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IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

KATHLEEN A. WINN and KAREN BREDAHL, individually and as Sole Surviving Heirs of ELIZABETH M. COX, deceased,
Plaintiffs and Appellants,

vs.

PIONEER MEDICAL GROUP, INC.; EMERICO CSEPANYI, M.D.; JAMES CHINUK LEE, DPM; STANLEY LOWE, DPM
Defendants and Respondents.

ANSWER BRIEF ON THE MERITS

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Eight, Case No. B237712

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I.

INTRODUCTION

Recognizing the susceptibility of the elderly and dependant adult populations of our State, in 1982 our legislature acted to specifically protect those two segments of our citizenry with the Elder Abuse and Dependent Adult Civil Protection Act.[1] The legislative intent included in the Act contains some of the clearest language ever written by the California legislature, explicitly recognizing its duty to protect both elderly persons and dependent adults.

Respondents now want this Court to ignore the Legislature's stated purpose of protecting the elderly by affording only "dependent adults" the protections that it clearly sought to provide two distinct classes of people. Respondents' argument would have this Court transform the Act into the "Dependent Adult Abuse Act," extending special protection to the elderly only if a person, age 65 or older, has physical or mental limitations that restrict their ability to carry out normal activities.

In exchange for excluding an entire class of persons whom the Legislature expressly intended to benefit, Respondents advocate giving special

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1 Unless otherwise stated, all reference to Code Sections are to the Welfare and Institutions Code.

protections to physicians. They want this Court to immunize them from responsibility under the Act for reckless neglect of elderly patients, unless such misconduct occurs at a long term care facility. Respondents additionally urge granting a physician immunity so long as "some" care is provided, even if he or she utterly ignores a critical health need of and causes injury to an elderly patient. These same points were made by Respondents in the Court of Appeal, and the majority had little difficulty dismissing them as improper efforts to rewrite legislation for the benefit of physicians and their insurers, at the expense of elderly victims of neglect.

The majority explained in detail how none of Respondents' arguments fit the language adopted by the Legislature in this important enactment. The majority also harmonized its conclusions with this Court's decisions in *Delaney v. Baker* (1999) 20 Cal.4th 31 ("*Delaney*"), and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 ("*Covenant Care*"), and also agreed with the Third District's opinion in *Mack v. Soung* (2000) 80 Cal.App.4th 974 (review and depub. requests den.) ("*Mack.*")

Predictions of a cascade of litigation flowing through the opened "flood gates" of the Act, to the detriment of physicians, have been made by this same class of defendants and their amici on each occasion the Elder Abuse Act has been addressed to this Court. On each occasion (most notably in *Delaney* and

Covenant Care) those arguments have been soundly rejected by this Court. The result should be no different here.

Respondents argue that reckless neglect should be treated differently under the Act, depending upon where it occurs. The class of individuals guilty of such neglect and their victims are the same. However, Respondents would look to the location of the neglect to ascertain whether the Act applies. Just as this Court has made clear that the licensure status of an individual who has harmed an elderly person by reckless neglect is irrelevant to the Act's application, so too should the location where that harm takes place. It is reckless neglect that causes injury to our elderly citizens that our legislature seeks to sanction and thereby abolish. Whether it occurs in a long term care facility, hospital, or doctors office is immaterial.

As we will show in this brief, (1) the Legislature intended to protect two distinct and vulnerable classes: (a) the elderly *and* (b) dependent adults; (2) a custodial relationship between a physician and his patient is not a prerequisite for the Act's application if there has been injury to an elderly patient due to reckless neglect; (3) the concept of reckless neglect includes circumstances where (a) a physician knew or should have known of a patient's medical need, that if not addressed would create a serious health risk, (b) there is a recognized medical response to address that risk, and (c) the healthcare

provider repeatedly fails to afford that care, resulting in injury; (4) a physician need not abandon his elderly patient to be held liable for an injury caused by reckless neglect.

The majority opinion of the Second District Court of Appeal, Division Eight, should be affirmed.

II.

