a plaintiff's primary evidence. A motion granting nonsuit will be upheld when it is clear that counsel has produced evidence and has been given an opportunity to state any and all of additional facts and evidence in an offer of proof, and despite such facts and evidence, it is plainly evident that those facts will not constitute a cause of action. *See, Freeman v. Lind,* (1986) 181 Cal.App.3d 791, 798-799.

While the rules governing the granting of a nonsuit are strict and weigh heavily in favor of allowing the matter to proceed to jury verdict, such rules do not relieve the plaintiff of the burden of establishing material elements of his case. The plaintiff must, therefore, produce evidence which supports a logical inference in his favor and which does more than merely permit speculation or conjecture. If a plaintiff produces no substantial evidence of liability or proximate cause then the granting of a nonsuit is proper. *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402; *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1209.

III. *PLAINTIFF HAS FAILED TO PRODUCE EVIDENCE NECESSARY TO SATISFY W& I CODE SECTION 15657(c) WHICH IS FATAL TO THE EADACPA CLAIM*

SHARP challenges the claim that Plaintiff's injuries are somehow the product of “wilful” or “reckless neglect” on the part of any employee of SHARP, and based upon the statutory requirements that impose upon Plaintiff a burden of showing corporate ratification of any wrongdoing before any damages or attorney's fees can be awarded under the EADACPA. *See. Welfare & Institutions Code* Section 15657(c). Specifically, *Welfare & Institutions Code* § 15657 states:
Where it is proven by clear and convincing evidence that a defendant is liable for physical **abuse** ... neglect... or fiduciary **abuse** *... and that the defendant has been guilty of recklessness. oppression. fraud. or malice in the commission of this* ***abuse*** *...*

(a) The Court shall award to the plaintiff reasonable attorney's fees ...

(b) The limitations [prohibiting non-recovery of general damages on behalf of the decedent in wrongful death cases] 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* [MICRA's $250,000 general damages cap]

However, in order to be able to recover such damages against an “employer”, *Welfare & Institutions Code* §15657(c) *requires* the following showing:

> 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*. [emphasis added]

Thus, Section 15657(c) acts as a Legislatively created *condition precedent* that must be satisfied *before* any enhanced remedies can be imposed against an employer defendant under the EADACPA. Section 3294(b) of the *Civil Code* states:

> An employer shall not be liable for [punitive] damages...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 conscious disregard of the rights or safety of others... *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.* (West Supp. 2001, p. 4 [emphasis added])

This section sets forth two (2) distinct requirements. The first requirement, applicable to all employers--irrespective of business form--mandates that there must be advance knowledge of a particular employee's unfitness or lack of qualification to carry out the tasks assigned by the employer. The second requirement--which is specifically directed to corporations--mandates that the advance knowledge of an unfit employee and conscious disregard must on the part of an officer, director or managing agent of the corporation. Alternatively, the acts constituting malice, oppression and/or fraud must be done by or ratified *after the fact* by an officer, director or managing agent of the corporation. *See. e.g., Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1067-1068, holding that corporate ratification is an essential element of EADACPA claim.

Based on these provisions, in order for PLAINTIFF to prevail on an EADACPA claim, he must prove by "clear and convincing evidence" that (1) the Defendants engaged in "reckless neglect", (2) the Defendants are guilty of recklessness, malice, oppression or fraud toward the patient and (3) that an officer, director or a managing agent of SHARP, ratified the alleged malice, oppression and/or fraud on behalf of the corporation. [1] And, for the purposes of assessing *Civil Code* §3294(b), "a managing agent" must be one with more than the power to hire and fire, but must also be in a position of authority on par with "officers and directors" such that their decisions ultimately determine or define the policy of an organization. *See. White v. Ultramar. Inc.* (1999) 21 Cal.4th 563, 573, 574.

In assessing both the legal standards and the evidence, it is abundantly clear that nothing has been presented, either in Opening Statement or in the substantive testimony for Plaintiff's case-in-chief that comes close to meeting Section 15657(c)'s threshold requirement of corporate ratification of alleged reckless neglect by SHARP. Nothing suggests any reckless neglect on the part of the SHARP employees, let along any unspecified danger that was presented and known to exist which any reasonable person could find that SHARP ratified any wrongful conduct.

