

2012 WL 8666823 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Central District
Stanley Mosk Courthouse
Los Angeles County

Celine BURK, Francesca Gasaway, Plaintiff,

v.

THE REHABILITATION CENTRE OF BEVERLY HILLS, et al., Defendant.

Edlyn BURK-SOORANI, an individual, Plaintiff,

v.

Robert SIMON, M.D., an individual, et al., Defendants.

No. BC432426.
June 6, 2012.

(c/w BC437799)

Dept.: "19"

[Filed concurrently herewith Separate Statement of Undisputed Material Facts; Notice of Lodging Exhibits; Request for Judicial Notice; and (Proposed) Order]

Date: August 22, 2012 [Reserveil]

Time: 8:30 a.m.

Action Filed: 2-24-10

Trial Date: 11-5-12

Defendant, the Rehabilitation Centre of Beverly Hills, Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Individual Causes of Action; Memorandum of Points and Authorities; Declarations of Sherry J. Hechanova, Esq., Alvin Chang, M.D., Maggie Spencer, RN, and Exhibits in Support Thereof

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Judge: Hon. [Rex Heeseman](#).

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on August 22, 2012 at 8:30 a.m., or as soon thereafter as this matter may be heard in Department "19" of the above entitled Court, located at 111 North Hill Street, Los Angeles, CA 90012, Defendant THE REHABILITATION CENTRE OF BEVERLY HILLS will move, and hereby does move, this Court for an order granting summary judgment, or in the alternative, summary adjudication of issues.

This motion for Summary Judgment, or alternatively, for Summary Adjudication of issues is brought pursuant to [California Code of Civil Procedure § 437\(c\)](#), on the following grounds:

SUMMARY ADJUDICATION ONE

Plaintiffs' cause of action for **Wrongful Death** is without merit because: (1) Defendant's conduct at all relevant times complied with the standard of care; (2) That nothing Defendant did or allegedly failed to do caused or contributed to the death of Beatrice Burk; and (3) Plaintiff has failed to provide any evidence sufficient to establish prima facie case as to any cause of action.

SUMMARY ADJUDICATION TWO

Plaintiffs' cause of action for **Elder Abuse** is without merit because: (1) Plaintiffs lack standing, (2) Defendant's conduct at all relevant times complied with the standard of care; (3) That nothing Defendant did or allegedly failed to do caused or contributed to the death to Beatrice Burk; (4) Plaintiffs have no evidence of recklessness, malice, oppression or fraud as to the moving Defendant; (5) Plaintiffs have no evidence that an officer, director or managing agent of the Defendant engaged in, ratified, authorized, any such conduct by its employees, or had advance knowledge of the unfitness of any employee who engaged in such conduct; and (6) Plaintiff has failed to provide any evidence sufficient to establish prima facie case.

SUMMARY ADJUDICATION THREE

Plaintiffs' claim for enhanced remedies is without merit because (1) Plaintiffs failed to provide clear and convincing evidence that the Defendant acted with malice, oppression or fraud; and (2) Plaintiffs failed to provide clear and convincing evidence that an officer, director or managing agent of the moving defendant engaged in, ratified, authorized, any such conduct by its employees, or had advanced knowledge of the unfitness of any employee who engaged in such conduct.

Based on the above grounds, Defendant, THE REHABILITATION CENTRE OF BEVERLY HILLS, is entitled to judgment as a matter of law in its favor and against Plaintiffs.

This Motion will be based upon this Notice, the attached Memorandum of Points and Authorities; the Separate Statement of Undisputed Material Facts; Exhibits; the Declarations of Sherry Hechanova, Esq., Alvin Chang, M.D., Margaret Spencer, RN, Notice of Lodging, Request for Judicial Notice of the pleadings filed with the Court, and all other matters on file with the Court herein, and upon such other matters as may be properly before the Court at the hearing on this Motion.

DATED: June 5 2012

LEWIS BRISBOIS BISGAARD & SMITH LLP

By:

KATHLEEN M WALKER ESQ

STACI L. TRANG, ESQ.

SHERRY HECHANOVA, ESQ.

Attorneys for Defendant, THE REHABILITATION CENTRE OF BEVERLY HILLS

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant THE REHABILITATION CENTRE OF BEVERLY HILLS (Hereinafter, “RCBH” or “Defendant”), brings this motion for summary judgment, or, in the alternative, motion for summary adjudication, because as a matter of law, its staff provided good and appropriate care to an **elderly** resident who, approaching the end of her life, suffered numerous preexisting and debilitating conditions, which resulted in her continued declined, acute and sudden respiratory problems, and eventual death. The evidence in this matter, as set forth in the accompanying moving papers and supported by the expert declaration of Margaret Spencer, RN, establishes that, as a matter of law, the care, treatment, services and judgment provided by the staff of RCBH, at all times relevant to this matter, complied with the standard of care in the community, met the needs of the Decedent, and was not neglectful or **abusive**. Furthermore, the declaration of Alvin Chang, M.D. establishes that nothing RCBH did or failed to do caused or contributed to Decedent's death.