STATEMENT OF THE CASE

A. STATUTORY FRAMEWORK

In 1981, a federal congressional committee issued a report estimating that four percent of the American elder population suffered mistreatment annually. House Select Comm. on Aging, 97th Cong. Elder Abuse: An Examination of a Hidden Problem 42, 123-24 (Comm. 1981). Recognizing the susceptibility of the elderly, the California Legislature acted to protect its citizenry with the adoption of an enactment entitled "The Elder Abuse and Dependent Adult Civil Protection Act" in 1982 (hereinafter "the Act"). In Section 15600(a) of the Act, the Legislature declared it "recognizes that elders . . . may be subject to . . . neglect . . . and that this State has a responsibility to protect those persons." Further, at subsection (b) the Legislature proclaimed that it desired to "direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable

segment of the population and that they are more subject to abuse, neglect and abandonment."

As originally enacted, the Elder Abuse Act established requirements and procedures for mandatory and non-mandatory reporting to local agencies of elder and dependent adult abuse. *Covenant Care*, *supra*, 32 Cal.4th at 779. These responsibilities applied separately to healthcare practitioners and care custodians (among others). This language shows that the Legislature intended to extend responsibility under the Act to those individuals who can be expected to routinely have contact with both the elderly and dependent adults.

Thereafter, in 1991, California amended the Act to create civil remedies against individuals and entities that committed elder abuse. *Covenant Care, supra*, at 779. Therein, the Legislature provided for enhanced remedies against those who abuse elders so as to encourage the filing of elder abuse cases. § 15600(h)(i). An abused elder may recover enhanced remedies if he or she can present clear and convincing evidence of recklessness or oppression or fraud or malice in the commission of neglect. *Id.*

An "elder" is defined as "any person residing in the State aged 65 or older . . ." § 15610.27. Section 15610.23 defines the other protected class ("dependent adults") as "any person between the ages of 18 and 64 years . . . who has physical or mental limitations that restrict his or her ability to carry

out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age." There is a further clarification that applies solely to dependent adults. A "dependent adult" "includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24 hour health facility. . ." § 15610.23 subd. (b). Again, the Act extends its protections to "dependent adults" within a custodial care setting. The elderly are afforded protection by the Act regardless of their living arrangements.

At Section 15610.07, the Act defines "Abuse of an elder or a dependent adult" to include either of the following: (a) neglect with resulting physical harm or pain or mental suffering, or (b) deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering. Accordingly, a "care custodian" is only addressed under subdivision (b) of Section 15610.07. There is no limitation on the identity of persons, or their relationship to the abused, who are responsible for "neglect" under subdivision (a).

The Act defines "neglect" at § 15610.57 to include (1) the negligent 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 like position

would exercise. In subdivision (b) the Legislature further advises that "neglect" includes, *but is not limited to*, ". . . (2) Failure to provide medical care for physical and mental health needs . . . (3) Failure to protect from health and safety hazards." Again, there is no limitation on the class of persons who can be held responsible for neglect, so long as that person is involved in providing care for an elder or dependent adult, *or* has a custodial relationship with either an elder or a dependent adult.

If "neglect," as defined in § 15610.57 is ultimately proven at trial by clear and convincing evidence to have been committed with recklessness *or* oppression *or* fraud *or* malice, then specified heightened remedies are available "in addition to all other remedies available at law." § 15657. Further, the limitation on the recovery of damages for pain and/or suffering in survival actions (*Code Civ. Proc.* § 377.34) does not apply to claims prosecuted under the Act. However, in survival actions, such damages are limited to $250,000.00.

"Recklessness" as contemplated by the Act has been interpreted by this Court to include "the deliberate disregard of the high degree of probability that an injury will occur . . . it rises to a level of conscious course of action if knowledge of a serious danger to an elder is involved." *Delaney, supra*, 20 Cal.4th at 31-32. Injury to an elder or dependent adult caused by a healthcare

provider's mere negligence is explicitly excluded by § 15657.2. This Court has recognized that a cause of action for reckless neglect is distinct from one for professional negligence, and thus the statutory restrictions on remedies against healthcare providers for professional negligence contained in the Medical Injury Compensation Reform Act ("MICRA") are inapplicable to a claim under the Act premised upon reckless neglect. *Delaney*, *supra*, 20 Cal.4th at 31.