A. *NONSUIT MUST BE GRANTED BECAUSE NO REASONABLE JUROR COULD FIND THAT SHARP ACTED WITH RECKLESS NEGLECT IN DENYING OR WITHHOLDING OF GOODS OR SERVICES*

As provided by the numerous cases interpreting the **elder** **abuse** statutes, Plaintiffs must prove more than simple neglect. "Neglect" as defined under the **Elder** and Dependent Adult **Abuse** Act also covers an area of misconduct distinct from "professional negligence" in California *Welfare & Institutions Code* section 15657.2. Neglect 'does not refer to the performance of medical services in a manner inferior to the 'knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing.' *Kay Delaney v. Calvin Baker. Sr.* (1999) 20 Cal. 4th 23, 34. substantive law relating to **elder** **abuse** has been clearly defined in the 2011 case of *Elaine Carter v. Prime Healthcare Paradise Valley, LLC* where the Appellate Court in this District, held that to recover the remedies available under the **Elder** **Abuse** Act (section 15657) from a healthcare provider, a plaintiff must prove more than simple or even gross negligence in the provider's care or custody of the **elder**. *Elaine*

Carter v. Prime Healthcare Paradise Valley, LLC (2011) 198 Cal. App. 4th 396, 405, citing Welfare and Institutions Code Section 15657.2; *Delaney v. Baker* (1999) 20 Cal. 4th 23, 31; *Sababin v. Superior Court* (2006) 144 Cal. App. 4th 81, 88. Indeed, Plaintiffs in **elder abuse** case must make a showing of denial or withholding of goods or services. *Elaine Carter v. Prime Healthcare Paradise Valley. LLC.* (2011) 198 Cal. App. 4th 396, 406.

In the Complaint filed in the *Carter* case, the plaintiffs alleged that the defendant hospital continually neglected Plaintiffs' Decedent such that: (1) the Decedent developed pressure ulcers on his heels; (2) the pressure ulcers were not treated; (3) the hospital did not give the Decedent life-saving medications, including antibiotics, despite records stating to the contrary; (4) the hospital failed to properly stock a "crash cart" for use in emergency situations and as a result of this alleged "**abuse**, neglect and fraud", the Decedent died. *Elaine Carter v. Prime Healthcare Paradise Valley, LLC* (2011) 198 Cal. App. 4th 396, 401-402.

In evaluating whether these allegations rose to the level of **elder abuse** as defined by the **Elder Abuse** Act, the Court reviewed the long line of case of cases involving conduct sufficiently egregious to warrant the award of enhanced remedies under the **Elder Abuse** Act. Specifically, the Court noted the following:
• A skilled nursing facility: (1) failed to provide an **elderly** man suffering from Parkinson's disease with sufficient food and water and necessary medication; (2) left him unattended and unassisted for long periods of time; (3) left him in his own excrement so that ulcers exposing muscle and bone became infected; and (4) misrepresented and failed to inform his children of his true condition. *Covenant Care, Inc. v. The Superior Court of Los Angeles County* (2004) 32 Cal. 4th 771, 778.

• An 88-year-old woman with a broken ankle "was frequently left lying in her own urine and feces for extended periods of time"; and she developed pressure ulcers on her ankles, feet and buttocks that exposed bone, "despite plaintiff's persistent complaints to nursing staff, administration, and finally to a nursing home ombudsman." *Delaney, supra,* 20 Cal. 4th at pp 27, 41.

• A facility caring for a dependent adult with known condition causing progressive dementia, requiring nutrition and hydration through a gastrostomy tube, and subjecting her to skin deterioration, ignored a medical care plan requiring the facility to check the dependent adult's skin on a daily basis and failed to notify a physician when pressure ulcers and other skin lesions developed. *Sababin v. Superior Court* (2006) 144 Cal. App. 4th 81, 88.

• A 78-year-old man admitted to a skilled nursing facility "was **abused**, beaten, unlawfully restrained, and denied medical treatment." *Smith v. Ben Bennett, Inc.* (2005) 133 Cal. App. 4th 1507, 1525.

• The staff of a nursing home: (1) failed to assist a 90-year-old, blind and demented woman with eating; (2) used physical and chemical restraints to punish the **elder** and prevent her from obtaining help; and (3) physically and emotionally **abused** the **elder** by bruising her, "withholding food and water, screaming at her, and threatening her." *Benun v. Superior Court* (2004) 123 Cal. App. 4th 113, 116-117.

