

2013 WL 4102075 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, N.D. California.

Michael Jene TORRES (decedent) (erroneously named in the original Complaint as Michael Gene Torres), Michael J. Torres, Jr. (erroneously named in the original Complaint as Michael G. Torres, Jr.), Robert Sexton, Individually and as personal representative of the estate of Michael Jene Torres (erroneously named in the original Complaint as Michael Gene Torres), and Zenaida Stilley, Plaintiffs,

v.

SANTA ROSA MEMORIAL HOSPITAL, St. Joseph Health System, Glenn T. Meade, M.D., Doe ER Doctor, Doe ER Nursing Supervisor, and Does 1-100, Defendants.

No. 4:12-CV-06364 PJH.  
July 25, 2013.

**Reply of Defendant Meade to Plaintiffs' Opposition to Defendant's Motion to Dismiss**

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District Judge Phyllis J. Hamilton.

Date: August 14, 2013

Time: 9:00 a.m.

Courtroom 3, 3<sup>rd</sup> Floor

**I.**

**PLAINTIFFS' ELDER/DEPENDENT ADULT ABUSE CLAIM AGAINST DR. MEADE SHOULD BE DISMISSED**

Plaintiffs argue that the decedent was a “dependent adult” because of his severe and acute illness. If this definition of “dependent adult” is accepted, it would turn every acutely ill person into a “dependent adult.” The Legislature cannot have intended this definition to be so overbroad.

When interpreting state law, federal courts are bound by the pronouncements of the California Supreme Court, and if that court has not yet spoken, the courts of appeal are consulted for “data for determining how the highest California Court would rule.” *Ortland v. County of Tehama (E.D. Cal. 1996) 939 F.Supp. 1465, 1468.*

“As originally enacted in 1982, the Elder Abuse Act established requirements and procedures for mandatory and nonmandatory reporting to local agencies of elder abuse, as defined, and the abuse of other dependent adults. The Act also addressed local agency investigation and criminal prosecution of such cases. [Citation.] The Act continues to contain such provisions.” *Covenant Care, Inc. v. Superior Court (2004) 32 Cal.4th 771, 779 (fn. omitted)*. “Although [s]ubsequent amendment refined the 1982 enactment, ... the focus remained on reporting abuse and using law enforcement to combat it. [Citation.] Also, Penal Code section 368 was enacted, making it [a criminal offense] for, among other things, a custodian of an elder or dependent adult to willfully cause or permit various types of injury.” *Id., at 779, n.4, quoting Delaney v. Baker (1999) 20 Cal.4th 23, 33.*

In 1991, [Welfare & Institutions Code section 15657](#) was enacted, “to enable interested persons to engage attorneys to take up the cause of **abused elderly** persons and dependent adults.” *Ibid.* Given that the **Elder Abuse** Act has a much broader scope and reach than simple medical care cases, and evinces a Legislative intent to impose mandatory reporting requirements, involve law enforcement, local agency investigation and criminal prosecution, it would make little sense to now include a population of temporarily acutely ill persons within its reach, as opposed to the originally intended population with a permanent or longstanding inability to care for themselves.

The California Supreme Court first interpreted [Welfare & Institutions Code Section 15657](#) in *Delaney v. Baker (1999) 20 Cal.4th 23*. In *Delaney*, the decedent had been an 88 year old mother of the plaintiff, who was placed in a skilled nursing facility after she had sustained a **broken ankle** and subsequently died. *Id.*, at 27. Therefore, there was no issue whether the decedent qualified as a “dependent adult.” She was conclusively an “**elder**.” The issue in the case was whether the MICRA provisions applicable in medical negligence actions barred the heightened remedies set forth in [Section 15657](#) in cases involving medical care and treatment. *Id.*, at 27.

The court explained the basic conceptual differences between a cause of action for medical negligence and one brought under this statute.

“Professional negligence” is one type of negligence, to which general negligence principles apply. “With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional ‘circumstances’ relevant to an overall assessment of what constitutes ‘ordinary prudence’ in a particular situation. Thus, the standard for professionals is articulated in terms of exercising ‘the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing....’

*Id.*, at 31, quoting *Flowers v. Torrance Memorial Hosp. Med. Center (1994) 8 Cal.4th 992, 997-998*. In contrast, when bringing a cause of action brought under the **Elder/Dependent Adult Abuse** statute a plaintiff *must demonstrate by clear and convincing evidence* that defendant is guilty of something more than negligence; he or she must show *reckless, oppressive, fraudulent, or malicious conduct*. The latter three categories involve “*intentional, “willful,” or “conscious” wrongdoing of a “despicable” or “injurious” nature*. [Citations.] “Recklessness” refers to a subjective state of culpability greater than simple negligence, which has been described as a “*deliberate disregard*” of the “*high degree of probability*” that an injury will occur [citations]. Recklessness, unlike negligence, involves more than “inadvertence, incompetence, unskillfulness, or a failure to take precautions” but rather rises to the level of a “*conscious choice* of a course of action ... *with knowledge of the serious danger* to others involved in it.”