Against this statutory backdrop, Appellants presented the following facts in their First Amended Complaint.

B. FACTUAL BACKGROUND

Critically, what distinguishes this case from one based upon "simple negligence" is Respondents' collective knowledge, for years, of Mrs. Cox's precarious medical condition, combined with their repeated failures during that time to make a crucial referral of their elderly, infirm patient to a vascular specialist. These recurrent failures to provide needed medical care occurred even though Respondents knew, or should have known, their failures to make such a referral exposed Mrs. Cox to the probable and catastrophic risk that she would lose her right leg.

Respondents began caring for Mrs. Cox in November 2000. In 2004, Dr. Lowe was treating her for a condition known to impair peripheral vascular

circulation, and recorded that he could not detect a pulse in Mrs. Cox's feet (indicating severely impaired vascular flow). (AA 71-72.) All of Mrs. Cox's healthcare providers at Pioneer Medical Group knew from 2004 onward that if Mrs. Cox was not referred to a vascular specialist, there was a high probability that she would suffer serious injury because of her age and medical history. (AA 71-72.)

In January 2007, Mrs. Cox's lower extremity vascular issues were deteriorating. Respondents charted that she suffered from *ankle edema*, her *feet were discolored* and she had "*decreased circulation.*" In February, 2007, Dr. Csepanyi diagnosed her with *peripheral vascular disease*. It is alleged that Respondents then knew (1) Mrs. Cox had suffered from decreased vascular flow since 2004; (2) the condition was becoming worse without treatment, and (3) that Mrs. Cox was at risk of serious injury. However, none of the Respondents referred Mrs. Cox for a vascular consult. Based on those facts it is also alleged that Mrs. Cox was *deprived of needed treatment because of Respondents' conscious care decisions*. Given Respondents' knowledge of the risk, it is also alleged that these decisions not to provide care, (vascular consult) were *reckless*. From this time until April 2009, Mrs. Cox's right leg vascular condition progressively worsened as repeatedly noted by each Respondent. (AA at 72, ¶ 11, ll. 15 - 19.)

Dr. Lowe again evaluated Mrs. Cox in December 2007 and saw that her lower extremity pulses were *further reduced.* Notwithstanding this awareness, Dr. Lowe again failed to *make a referral* to a specialist. (AA at 72, ¶ 12, ll. 20 - 23.) In February 2008, Dr. Lowe noted Mrs. Cox developed an abscess on her right toe with "cellulitic [acute spreading bacterial infection below the surface of the skin] changes of the left hallux nail plate." These findings are well known in the health care profession as evidence of tissue damage due to vascular insufficiency. Notwithstanding the clear evidence of vascular compromise, Dr. Lowe again decided *not* to refer Mrs. Cox to a vascular specialist. (AA at 72-73, ¶ 12.)

In January 2009, Mrs. Cox saw Dr. Lee complaining of pain from a non-healing wound in her right toe. Later in January 2009, Mrs. Cox saw Dr. Csepanyi, complaining that this wound still had not healed and was painful. During a February 9, 2009 followup visit, Dr. Csepanyi noted cellulitis and cyanosis associated with the toe abscess. It is alleged that "*these symptoms*, noted by [Respondents] in January and February of 2009, are additional evidence of cellular deterioration and tissue destruction due to peripheral vascular ischemia and, given the past medical history of [Mrs. Cox], the only appropriate care at that time would have been a referral to a vascular specialist, as [Mrs. Cox] was then at clear risk of serious injury due to progressive

peripheral vascular insufficiency. Neither Lee, nor Csepanyi made a referral for vascular consult. By their decisions not to refer, they further deprived [Mrs. Cox] of needed medical care that they knew, under the circumstances of [Ms Cox's] age and medical history, would expose [her] to harm." (AA at 73, ¶14, ll. 14 - 15.)