• A skilled nursing facility: (1) failed to provide adequate pressure relief to a 76-year-old woman with severe pain of her left leg and identified as at high risk for developing pressure ulcers; (2) dropped the patient; (3) left "her in filthy and unsanitary conditions"; and (4) failed to provide her the proper diet, monitor food intake and assist with eating. *Country Villa Claremont Healthcare Center. Inc. V. Superior Court* (2004) 120 Cal. App. 4th 426, 430, 434-435.

• A physician "conceal[ed] the existence of a serious bedsore on a nursing home patient under his care, oppose[d] her hospitalization where circumstances indicate[d] it [was] medically necessary, and then abandon[ed] the patient in her dying hour of need." *Mack v. Soung* (2000) 80 Cal. App. 4th 966, 973.

Elaine Carter v. Prime Healthcare Paradise Valley, LLC (2011) 198 Cal. App. 4th 396, 405-406.

Based on the *Carter* Court's review of the long line of **elder abuse** cases, the Court held that:

"From the statutes and cases discussed above, we distill several factors that must be present for conduct to constitute neglect within the meaning of the **Elder Abuse** Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant (1) had responsibility for meeting the basic needs of the **elder** or dependent adult, such as nutrition, hydration, hygiene or medical care (2) knew of conditions that made the **elder** or dependent adult unable to provide for his or her own basic needs; and (3) *denied or withheld goods or services necessary to meet the **elder** or dependent adult's basic needs*, either with knowledge that injury was substantially certain to befall the **elder** or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness) The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the **elder** or dependent adult to suffer physical harm, pain or mental suffering. Finally, the facts constituting the neglect and establishing the causal link between the neglect and the injury 'must be pleaded with particularity,' in accordance with the pleading rules governing statutory claims." [Citations omitted]. [Emphasis added]. *Id.* at 406-407.

In applying the foregoing legal principles to the *Carter* case, the Court "[did] not find in plaintiffs' pleadings allegations that the defendant Hospital did anything sufficiently egregious to constitute neglect (or any other form of **abuse**) within the meaning of the **Elder Abuse** Act." *Id.* at 407.

Unlike the long string of cases which found conduct sufficient to warrant the award of enhanced remedies under the **Elder Abuse** Act, in the instant matter the alleged violations of the standard of care as testified to by Plaintiff's experts, simply rise to the level of negligence only.

1. TRIAL TESTIMONY OF MICHELLE TIPTON-BURTON

Plaintiff's occupational therapy expert, Michelle Tipton-Burton, testified at trial that SHARP occupational therapist Amanda Hill violated the standard of care, or something greater than that, including **elder abuse**, for the following reasons: 1) she chose a shower commode chair for the patient transfer that was not the "optimal" commode chair that she wished to use; 2) instead of a squat pivot transfer, she should have used an assistive device, such as a slideboard, to transfer the patient from the bed to the shower commode; 3) she used an ice pack as a modality for the patient's pain for the first time.

Addressing items 2 and 3 from above, Ms. Tipton-Burton testified at trial, however, that there was *no evidence* of any injury to the patient during the transfer from his bed to the shower commode. She also testified at trial that there is *no evidence* of any injury to the patient by the use of the ice pack, and no reason to believe any harm occurred. This leaves her sole opinion relating to violations of the standard of care, or something greater than that, including **elder abuse**, are against only Amanda Hill for sole reason that she chose a shower commode chair for the patient transfer that was not the "optimal" commode chair that she wished to use. This, however, is clearly a therapist's choice of modalities, and is by its own description a choice of a health care modality to provide to the patient, and cannot in any sense of the imagination be construed by any reasonable juror as a denial of basic goods or services as *mandated* by the *Carter* court to support and EADACPA claim. Here, and in conjunction with the controlling case in point, *Carter*, no reasonable juror can find that SHARP "did anything sufficiently egregious to constitute neglect (or any other form of **abuse**) within the meaning of the **Elder Abuse** Act." *Carter*, 198 Cal.App.4th at 407. These criticisms apply *to the provision of medical care*, or that Ms. Hill used the wrong equipment or used the wrong modalities in her provision of medical care. If anything at all such criticisms are rooted in negligence, and they certainly do not amount to a denial or withholding of goods or services rising to the level of "recklessness" under *Carter v. Prime Healthcare Paradise Valley. LLC* (2011) 198 Cal.App.4th 396, 406.