Thus, RCBH respectfully requests the Court to grant its Motion for Summary Judgment, or in the alternative, Motion for Summary Adjudication of Issues as to the Wrongful Death and **Elder Abuse** causes of action and punitive damages.

II. PROCEDURAL FACTS

On February 24, 2010, Plaintiffs, Celine Burk and Francesca Gasaway, filed a complaint for Wrongful Death and **Elder Abuse**. RCBH demurred to the Complaint on July 29, 2010. Plaintiffs then filed an amended complaint. RCBH demurred to Plaintiffs' First Amended Complaint. The matter was heard and Defendant filed an Answer.

III. STATEMENT OF UNDISPUTED FACTS

On December 22, 2008, Mrs. Burk was admitted to Cedars-Sinai Medical Center for difficulty swallowing. Her admitting diagnoses included swallowing dysfunction, **dementia**, dehydration, and **anemia**. (Undisputed Fact 10) Mrs. Burk's history included **dementia**, **progressive supranuclear palsy**, and **colon cancer**. (Undisputed Fact 9) **Metastatic Colon Cancer**, **Advanced Dementia** and **Progressive Supranuclear Palsy** were all included in Mrs. Burk's Death Certificate as either causes of death or significant contributing factors. (Undisputed Fact 19)

On December 23, 2008, Mrs. Burk was seen by gastroenterologist, Dr. Mehrdad Vosoghi, who noted that Mrs. Burk had been having difficulty with swallowing for about one and one half weeks prior to admission. Mrs. Burk was also noted to have **lost 27 pounds** in the last six months. Also, Mrs. Burk had been choking on food given by her caregivers for approximately ten days. (Undisputed Fact 10) Moreover, she was noted to have been having problems swallowing for the six months prior to her admission. Mrs. Burk was noted to have **had aspiration pneumonia**. *Despite Dr. Vosoghi's recommendation for the use of a percutaneous endoscopic gastrostomy (PEG) tube for feeding, her daughter declined.* (Undisputed Fact 10)

Also, Mrs. Burk was seen by neurologist Dr. Cyrus K. Moody, who noted that four months prior to admission, Mrs. Burk was diagnosed with **supranuclear palsy**. Dr. Moody indicated that Mrs. Burk's history and neurological examinations were most

compatible with an [acute encephalopathy](#) related to an ongoing infectious process. Dr. Moody recommended to treat Mrs. Burk aggressively for her infectious process. (Undisputed Fact 10)

On or around December 26, 2008, Mrs. Burk was transferred to Providence St. Joseph Medical Center. (Undisputed Fact 10) The following day, Mrs. Burk was seen by infectious disease specialist Dr. Karen L. Tsujimoto for [leukocytosis](#) (elevated white blood cell count usually indicative of infection), [urinary tract infection](#), and [pneumonia](#). A [chest x-ray](#) showed some basilar [atelectasis](#). A urine culture showed yeast growth. Dr. Tsujimoto diagnosed Mrs. Burk with [aspiration pneumonia](#), and possible [fluconazole-resistant fungal urinary tract infection](#). Mrs. Burk's antibiotics were continued. (Undisputed Fact 10)

Dr. Alan W. Rubin saw Mrs. Burk and noted that while Mrs. Burk was at Cedars-Sinai, she was placed on broad spectrum antibiotics for [aspiration pneumonia](#) or [urinary tract infection with fungus](#). Lab results indicate an elevated white blood cell count at 13 (normal range: 4.8-10.8) and depressed [Hemoglobin](#) at 8.8 (normal range: 12-16). Mrs. Burk also received [blood transfusions](#). Mrs. Burk's urine culture was positive for *Candida albicans*, a fungus that causes oral or [genital infections](#) in humans. [Chest x-ray](#) results revealed bilateral infiltrates. Dr. Rubin assessed that Mrs. Burk was suffering from [aspiration pneumonia](#). (Undisputed Fact 10)

A [chest x-ray](#) on January 11, 2009, revealed **opacity in the right lower lung**, which was more prominent, compared to a prior study and was believed to be due to early developing consolidation or [atelectasis](#). (Undisputed Fact 10) Consolidation is a condition where the lung tissue stiffens and is no longer able to exchange gases due to fluid accumulation. [Atelectasis](#) is defined as the diminished volume affecting all or part of the lung.