The next day Mrs. Cox saw Dr. Lowe, who recognized that she was suffering from chronic non decubitus (due to vascular compromise) ulcers in her toes, "more clearly evidencing tissue destruction caused by vascular insufficiency." (AA at 73, ¶ 15, l. 25.) The complaint states that he continued to document Mrs. Cox's active problems of right leg pain and non-healing foot ulcers. (AA at 74, ¶ 15, ll. 1 - 8). Further, it is alleged that during two of these visits, Dr. Lowe again reported that *he could not feel a pulse in Mrs. Cox's feet.*

These persistent symptoms are clear evidence of impaired vascular flow and tissue death due to peripheral vascular ischemia. It is also alleged that, given Mrs. Cox's age and past medical history, Respondents' decisions not to provide needed medical care clearly exposed her to the then immediate risk of serious injury. At the conclusion of each of these evaluations, Dr. Lowe made no referral for a vascular consult. "He therefore deprived [Mrs. Cox] of

needed medical care under circumstances that he knew would expose [Mrs. Cox] to harm." (AA at 74 ¶ 15, 11, 1-8.)

Mrs. Cox saw Dr. Csepanyi one last time on March 18, 2009. He again saw that she still suffered from chronic non decubitus toe ulcers, (caused by vascular insufficiency). Now he also saw that she suffered from abnormal weight loss. But no follow-up plan was made, and no referral was provided for a vascular consult. Mrs. Cox was simply given a dietary supplement. By these decisions "Respondents again consciously deprived [Mrs. Cox] of needed medical care under circumstances where they knew [Mrs. Cox] was certain to be harmed by the failure of Respondents to provide that care." (AA at 74, ¶ 16, ll. 9 - 16.)

The complaint describes the result of Respondents' repeated decisions over the years not to act in the face of their patient's continued deterioration. (AA at 74-75). "The next day (March 19, 2009), Mrs. Cox was admitted to Lakewood Regional Medical Center with symptoms consistent with a history of right lower extremity ischemia (inadequate blood supply to a local area due to blockage of the blood vessels) and a two-week history of *right first toe gangrene. Her right foot was black due to tissue death* caused by the long term impaired vascular flow Respondents had charted, and ignored, for years. The examination at Lakewood revealed that Mrs. Cox's foot was black because

she had been suffering from sepsis (blood poisoning) due to the gangrene in her right foot." (AA at 74, ¶ 17, 11. 17-24) Mrs. Cox was readmitted for an above-the-knee amputation of her right leg. (AA at 74-75)

C. THE COURT OF APPEAL'S MAY 24, 2013 DECISION

On May 24, 2013, Division Eight of the Second District filed its published decision, comprised of majority and dissenting opinions. The majority opinion begins with a comprehensive recitation of the facts reflecting Respondents' extensive involvement in Mrs. Cox's healthcare decisions since 2000. The majority interpreted the allegations to mean that Respondents had clear evidence Mrs. Cox was suffering from peripheral vascular ischemia for an extended period of time, and that she was exhibiting physical changes universally recognized as tissue destruction due to peripheral vascular ischemia. (Slip Opn., p. 2.)

The majority noted that Respondents were alleged to have failed to provide critically needed medical care repeatedly over two years and that as a result, Mrs. Cox ultimately suffered sepsis, requiring that her right leg be amputated. The majority opinion sets forth the well understood history and interpretation of the Act, extensively discussing this Court's decisions in *Delaney* and *Covenant Care.* (Slip Opn., pp. 7-9.)

The majority meticulously analyzes each of the issues now presented to this Court. The majority rejected Respondents' contention that the Act applies to healthcare providers only if they have a custodial relationship with an elder. The majority noted that such an interpretation is contrary to the plain meaning of the statute, as well as this Court's holding in *Delaney* that a healthcare provider who engages in reckless neglect is subject to liability under the Act. (Slip Opn., pp. 9-19.)