2. TRIAL TESTIMONY OF SUSAN L. GROAH, M.D., M.S.P.H.

Plaintiff's Physical Medicine and Rehabilitation physician expert, Susan L. Groah, M.D., M.S.P.H., testified at trial that the SHARP nursing staff violated the standard of care, or something greater than that, including **elder abuse**, for the following reasons: 1) they did not chart an apparent blood pressure reading of 53/34 on the early afternoon of January 16, 2009 or inform the physician; 2) that they did not take the patient's blood pressures with additional frequency over the day of January 16, 2009; and 3) that they did not share the patient's vital signs with the nurses who were coming on to their shift.

Addressing item 1 from above, Dr. Groah was shown at trial the physical therapy note charted by Jamie Bowman which clearly displayed a 53/34 blood pressure measurement. To say this was not charted is simply inaccurate. To say it is **elder abuse** to not inform a physician of a blood pressure reading when the physician was summoned to the room seconds later is not a withholding of basic goods or services as mandated by *Carter* to support an EADACPA claim. The physician was in the patient's room seconds later, did an assessment, and wrote orders based on that assessment. The physician further testified that he was on the floor and made his rounds early in the evening of January 16, 2009, such that he would have been aware of and satisfied with the vital signs that were taken at 4:05 p.m. Item 2 above is clearly to be judged by a negligence standard, as Plaintiff's expert alleges that the vital signs were not taken frequently enough. It is never alleged that they did not take any vital signs, just that they did not do so often enough. Again, it cannot be overstated that this is not a withholding of basic goods or services, but this is an allegation that the care provided was not enough care. Item 3 above is simply inaccurate as all of the nurses called to the stand indicated that they would have been aware of the patient's vital signs from earlier in the day either from receiving them during report from the offgoing nurse, or from their own review of the patient's medical chart when they were coming on shift. In either instance, it is certainly not an allegation of the withholding of basic goods or services to the patient as *mandated* by the *Carter* court to support and EADACPA claim. Here, and in conjunction with the controlling case in point, *Carter,* no reasonable juror can find that SHARP "did anything sufficiently egregious to constitute neglect (or any other form of **abuse**) within the meaning of the **Elder Abuse** Act." *Carter,* 198 Cal.App.4th at 407. These criticisms apply *to the provision of medical care,* or that the nurses did not do enough charting or reporting, and if anything, such criticisms are rooted in negligence, and they certainly do not amount to a denial or withholding of goods or services rising to the level of "recklessness" under *Carter v. Prime Healthcare Paradise Valley, LLC* (2011) 198 Cal.App.4th 396, 406.

B. ***NONSUIT MUST BE GRANTED BECAUSE NO REASONABLE JUROR COULD FIND THAT ANY MISCONDUCT WAS RATIFIED BY THE CORPORATE DEFENDANT SHARP***

The *Marron* case is particularly instructive because it involved summary judgment proceedings -- which employs a similar analysis to be conducted by the Court in determining a motion for nonsuit. *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049. Further, the last portion of the opinion directly involved "corporate ratification" as a necessary element under EADACPA In *Marron* the Regents of the University of California moved for summary adjudication of the "enhanced remedies" on three alternative grounds. First, the Regents contended that the "enhanced remedies" were punitive in nature and thus prohibited from being awarded against a public entity under *Government Code* Section 818. Second, the Regents contended that Ms. Marron was not a "dependent adult" as contemplated by the EADACPA. And third, the Regents submitted that corporate ratification was neither alleged nor presented as evidence so as to create a material issue of fact. The Fourth District Court of Appeal ruled that W & I Code Section 15657 was not "punitive in nature" and that Ms. Marron technically constituted a "dependant adult" under the Legislative definitions given under Section 15610.23(b). (*Id.* at 1061, 1066-1067.) As to the third basis for summary adjudication, the Court agreed that "corporate ratification" was an essential element necessary to perfect a claim for "enhanced remedies" but found that in that case the evidence presented by plaintiffs was sufficient to create a triable issue. The *Marron* analysis is instructive because it highlights the utter failure of proof presented by Plaintiff in this case:

> As a public entity, RUC can act only through its employees or agents... Furthermore, regarding RUC's assertion the Marrons did not submit any evidence that it ratified the reckless neglect of its employees, the Marrons submitted evidence showing that Mary Middleton, the Hospital's director of patient care services, had actual knowledge of understaffing complaints made by nurses caring for Lidia and apparently did not take any remedial action. (*Marron* at 1067.)