On January 8, 2009, Mrs. Burk's *blood test results were positive for Gram positive cocci in chains - enterococcus faecalis. Her urine sample was also positive for Escherichia Coli.* (Undisputed Fact 10)

Mrs. Burk was admitted to RCBH, a skilled nursing facility, on February 18, 2009. She was accompanied by her private care giver, who was Mrs. Burk's employee. (Undisputed Fact 1) History and Physical notes from the same day indicate that Mrs. Burk was a frail, [elderly](#) female, with decreased breath sounds in the right lower left quadrant. She was diagnosed with [aspiration pneumonia with pneumothorax](#), [hypothyroidism](#), history of [colon cancer](#), [dementia](#), and [supranuclear palsy, fungal infection](#) at Cedars-Sinai Medical Center along with [aspiration pneumonia](#) and [urinary tract infection](#). (Undisputed Fact 2)

Physician's Progress Notes indicate that there were concerns that Mrs. Burk's [pneumonia](#) was "back." (Exhibit 3 to Hechanova - RCBH records) Mrs. Burk was diagnosed with [aspiration pneumonia](#). (Undisputed Fact 2) Nursing Admission History and Assessment notes indicate that Mrs. Burk's admitting diagnoses included [pneumonia](#), [pneumothorax](#), [dementia](#), [hypothyroidism](#), and history of [colon cancer](#). (Undisputed Fact 2) Mrs. Burk was also noted to have had multiple skin problems, including a Stage II sacrococcyx ulcer measuring 4 x 3.5 cm, a left elbow skin tear measuring 1.5 x 1 cm, right arm discoloration, scattered abdominal [skin discoloration](#) due to injection sites, right and left shin discolorations, right dorsal [hand incision](#) scar, and left and right heel dry and scaly skin. Mrs. Burk was noted to have been wheezing. (Exhibit 3 to Hechanova - RCBH records)

On **February 19, 2009**, Mrs. Burk's care plan appropriately addressed her [dysphagia](#) and risk for choking. (Undisputed Fact 6) Licensed Nurse notes indicate that Mrs. Burk responded well to the administered breathing treatment. (See Declaration of Spencer ¶ 19 and Exhibit 3 to Hechanova - RCBH records)

On February 20, 2009, RCBH formulated a revised Long-Term Care Plan that addressed Mrs. Burk's numerous health problems. (See Declaration of Spencer ¶ 21 and Exhibit 3 to Hechanova - RCBH records) A physician's note from that day indicates that Mrs. Burk was examined with her private caregiver at her bedside. Her functionality was noted to be very limited, with poor prognosis for functional recovery. She was also noted to be at high risk for aspiration. Her labs were checked and a breathing treatment was provided in light of the low saturation levels. (Undisputed Fact 4) Due to of her advanced age, prolonged hospitalizations, and progressive health problems, changes in Mrs. Burk's respiration were not unusual. Changes in Mrs. Burk's

respirations were also not unusual in light of the fact that she had already been repeatedly diagnosed with [pneumonia](#) long before her admission RCBH. (Declaration of Chang ¶ 47)

Later that morning, Mrs. Burk was observed sitting in the wheelchair, experiencing shortness of breath. Breathing treatment of oxygen was immediately provided. She was placed back in bed with the head of the bed properly elevated. Her [oxygen saturation](#) increased up to 94%. (Undisputed Fact 5)

The staff promptly spoke with Dr. Wang, who conferred with Mrs. Burk's conservator. Mrs. Burk was ordered to be transferred to the emergency room for further treatment. Dr. Wang placed a telephone order to transfer Mrs. Burk to the emergency room due to oxygen desaturation. The R.N. supervisor called paramedics, who arrived soon after and transported Mrs. Burk to an emergency facility. (Undisputed Fact 6) Throughout Decedent's residency at RCBH, she was cared for by her private care givers, who were her employees. (Undisputed Fact 27) One of Decedent's private caregivers, Beth Zaides, testified that based on what she observed, she did not have any complaints or criticisms regarding the care provided by RCBH to Decedent (Undisputed Fact 23) Decedent also did not express any complaints to Ms Zaide regarding the treatments she was receiving at RCBH. (Undisputed Fact 24) Even Plaintiffs admitted that neither expressed their complaints to the Administrator or the Director of Nursing while Decedent was at RCBH. (Undisputed Fact 28)

Mrs. Burk was admitted to the Emergency Department of Olympia Medical Center on February 20, 2009, for low [oxygen saturation](#) and fever. Emergency physician Dr. Andrea Brault noted that there were family issues involved in the case, because Mrs. Burk's daughters were in contention as to proper decision making rights. A [chest x-ray](#) revealed a **right lower lobe infiltrate** associated with underlying [pleural effusion](#). (Undisputed Fact 13)

Mrs. Burk was started on a [pneumonia](#) protocol less than an hour after being seen at the Emergency Department. Dr. Robert Wang noted that in light of her diagnoses of [Alzheimer's disease](#), [progressive supranuclear palsy](#) and significant white matter [disease on her brain](#), she had **no likelihood for significant improvement in functional status**. Dr. Wang noted that the private sitter's feeding was a factor which may have impacted Mrs. Burk's aspiration. Mrs. Burk was diagnosed with significant [aspiration pneumonia](#) with severe electrolyte disorder, [hypoxia](#), and [leukocytosis](#). Upon discussions with the family, Dr. Wang noted that they were **unrealistic in their expectations regarding her recovery**. (Undisputed Fact 14 and Declaration of Chang ¶36)