The majority recognized that this issue was carefully dissected by the Third District in *Mack, supra*, 80 Cal.App.4th 996. The majority agreed with the statement in *Mack* that the Act was expressly designed to protect both elders *and* dependent adults who are victims of neglect. The majority also agreed that the Act explicitly contemplates both "health practitioners" (defined in § 15610.37) and "care custodians," (identified in § 15610.17) are potentially liable. The majority also embraced the distinction noted by *Mack* between liability under § 15610.07(b), applicable only to "care custodians," and liability for "neglect," reaching anyone having either "care *or* custody" of an elder. Further, the majority concurred with the conclusion that the heightened remedy section is not limited to care custodians, but targets any "defendant" whose neglect is undertaken with "recklessness, oppression, fraud, or malice." (§ 15657.) (Slip Opn., pp. 9-11.)

The majority saw "no flaw in *Mack's* reasoning," and further recognized that the term "care custodian" as defined includes Respondents, since "clinics" are among the entities listed. (§ 15610.17.) (Slip Opn., p. 11.)

The majority opinion then discusses *Delaney* and *Covenant Care*, and in so doing rejects Respondents' attempt to limit the scope of the Act to only "those with custodial obligations,"to wit: " The cases cited (*Delaney* and *Covenant Care*) do indeed have language referring to custodial obligations. This is not surprising, since the cases involve claims against nursing homes or skilled nursing facilities, that is, defendants, without question, owed custodial obligations to elders." (Slip Opn., p. 14.) Neither case proposed to construe the Act in any other context, and neither stated the Act applies only to healthcare providers who have custodial obligations. Accordingly, the majority saw no reason in the holdings of *Delaney* or *Covenant Care*, or their progeny, to "support the broad proposition Respondents assert, that the protection of the Elder Abuse Act was intended only for those in nursing homes, skilled nursing facilities, and the like." (Slip Opn., pp. 12-16.)

The majority acknowledged that the Act was directed at proscribing "reckless" misconduct, rather than negligence. In that regard, the majority discussed the observation in *Delaney* that if "neglect" is "reckless," then the action falls within the scope of § 15657, and as such cannot be considered

simply based on professional negligence. Accordingly, the majority determined that reckless neglect *is* the egregious act that was intended to be sanctioned by § 15657. The majority embraced *Delaney's* recognition that defendants in Elder Abuse claims are protected from unsubstantiated allegations by the Act's requirement that reckless neglect be proven by clear and convincing evidence. (Slip Opn., pp. 16-19.)

This finding was further confirmed, the majority noted, by the opinion of this Court in *Covenant Care* wherein it refused to make application of the Act dependent upon the licensure status of a defendant. The majority held that the location where the abuse or neglect takes place is not determinative. (Slip Opn., p. 14.)

In conclusion on that issue, the majority returned to the statute and found the language clear. The Act includes within its scope "any person" who has responsibility for the care of an elder. (Slip Opn., pp. 15-16.) The majority also held that "neglect" under the Act includes the "failure to provide medical care." Harkening back to *Delaney*, the majority determined that a healthcare provider who engages in reckless neglect may be subject to the Act's heightened remedies. The majority also agreed with the conclusion in *Mack* and rejected the notion that the Act cannot apply to physicians who merely treat elderly patients on an as needed basis. (Slip Opn., p. 16.)

The majority also found that the factual allegations in the Amended Complaint were adequate to support a claim for "reckless neglect." In so doing, the majority rejected Respondents' attempt to equate the facts in *Carter v. Prime Health Care Paradise Valley* (2011) 198 Cal.App.4th 396 ("*Carter*") with those now before this Court. In *Carter*, the elder decedent was hospitalized three times. In two of those hospitalizations there were no allegations to support any claim of liability. The third hospitalization reflected at best negligence in the handling of a single emergent event. In this case, the majority noted, Respondents withheld critically needed medical treatment and utterly disregarded the serious risk to which they exposed Mrs. Cox for years, "circumstances quite different from those in *Carter*." (Slip Opn., pp. 17-19.)

The majority then discussed *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, in which the Act was held to apply where a prolonged period of neglect causes harm. Relying on *Sababin*, the majority rejected Respondents' assertion that there must be a refusal to provide *all* medical care in order to establish "neglect" under the Act. The majority agreed with *Sababin* that the proscribed "withholding of care occurs when a specific type of care is provided only sporadically, or when multiple types of care are required, but only some of them are provided." (Slip opn. at p. 18-19.) The majority also agreed that a repeated withholding of care can support a

conclusion that such a pattern was the result of deliberate indifference. (Slip Opn. at p. 18.)