*Id.*, at 31-21 (*emphasis added*). The court noted that the Legislature intended [Section 15657](#) to apply “only” to “acts of egregious **abuse**,” and therefore it requires “clear and convincing evidence of (i) liability and (ii) recklessness, malice, oppression or fraud,” thereby “adequately protect[ing] providers of care from acts of simple negligence, or even gross negligence.” *Id.*, at 32.

In a lengthy discussion of the Legislative History of the **Elder/Dependent Adult abuse** statute, the California Supreme court never hinted at a purpose to protect all “acutely ill” persons who appear at emergency rooms; rather the focus was on protecting “**elder** and dependent adults who are residents of nursing homes and other health care facilities,” *Id.*, at 40, the “elimination of the institutional **abuse** of the **elderly** in health care facilities,” *Id.*, at 35-36, “protection of residents of nursing homes and other health care facilities,” *Id.*, at 37, and “protect[ing] **elder** adults through the application of heightened civil remedies from being recklessly neglected at the hands of their custodians, which includes the nursing homes or other health care facilities in which they reside.” *Id.*, at 42. In fact, the Legislature formally declared that “infirm **elderly** persons and dependent adults are a disadvantaged class.” *Covenant Care, supra, 32 Cal.4th at 784*. It seems clear that the **Elder Abuse** statutes are aimed at a class of “dependent adults” who are more than acutely ill.

According to the Plaintiffs' opposition brief, the decedent was clearly not a "dependent adult" prior to his acute illness, as it was asserted that he was helping his mother prepare for and attend flea markets, doing yard work, assisting with the shopping and "providing security" for the premises and helping with his father's frequent falls on a regular basis.

Simply put, Plaintiffs' **Elder/Dependent Adult Abuse** claim fails to state facts sufficient to constitute a "plausible" claim for **Elder/Dependent Adult Abuse** because the decedent does not qualify under California law as either an "**Elder**" or a "Dependent Adult." This claim should therefore be dismissed without leave to amend. *Burger v. Kuimelis (N.D. Cal. 2004) 325 F.Supp.2d 1026, 1034.*

## II.

### THE PUNITIVE DAMAGES CLAIM SHOULD BE DISMISSED

The bare facts alleged regarding the decedent's medical treatment are that he was evaluated, diagnosed with alcohol withdrawal, his lungs were noted to be "clear," he was treated for withdrawal symptoms, he spent several hours in the emergency department and was then discharged with instructions to follow up the next day at a local clinic. The complaint *incorrectly* notes an oxygenation rate of 92% [it was actually 97%, and was recorded as such in multiple places in the medical record].

The rest of the allegations directed toward "Defendants and each of them" are filled with invective, and generally allege that the "refusal" to test for **pneumonia** was "intentional" because of "bias and animus" toward the patient, and that "Defendants knew" that the patient was actually gravely ill, "pretended" to screen him, and intentionally discharged him nevertheless. Every malpractice case can be turned into a punitive damages case by merely alleging that every single act and omission was "despicably" and "cruelly" and "intentionally" done for the express purpose of causing suffering and harm.

Because the allegations pertaining to punitive damages amount only to conclusory, non-specific "group" allegations of alleged misconduct, Defendant requests that Plaintiffs' punitive damages claim be dismissed without leave to amend.

## III.

### PLAINTIFF ZENAIDA STILLEY'S CLAIM FOR WRONGFUL DEATH SHOULD BE DISMISSED

Plaintiff's First Amended Complaint provided only conclusory and non-specific allegations pertaining to Ms. Stille's standing to pursue a wrongful death claim. Plaintiff apparently now proposes to amend the complaint (again) to allege that the decedent "enabled her to participate in flea markets twice per month," which she cannot now do, and that she has lost approximately \$600 per month as a result. She also alleges that the decedent provided assistance in caring for her husband, providing "security" for the premises and assisted in various chores around the house.

While the Plaintiffs' opposition brief states that the decedent assisted his mother in an activity that allowed her to earn approximately \$600 per month, this does not establish that this assistance aided her "in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without." *Perry v. Medina (1987) 192 Cal.App.3d 603, 610, abrogated on other grounds in Saldana v. Globe-Weis Systems Co. (1991) 233 Cal.App.3d 1505, 1515.* "Some" assistance is not the equivalent of providing assistance to obtain the "necessities of life."

Defendant therefore requests that the court dismiss Ms. Stille's claim for wrongful death.

## IV.

### CONCLUSION

Based upon the foregoing, Defendant GLENN T. MEADE, M.D. respectfully requests that the court:

1. DISMISS Plaintiffs' claim for **Elder**/Dependent Adult **Abuse** without leave to amend on the ground that the decedent was neither an "**Elder**" nor a "Dependent Adult" as defined by statute;
2. DISMISS Plaintiffs' claim for Punitive Damages on the ground that the allegations purporting to establish the claim are conclusory; and
3. DISMISS Plaintiff Zenaida Stilley's claim for wrongful death on the ground that she has failed to allege facts supporting her standing to sue.

Dated: 7/25/2013

DONNELLY NELSON DEPOLO & MURRAY

By: *Sonja M. Dahl*

SONJA M. DAHL

Attorneys for Defendants

GLENN T. MEADE, M.D.

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