Mrs. Burk was seen by cardiologist Dr. Shaun Daneshrad, who noted her to have been tachycardic. She was diagnosed with [pneumonia](#), [hypoxia](#), [sinus tachycardia](#), elevated sodium and decreased potassium, [azotemia](#), [dementia](#), aspiration history, and elevated carcinoembyonic antigen history. (Exhibit 4 to Hechanova - Olympia Medical Center records)

Mrs. Burk was also seen by pulmonary critical care specialist Dr. Mohammad Ansari, who diagnosed Mrs. Burk with [acute respiratory insufficiency](#), [right lower lobe pneumonia](#) with possible [parapneumonic effusion](#), high risk for aspiration, [hypernatremia/dehydration](#), [azotemia](#) due to dehydration, advance [dementia](#), history of [hypothyroidism](#) and hypokalemia. He agreed with the care outlined by Dr. Wang. (See Declaration of Chang ¶ 38 and Exhibit 4 to Hechanova - Olympia Medical Center records)

As Mrs. Burk's [leukocytosis](#) persisted, she was seen by Dr. Salam Alkasspooles. Her white blood cell count was 20,000. She was in [septic shock](#) and was diagnosed with [respiratory insufficiency](#), likely [pneumonia](#), nosocomial burst aspiration, and gram negative MRSA. Mrs. Burk was continued on IV antibiotics. (See Declaration of Chang ¶39 and Exhibit 4 to Hechanova - Olympia Medical Center records)

Mrs. Burk continued to develop progressive [renal failure](#), and was seen by Dr. Alfred Rahban. As of February 22, 2009, Mrs. Burk's BUN was 80, [creatinine](#) 2.5. By February 23, 2009, Mrs. Burk's BUN was 82 and her [creatinine](#) was 2.3. She appeared to have been in [septic shock](#). Her [renal failure](#) had worsened over the prior few days. (See Declaration of Chang ¶ 40 and Exhibit 4 to Hechanova - Olympia Medical Center records)

She passed away on February 26, 2009, at approximately 11:55 p.m. (Undisputed Fact 15)

The Death Certificate listed Mrs. Burk's cause of death as "Overwhelming Sepsis," due to recurrent [bacteremia](#) enterococcus, coagulase recurrent staphylococcus, and [metastatic colon cancer](#). Other conditions contributing to her death were probable [colitis](#), advanced [dementia](#), possible [progressive supranuclear palsy](#), spontaneous [left femoral fracture](#), and recurrent [pneumonia](#). (Undisputed Fact 19)

IV. SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION, IS PROPER WHEN THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT AND THE DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A party may move for summary judgment if the party contends that the action has no merit. *Code of Civil Procedure* § 437c(a). A cause of action has no merit if either "[o]ne or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded" or if "[a] defendant establishes an affirmative defense to that cause of action." *Id.* at § 437c(o)(1)-(2); *Aguilar v. Atlantic Richfield Corp.* (2001) 25 Cal.4th 826, 849; *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1050. "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Code of Civil Procedure* § 437c(c).

The purpose of summary judgment is to expedite litigation by eliminating needless trials that have no foundation in fact. *Aguilar*, 25 Cal.4th at 843; *In re Kelly's Estate* (1960) 178 Cal.App.2d 24, 28. Thus, motions for summary judgment "must be granted when they must." *Aguilar*, 25 Cal.4th at 852. [Internal citations omitted]. Although a "drastic procedure," the court should be encouraged to grant summary judgment in a meritless action because it "saves the court and counsel a great deal of time and unnecessary work." *Martens v. Winder* (1961) 191 Cal.App.2d 143, 149. Furthermore, "[J]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a Plaintiff is entitled to maintain a good one [Citation omitted] (Emphases added). *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 704. Such a motion is properly granted when, as here, "there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Code of Civil Procedure* § 437c(c).

When considering a motion for summary judgment, the trial court's function is "not to find the true facts of the case, but to determine whether a triable issue of fact exists." *Terry v. Atlantic Richfield Corp.* (1977) 72 Cal.App.3d 962, 966. Accordingly, "[s]ummary judgment may be appropriate even if there are disputed factual issues." Shively, 29 Cal.App.4th at 1627. Where the defendant's affidavit negates an essential element of the plaintiff's case and the plaintiff's affidavit in reply does not show a triable issue of fact with respect to that element, no amount of factual conflict on other aspects of the case will preclude summary judgment. *Id.*; *Security First Nat. Bank v. Ross* (1963) 214 Cal.App.2d 424, 432.

In the alternative, a party may move for summary adjudication as to one or more causes of action or claims for damages if the party contends that such claims are without merit. *Code of Civil Procedure* § 437(c)(f)(1). "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." *Id.* at § 437(c)(f)(2). In the event that this Court denies defendant's Motion for Summary Judgment as to any single cause of action, defendant requests that the Court consider this Motion as a Motion for Summary Adjudication and rule separately and independently on each cause of action.