Referring to *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, the majority also found nothing inconsistent with asserting both a medical malpractice and an elder abuse claim in the alternative, arising out of the same circumstances. (Slip Opn., p. 19.)[2] The majority recognized that a jury could find Respondents' neglect constituted merely professional negligence. On the other hand, so long as clear and convincing evidence is presented, that same jury could view the defendants' knowing failure to refer Mrs. Cox for specialized care repeatedly for years as evidencing deliberate indifference to her increasingly urgent medical needs. In sum, the majority believed that the allegations in the complaint could be reasonably considered reckless neglect, an "egregious act." (Slip Opn., pp. 19-20.)

The dissent focuses on the Act's exclusion of claims based upon negligence, and would not allow the facts alleged to be interpreted as anything other than simple medical malpractice. The dissent does so by denigrating the exclusivity of the healthcare practitioner/patient relationship in this case, as well as its duration. (Dis. at pp. 3-4.) The dissent refused to accept that

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2 See also, *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 352; *Perry v. Shaw* (2001) 88 Cal.App.4th 658, 661.

Respondents' repeated failures to provide needed medical care was a failure to provide for a basic need of an elder. In doing so, the dissent fails to realize that "medical care" has been equated with an elder's "basic need." *Carter*, *supra*, 198 Cal.App.4th at 406. In the eyes of the dissent, "the only thing that distinguishes this case from a standard medical malpractice claim is Cox was over 65 years old." (Dis. at p. 4.) The dissent does not afford Appellants the benefit of a favorable construction of the allegations as framing a claim that Respondents acted with a conscious indifference for the health needs of Mrs. Cox. Instead it adopts an interpretation of the facts that is entirely beneficial to Respondents. The dissent sees the Complaint as amounting to nothing more than allegations of "disastrously bad professional judgment." (Dis. at p. 4.)

The dissent further minimizes the significance of the care provided as "only" outpatient visits. (Dis. at p. 5.) The dissent also cavalierly suggests that there was nothing that inhibited Mrs. Cox from seeking a second opinion. However, this entirely ignores the fact that Mrs. Cox was an 80 year old widow, who was not receiving any information about how dire her medical condition was, how that condition was deteriorating, or her options. The dissent emphasizes that Mrs. Cox was not "in a nursing home," nor did she have reduced cognitive abilities. (Dis. at pp. 5-6.) The dissent also believed it significant that the allegations of the complaint did not claim intentional or

fraudulent misconduct. Further, the dissent believed that Mrs. Cox was unworthy of protection under the Act because there was not a "complete failure to treat." (Dis. at pp. 5-6.)

The dissent misconstrues the complaint by suggesting the theory advanced was simply that Respondents did not do the "right thing to treat Cox's condition as judged by medical standards." (Dis. at p. 5.) Again, the dissent fails to consider the significance of Mrs. Cox's age, that she was seriously ill or Respondents' repeated failures over the years to provide needed care, in the face of a known serious condition and the knowledge that without such care, profound injury was certain.

Additionally, the dissent interprets *Delaney* and *Covenant Care* as requiring a custodial responsibility between the healthcare provider and the patient before the Act will apply. (Dis. at pp. 6-7.) It seems that the dissent is under the impression that unless there is a custodial relationship, a physician who repeatedly fails to provide needed medical care to the detriment of an elderly patient can only be responsible for professional negligence. Almost parenthetically, the dissent acknowledges the concept of reckless neglect could "theoretically" be applied regardless of whether a defendant has custodial duties. (Dis. at p. 8.) Nonetheless, the dissent was resistant to applying that concept outside of a custodial setting based upon what it considered this

Court's directions as to the mutual exclusivity of "Elder Abuse" and professional negligence. (Dis. at pp. 7-9.)