In footnote 12 of the opinion, the Court was very specific as to the evidence constituting potential ratification: "The nurses' complaints alleged they were given assignments that 'posed a potential threat to the health and safety of [their] patients' and staffing was insufficient to 'meet the individual patient care needs/requirements of [their] patients.' " Thus, *actual evidence -- statements made by the nurses actually caring for Ms. Marron* - were made to management letting them know of a potentially dangerous situation at the hospital while Ms. Marron was a patient. This was sufficient to the Court to overcome speculation of awareness on the part of corporate officials in the Regents and was deemed sufficient to show that, *in the absence of evidence of corrective action,* acknowledgment of a potentially dangerous situation.

Here, no such evidence is presented, nor does it exist. Instead, counsel for Plaintiff is attempting to show that the Therapy Manager, Jennie Yellin, and the Nursing Manager, Carol Dentz, somehow did not do a good enough investigation into the alleged incident, despite the fact that their investigations covered multiple days and resulted in the writing of two Quality Variance Reports. It is difficult to see how this is corporate ratification, and impossible to see how this satisfies the requirements of *Welfare & Institutions Code* § 15647(c) and *Civil Code* §3294b. Section 15657(c) acts as a Legislatively created *condition precedent* that must be satisfied *before* any enhanced remedies can be imposed against an employer defendant under the EADACPA. Section 3294(b) of the *Civil Code* states:

> An employer shall not be liable for [punitive] damages...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 conscious disregard of the rights or safety of others... *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.* (West Supp. 2001, p. 4 [emphasis added])

This section sets forth two (2) distinct requirements. The first requirement, applicable to all employers--irrespective of business form--mandates that there must be advance knowledge of a particular employee's unfitness or lack of qualification to carry out the tasks assigned by the employer. The second requirement-which is specifically directed to corporations-mandates that the advance knowledge of an unfit employee and conscious disregard must on the part of an officer, director or managing agent of the corporation. Alternatively, the acts constituting malice, oppression and/or fraud must be done by or ratified *after the fact* by an officer, director or managing agent of the corporation. *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1067-1068, holding that corporate ratification is an essential element of EADACPA claim. There has been no testimony from Plaintiff's experts that any of the nurses were involved in any prior incident where they did not chart vital signs or inform a physician, where they did not document vitals enough, or where they did not give report to the oncoming nurses. Furthermore, there has been no testimony from Plaintiff's experts that any of the therapists were involved in any prior incident where they selected a shower commode chair for a patient transfer that was inappropriate, that any of the therapists were involved in any prior incident where they used one method of transfer instead of another or instead of utilizing an assistive device, nor that any of the therapists were involved in using an ice pack as a modality for a patient for the first time. Just because the investigations of the therapy manager and the nursing manager did not reveal any employee misconduct does not rise to the level of proof required to show ratification, let along the level of proof to show any malice, oppression, or fraud on the part of any employee.

As a consequence, the theories advanced by the Plaintiff's "experts" fail to rise to the level contemplated under the statute to support a claim for enhanced remedies. This is not to say that the jurors cannot determine SHARP was - it simply means that Plaintiff's efforts to impose "enhanced remedies" as contemplated by the Act are not appropriate to proceed as a matter of law.

IV. *CONCLUSION*

For all the foregoing reasons, arguments and authorities, and those as may be presented at the time of hearing of this motion, SHARP respectfully submits that the EADACPA claim is subject to nonsuit, and that a nonsuit should be granted as to that claim.

DATED: November 1, 2012

LOTZ, DOGGETT & RAWERS, LLP

By: <<signature>>

PATRICK F. HIGLE, ESQ

Attorneys for Defendant, SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER

Footnotes

1 According to the California Supreme Court, "clear and convincing evidence" is that state of evidence which is "sufficiently strong to command the *unhesitating assent of every reasonable mind"* and is described as "a standard far higher than the mere preponderance standard usually employed in civil cases." (*See*, *In re Angila P.* (1981) 28 Cal. 3d 908, 919; *BAJI* 2.62.)

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