V. THE COURT SHOULD GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION, AS TO PLAINTIFFS' WRONGFUL DEATH CAUSE OF

ACTION BECAUSE THERE IS NO TRIABLE ISSUE OF MATERIAL FACT AND DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Code of Civil Procedure § 377.60 governs wrongful death causes of action. ““The elements of the cause of action for wrongful death are (1) the tort (negligence or other wrongful act), (2) the resulting death, (3) and the damages...”” *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263. [Internal citation omitted].

The elements of a negligence cause of action are the duty to use due care, breach of that duty, and that the breach was the proximate or legal cause of the resulting injury. *Vasquez v. Residential Investment, Inc.* (2004) 118 Cal.App.4th 269, 278.

Whether a defendant health care provider breached such a duty is determined by whether he or she complied with the community standard of care in treating the patient. *Munro v. Regents of the University of California*, (1989) 215 Cal.App.3d 977, 983. The requisite standard of care is determined by the applicable standard then existing in a particular professional community. *Jambazian v. Borden*, (1994) 25 Cal.App.4th 836, 844. Specifically, a health care provider is only required to exercise “that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by a member of the medical profession under similar circumstances.” *Munro, supra*, at pp. 983-84 (citations omitted.)

In *Landeros v. Flood*, (1976) 17 Cal.3d 399, 410, the Court determined that the standard of care against which the acts of health care providers are measured is a matter within the knowledge of experts. As such, whether a defendant has complied with the standard of care can only be established through expert testimony. (*Id.* at p. 410; *see also, Jambazian, supra*, at pp. 844, 849; and *Willard v. Hagenmeister*, (1981) 121 Cal.App.3d 406, 412 [expert testimony is conclusive as to proof of prevailing standard of care by particular practitioner in community].) This rule regarding the necessity of expert testimony applies whether the defendant is a physician or a health care facility. Furthermore, an expert's declaration is sufficient to show the absence of triable issues for the purposes of summary judgment or summary adjudication. *Lerner v. Superior Court* (1970) 70 Cal.App.3d 656, 660.

Once a defendant has established through expert statements that the standard of care in the medical community has been met, the burden of proof shifts to the plaintiff to produce expert statements to the contrary. *Jambazian, supra*, at pp. 849-50. In this regard, summary judgment or adjudication should be granted where supporting affidavits state facts sufficient to sustain the requested judgment, and the opposing party's counter-affidavits do not proffer competent and sufficient evidence to present a triable issue of fact. *Katcher v. Home Sav. and Loan Ass'n*, (1966) 245 Cal.App.2d 425, 430. In fact, if the moving party's declarations are not controverted, a court must accept them as true for purposes of summary judgment. *Code of Civil Procedure* § 437c(e) When a matter in issue is within the knowledge of only experts, and not within common knowledge, expert evidence is conclusive and cannot be disregarded. *Hubert, Hunt & Nichels, Inc. v. Moore* (1977) 67 Cal.App.3d 278. Additionally, where a plaintiff does not contradict a defendant's expert testimony, there is no triable issue of fact for the court to consider and the defendant must prevail as a matter of law. *Willard v. Hagemeister* (1981) 121 Cal.App.3d 406.

Furthermore, Plaintiffs cannot prevail unless they establish that defendants' alleged breach bore a causal connection to Decedent's injuries. *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 481. In a wrongful death action, a plaintiff must prove that defendant's conduct was a “substantial factor in bringing about the death.” *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1497. “Although proof of causation may be by direct or circumstantial evidence, it must be by ‘substantial’ evidence, and evidence ‘which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient.’” *Leslie G.*, 43 Cal.App.4th at 484 (citing *Showalter v. Western Pacific R. R. Co.* (1940) 16 Cal.2d 460, 471).

Altogether, the Court should grant defendants' Motion for Summary Judgment as defendant has negated a necessary element of plaintiffs' Wrongful Death cause of action—causation. *Code of Civil Procedure* § 437c(o); *Aguilar*, 25 Cal.4th at 849; *Valdez*, 231 Cal.App.3d at 1050. Additionally, the Court should grant defendants' Motion for Summary Judgment as to plaintiffs'

Wrongful Death cause of action because there is no triable issue of material fact and defendants are entitled to judgment as a matter of law. *Code of Civil Procedure* § 437c(c).

A. RCBH Was Not Negligent

It is undisputed that the care and treatment RCBH provided to Mrs. Burk complied at all times with the standard of care in the community. Thus, Plaintiffs cannot establish a wrongful act or neglect on the part of RCBH. Decedent was admitted with Prior to being admitted to RCBH, Decedent's long history of debilitating illness included advanced age, a long history bacterial and fungal infections, dementia, Alzheimer's, recurrent aspiration pneumonia, supranuclear palsy, oxygen desaturations, tachycardia, urinary tract infections, abnormal lab results which show dehydration and malnutrition, anemia, decubitus ulcers, and rapid weight loss. Furthermore, the chest x-ray from January 11, 2009, revealed subtle opacity in the right lower lung. The day that Decedent was transferred to RCBH, her BUN was extremely high, which was indicative of dehydration and renal problems.