In the next paragraph, the dissent rejected Respondents' argument that only healthcare providers with custody of an elder are subject to liability under the Act. However, without citation to any authority (and seemingly at odds with *Delaney* and *Covenant Care*), the dissent opines "considering the egregiousness of the alleged conduct *alone* does not recognize that elder abuse and professional negligence are mutually exclusive claims." (Emphasis added.) (Dis. at p. 8.) In summation, the dissent states "even without defining exactly what caregiving duties a physician may owe an elder which are distinct from simply rendering medical services, I do not think it can be said that in this case, plaintiffs' claims are brought against defendants in their capacity as 'custodians and caregivers that abuse elders' who are 'incidentally health care providers.'" (Dis. at pp. 8-9.)

III.

ARGUMENT

A. RESPONDENTS MAY NOT CONTORT THE CLEAR LANGUAGE OF THE ACT THROUGH THE GUISE OF STATUTORY CONSTRUCTION

Respondents seek to restrict the protections afforded the elderly under the Act solely to those who are incompetent and/or to those who live in a custodial setting. Respondents would also afford physicians immunity from the Act, unless they refuse all care to an elder at a long term care facility. These efforts by Respondents ignore the clear language of the Act, add language that it does not utilize and twist the English language in a fashion that is simply untenable. The Act's language, as relevant here, requires no interpretation. It clearly applies to *all* persons aged 65 years or older who have sustained injury due to the reckless neglect of *any* person who provides them care.

In construing a statute a court seeks to determine and give effect to the intent of the enacting legislative body, and begins by examining the statutory language – "generally the most reliable indicator of legislative intent." *Murphy v. Kenneth Cole* Productions (2007) 40 Cal.4th 1094, 1103; *People v. Braxton* (2004) 34 Cal.4th 798, 810. If the statutory language is clear, the court's inquiry ends. If there is no ambiguity the court will presume the

Legislature meant what it said and the plain meaning will govern. *Murphy v. Kenneth Cole Productions, supra*, 40 Cal.4th at 1103; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919. "The words of a statute should be given their ordinary and usual meaning and should be construed in their statutory context." *Fitch v. Select Products Co,* (2005) 36 Cal.4th 812, 818.

There is also a fundamental of rule statutory interpretation that a court cannot "change [a statute's] scope by reading into it language it does not contain or omit language it does." *Vasquez v. State* (2008) 45 Cal.4th 243, 253. While every word of a statute must be presumed to have been used for a purpose, it is also true that every word excluded from a statute must be presumed to have been excluded for a purpose. *Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal.App.4th 507, 516. Contrary to the approach adopted by Respondents, as remedial legislation, the Act should be liberally construed to the end of fostering its objectives. *People ex. rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269. "[W]henever the meaning is doubtful, [remedial legislation] must be so constructed as to extend the remedy." *Id.*

Based upon these well settled principles of statutory construction, Respondents' effort to change the clear language of the Act is entirely inappropriate.

1. The Act Applies to All Persons Over the Age of 65 Years Regardless of Their Competence or Living Situation

a. Respondents would change the Act to the "Dependent Adult Civil Protection Act."

Respondents' underlying theme is that the Act should only apply to incompetent adults. This changes the scope of the Act entirely; even its name. If the Act was as Respondents claim, the Legislature would have simply called the statute the "Dependent Adult Civil Protection Act." Respondents' argument requires that we assume that the Legislature's addition of the word "Elder" was surplusage. However, this is an inappropriate assumption. *People v. Cruz* (1996) 13 Cal.4th 764, 782.

It is clear that the Legislature wanted to protect more than simply dependent adults. In § 15600(a) the Legislature declared that it "recognizes that elders . . . may be subject to . . . neglect . . . and that this State has a responsibility to protect those persons." Further, at subsection (b) the Legislature proclaims it desires to "direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more

subject to abuse, neglect and abandonment." The Legislature did not state that the elderly are subjected to neglect *only* when they are disabled or in an extended care setting. Giving the entirety of § 15600 a fair and reasonable interpretation, it is apparent the Legislature recognized two separate groups were entitled to special protection: the elderly and dependent adults.

The Act's definition of an "elder" is solely dependent upon age. In contrast, a "dependent adult" has an age element coupled with a disability requirement and expressly includes those "whose physical or mental abilities have diminished because of age," as well as those in a custodial setting. Therefore it is clear that two distinct classes of California citizens are protected: persons between the ages of 18 and 64 years with physical and mental limitations and individuals over the age of 65 years, regardless of their physical or mental capabilities.