Upon Decedent's admission into RCBH, her admitting diagnosis continued to include aspiration pneumonia, hypothyroidism, history of colon cancer, dementia, and supranuclear palsy, along with history of aspiration pneumonia and urinary tract infection. While at the facility, staff assessed Decedent, developed proper care plans, implemented proper treatment, notified her physician of changes in condition, and provided Decedent with care that complied with the community standard.

1. The Expert Declaration of Maggie Spencer, RN Establishes that RCBH Complied with the Standard of Care in Treating Decedent.

Ms. Spencer is a Registered Nurse familiar with the standard of care pertaining to skilled nursing facilities. (Spencer Declaration 113.) Ms. Spencer opines that the staff at RCBH complied with the standard of care throughout the approximately 48-hour admission to RCBH. (Spencer Declaration ¶7, 28.) Ms. Spencer also opines that the manner in which the staff at RCBH handled the Decedent's change of condition on February 20, 2009, was within the standard of care and did not cause or contribute to any injury to the decedent. (Spencer Declaration ¶7, 28.) Ms. Spencer also opines that if Decedent aspirated, it was not the result of any act or omission by staff providing care to him at RCBH. (Spencer Declaration ¶7.)

Based upon the expert opinions of Ms. Spencer, defendant RCBH complied with the standard of care in their care and treatment of the decedent and there is no triable issue of fact with regard thereto, and defendant RCBH is therefore entitled to Summary Judgment/Summary Adjudication of Issue as to Wrongful Death. Accordingly, there are no triable issues of material fact and Defendant is entitled to Summary Judgment or Adjudication as to the Negligence cause of action as a matter of law.

B. RCBH Did Not Cause Decedent's Death

Even if Plaintiffs can establish a wrongful act or neglect on the part of RCBH, which they cannot, Plaintiffs cannot establish that such conduct *caused* Decedent's death. The expert declaration of Alvin Chang, M.D. establishes that nothing RCBH did or alleged failed to do caused or contributed to the death of Decedent. (Chang Declaration ¶8,9, 49).

To support a cause of action for wrongful death, a Plaintiff must not only prove that a defendant was negligent, but that the negligence was the legal cause of any alleged injuries. A Plaintiff in a medical negligence and wrongful death action must prove causation "within a reasonable medical probability based upon competent expert testimony." *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402. A "mere possibility" that a defendant's negligence caused a plaintiff's injury is not sufficient. *Morgenroth v. Pacific Medical Center, Inc.*, (1976) 54 Cal.App.3d 521, 533. Reasonable medical probability is defined as something more than a 50/50 possibility. *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1504. Reasonable medical probability in a wrongful death claim requires the plaintiff to show that the decedent would have had a greater than 50 percent chance of survival had the defendant complied with the standard of care. *Id.*

1. *The Declaration of Alvin Chang, M.D Supports that RCBH Did Not Cause Decedent's Death.*

In the instant case, Dr. Alvin Chang states in his declaration the staff of RCBH did not commit any negligent act or omission which caused the death of Decedent. Therefore, there is no legal connection to a negligent act or omission on the part of RCBH and plaintiffs' claimed damages. Thus, the evidence submitted herewith also disproves causation, a separate and essential element necessary to plaintiffs' claim.

As fully set forth in his attached declaration, Dr. Chang is a board certified geriatrician familiar with the diagnosis and treatment of patients such as Decedent. (Chang Declaration ¶2.)

The decedent had been diagnosed with [aspiration pneumonia](#) (as evidenced by the right lung infiltrates) long before her admission to RCBH. (Chang Declaration 11-21.) Even if the decedent did aspirate prior to transfer to Olympia Medical Center, the aspiration, to a reasonable degree of medical probability did not cause the death of the decedent. Dr. Chung is of the further opinion, that to a reasonable degree of medical probability, nothing that the staff at RCBH did or failed to do caused or contributed to the death of the decedent. (Chang Declaration 1149.) Further, it is Dr. Chang's opinion that the decedent's death was caused by the progression of her underlying processes related to his pre-existing conditions. (Chang Declaration¶44.)

In contrast to the declarations offered by Dr. Chang and Ms. Spencer, the plaintiffs will not be able to provide any evidence by a competent expert in these fields to establish that the defendant failed to comply with the standard of care or that the defendant caused the death of Decedent, the decedent. Therefore, there are no triable issues of material fact, and defendant is entitled to summary judgment or adjudication as to the negligence and wrongful death causes of action, as a matter of law.

2. Death Certificate

Moreover, [Health & Safety Code § 103550](#) provides a presumption regarding the cause of death where there is a death certificate:

Any ...death ...record that was registered within a period of one year from the date of the event under the provisions of this part ... is **prima facie evidence in all courts and places of the facts stated therein.**

(Emphasis added.)

Here, Decedent's Death Certificate indicates the cause of death as overwhelming sepsis, secondary to recurrent [bacteremia](#) enterococcus, coagulase recurrent staphylococcus, and [metastatic colon cancer](#). However, none of these causes of death can be attributed to alleged improper care to Decedent. As noted by Dr. Chang, nothing RCBH and its staff did or failed to do caused and/or contributed to the death of Decedent. Altogether, Decedent's death certificate indicates that her death was caused by the natural progression of preexisting comorbidities unassociated with the care and treatment he received at RCBH.

VI. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION, AS TO THE **ELDER ABUSE CAUSE OF ACTION SHOULD BE GRANTED AS PLAINTIFF LACKS STANDING AND CANNOT ESTABLISH A CAUSE OF ACTION FOR **ELDER ABUSE****

The **Elder Abuse** cause of action is alleged only by Celine Burk. However, in order to bring an action for **Elder Abuse**, the requirements of [Code of Civil Procedure § 377.32](#) must be met in order for the right to commence an action to pass to the people listed in [Welfare & Institutions Code § 15657.3\(d\)\(1\)\(A-C\)](#). [Code of Civil Procedure § 377.32](#) provides that anyone who seeks to commence an action, or continue a pending action, as the decedent's successor in interest “shall execute and file an affidavit or a declaration under penalty of perjury that he/she is a successor in interest or is authorized to act on behalf of the successor in interest and that no other person has a superior right to sue.” **It is plaintiffs burden to establish standing and to**

provide evidence that the person purporting to act as successor in interest has satisfied the requirements of California Law. *Robbins v. City of Hanford* (2006) WL 1716220 (E.D.Cal).

However, Plaintiff has not provided a declaration or affidavit satisfying the above requirement as she has failed to establish that she has superior right (over Edlyn Burk Soorani) to sue on Decedent's behalf. Because Plaintiff has failed to comply with the requirement, the court may conclude she is not legally able to do so. *Robbins, supra*. Accordingly, this entire action should be adjudicated in favor of defendant for lack of standing.

A. Summary Adjudication as to the Elder Abuse Cause of Action With Punitive Damages Should Be Granted

The Elder and Dependent Adult Civil Protection Act (“EADACPA”), *Welfare & Institutions Code* §§ 15600, et seq. establishes particular remedies for the egregious conduct described therein. Specifically, to prevail on an EADACPA claim, section 15657 requires a plaintiff to prove “*by clear and convincing evidence* that a defendant is liable for physical abuse as defined in Section 15610.57, and that the defendant has been guilty of *recklessness, oppression, fraud, or malice in the commission of this abuse...*” (Emphasis added.)

Prevailing under Section 15657 against a defendant corporate employer, such as RCBH in this case, also requires proving by clear and convincing evidence, the elements of *Civil Code* § 3294(b) (providing for punitive damages), which is incorporated by *Welfare & Institutions Code* § 15657. *Civil Code* § 3294(b) states:

“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 the rights or 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. 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 the officer, director, or managing agent of the corporation.”

Therefore, based upon the provisions of *Welfare & Institutions Code* § 15657 and that section's incorporation of *Civil Code* § 3294(b), the elements of plaintiffs' right to recovery pursuant to EADACPA are: (1) that decedent was an elder or dependent adult as defined by the act; (2) that defendant is liable for physical abuse, neglect, or fiduciary abuse; (3) that defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse; (4) where defendant is an employer, that said defendant had *advance knowledge of the unfitness of the employee and employed him or her* with a conscious disregard of the rights or 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 plaintiffs as a result of the abuse or neglect. All of these elements *must be established by clear and convincing evidence*. *Welfare & Institutions Code* § 15657.

In *Carter v. Prime Healthcare Paradise Valley* (2011) 198 Cal.App.4th 396, and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, the Court distinguished between professional negligence, which may be subject to *Code of Civil Procedure* § 425.13, and conduct amounting to Elder Abuse. The Court explained that as defined in *Welfare & Institutions Code* § 1561057(a), 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**. (*Covenant Care, supra*, 32 Cal.4th at 783, citing *Delaney v. Baker* (1999) 20 Cal.4th 23, 34 and *Carter v. Prime Healthcare Paradise Valley* (2011) 198 Cal.App.4th 396)

In this case, Plaintiffs First Amended Complaint appears to confuse **Elder Abuse**/Neglect and Professional Negligence. Plaintiffs are not claiming that Defendant physically or financially **abused** Decedent, instead, they are claiming neglect. As will be described below, the claim for **Elder Abuse** fails to demonstrate that anything Defendant did was something more than mere negligence, unskillfulness, or inadvertence.

1. A Cause of Action for **Elder Abuse** Must State Facts That Show Acts of Egregious **Abuse**

The court in *Carter v. Prime Healthcare Paradise Valley* (2011) 198 Cal.App.4th 396, went into detail as to analyze which facts rise to the level of **Elder Abuse**:

--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 plaintiffs persistent complaints to nursing staff, administration, and finally, to a nursing home ombudsman.” (citing *Delaney*, 20 Cal.4th at pp. 27 41.)

--A 78-year-old man admitted to a skilled nursing facility “was **abused**, beaten, unlawfully restrained, and denied medical treatment.” (citing *Smith*, 133 Cal.App.4th at p. 1512.)

--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.” (citing *Ben'n v. Superior Court* (2004) 123 Cal.App.4th 11 -- 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 her with eating. (citing *Country Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426.)

Plaintiffs' allegations do not even come close to the facts discussed above. Plaintiffs have no facts buttress their allegation that Defendants' alleged acts or omissions amounted to **Elder Abuse**.

Similar to the Carter case, Plaintiffs herein have no admissible evidence supporting that RCBH independently denied or withheld goods or services from plaintiff. In fact, the medical records, plaintiffs' testimony, and witness testimony all point to the fact that care was indeed provided. Decedent herself expressed no complaints to her caregiver regarding the treatments provided to her by RCBH. (See Exhibit 7 to Hechanova Declaration.) Furthermore, Decedent's own private caregiver had no complaints regarding the care and treatment provided to Decedent during her residency at RCBH. (See Exhibit 7 to Hechanova Declaration.)

To sustain the clear and convincing burden, Plaintiffs must present evidence showing a “high probability” the moving defendant acted with recklessness, oppression, fraud, or malice. Where this burden is clear, they must present competent evidence of such convincing force that it creates a high probability of the proposition for which it is offered. (CACI 201.)

However, Dr. Alvin Chang and Margaret Spencer both conclude after reviewing the relevant documents that the care and treatment provided by RCBH to Decedent complied with applicable standard of care. As such, it cannot be proven that the actions of RCBH rise to the level of recklessness as defined by the court in *Delaney v. Baker, supra*, 20 Cal.4th at 31-32. Specifically, RCBH's actions do not represent “a conscious choice of a course of action... with knowledge of the serious danger to others involved in it.” *Id.* Even Plaintiffs' unsupported contentions merely allege “a failure to take precautions”, which the Delaney court expressly excluded from the recklessness standard. (*Id.* at 31.) Thus, defendant's actions did not constitute reckless neglect.

2. A 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 Defendants were 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:

“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).

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) First, Plaintiffs allege that Decedent aspirated while at the facility from pudding that was fed by **Decedent's own private care giver, who was not an employee of the facility.** (See First Amended Complaint as referred to in Request for Judicial Notice.) However, Decedent's caregiver is not an employee of the facility; thus, she was not an agent of the facility. Instead, she is an agent of Decedent. (See Exhibits 5 and 7 to Hechanova Declaration.) In light of the fact that RCBH may only be held liable for acts of its employees, Plaintiffs' **Elder Abuse** cause of action on this basis must be denied and the Motion for Summary Adjudication granted.

Second, both plaintiffs admit that neither of them spoke with the administrator or the director of nursing during Decedent's approximately 48-hour residency to convey any complaints or request that Decedent's private caregiver not feed her. (Undisputed Fact 28) This shows that while Decedent was at RCBH neither Plaintiffs notified RCBH's managing agent that they had complaints or a problem with Decedent's caregiver feeding her. Absent notification, there was no way for the managing agents of RCBH to know or prevent Decedent's *own private caregiver from administering the services Decedent paid her to do.*

3. Plaintiffs Have Alleged No Facts To Support Her Claim That Defendant's Alleged Neglect Was a Cause of Any Injuries Sustained by Decedent

Section 15657 provides: “Where it is proven... that a defendant is liable for physical **abuse**..., or neglect..., and that defendant has been guilty of recklessness, oppression, fraud, or malice *in the commission of this abuse*, the following shall apply.” (Emphasis added.) **Abuse**, or more accurately, “**Abuse** of an **elder** or a dependent adult” is defined in section 15610.07 as: “Physical **abuse**, neglect, financial **abuse**, abandonment, isolation, abduction, or other treatment *with resulting physical harm or pain or mental suffering.*” (Emphasis added.) From these two sections, it is abundantly clear that **elder abuse** (or the alleged neglect) cannot occur unless it results in injury.

Plaintiff herein has failed to state any facts to support the conclusion that Decedent's injury was caused by any neglect, let alone reckless neglect. The expert declarations clearly indicate that nothing RCBH did or failed to do caused Decedent injuries in light of the fact that the care provided was appropriate and within the community standard. (See Declaration of Chang and Declaration of Spencer) The Court should therefore grant this Motion for Summary Judgment or summarily adjudicate plaintiffs' **Elder Abuse** cause of action and the accompanying punitive damages.

VII. CONCLUSION

Based upon the foregoing, Defendant, respectfully requests that this Court grant its Motion for Summary Judgment, or in the alternative, Summary Adjudication as the Court deems appropriate as there are no remaining issues of material fact and Defendant is entitled to judgment as a matter of law.

DATED: June 5, 2012

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