The Act's language on this point is clear. Respondents' attempt, in the guise of "interpretation," to strip all non-dependent "elders" of the Act's protections is inappropriate.

b. The Class of Persons Potentially Responsible for Injuring a Protected Elder Arising From Their Neglect is Not Limited

In a similar fashion, Respondents would limit the reach of the Act to persons who have caused injury due to neglect only if they have a custodial relationship with a covered elder. First, this is clearly contrary to the express language of the statute. Second, even if a "care custodian" was the limited class the Legislature meant to hold responsible, its definition of "care custodian" is broad enough to encompass Respondents. Finally, this Court has not limited the identity of those responsible for injuries to elders caused by neglect to "care custodians." *Where* the proscribed acts occur and *who* commits those egregious acts should have no bearing, whatsoever, on whether the Act should be applied.

i.) Respondents' attempt to limit the class of persons whose neglect may be remedied is contrary to the language of the statute

The remedial provision of the Act, § 15657, was added by the Legislature in 1991. Except for the terms "elder," "dependent adult," "neglect," and "physical abuse," (added to definitions §15610 in 1994), § 15657 does not directly or indirectly limit the scope of its application. It certainly does not restrict its reach to only "care custodians" (defined at §15610.17). Indeed, the term "care custodian" is employed in the Act's reporting requirement sections. (§§15630-15632). By contrast, it is § 15657 that provides the remedy for "reckless neglect." Neglect is ultimately defined

in the later added section 15610.57. That section also does *not* refer to a "care custodian." Rather, it is directed to "any person" who has *either* "care *or* custody" of an elder. (§15610.57(a)(1).) The allegations of the Complaint explicitly state Mrs. Cox was under the "sole medical *care*" of Respondents (AA at 71, ¶4) It is further stated that Respondents' decisions took place while they were providing "care" for Mrs. Cox, as that term is utilized in §15610.57(a) (AA at 71, ¶4)

Therefore, Respondents' attempt to erroneously link the definition of "care custodian" to the reach of civil remedies addressed in § 15657, is entirely misguided. To be sure, care custodians *can* be held responsible under the Act for their harmful neglect of elders. However, there is nothing in the Act that restricts its remedial reach *solely* to "care custodians."

ii.) Respondents' attempt to hold only "care custodians" responsible under the Act is grammatically incorrect

Respondents' effort to restrict the remedial section of the Act to custodial relationships is entirely dependent upon an erroneous grammatical argument. Respondents try to equate the term "care" with "custody," in § 15610.57. In essence, Respondents suggest that one or the other word in that section is either unnecessary, or meaningless. However, this is expressly contrary to how courts are to interpret a statute. *People v. Cruz, supra*, 13 Cal.4th at 782. Courts must first look to the words of a statute and try to give effect to the ordinary meaning of the language in a way that does not render

any language mere surplusage. *Pasadena Metro Blue Line Const. Authority v. Pacific Bell Telephone Co.* (2006) 140 Cal.App.4th 658, 664.

As noted, § 15610.57 defines neglect as applying to "*any* person having *the care or custody* of an elder *or* a dependent adult . . ." (Emphasis added.) Respondents claim "'Having the care or custody' means that the defendant must have 'custodial obligations,' not merely provide care." They attempt to support this claim largely through parsing – that is, analyzing the grammatical constituents and syntax[3] – the Act's definition of neglect. But their analysis has no basis in English grammar or compositional logic; indeed, their parsing of § 15610.57, subd. (a)(1), is profoundly misleading.

Respondents' assertion that the Legislature's use of the definite article "the" preceding the term "care or custody" indicates the need of a relationship more significant than merely between someone who provides care and the recipient of that care is grammatically and syntactically illogical. The precedent they cite for this assertion reads as follows: "in construing [a] statute, [the] definite article 'the' particularizes the subject which is precedes and is [a] word of limitation as opposed to [an] indefinite or generalizing force [such as] 'a' or 'an.'" *CD Investment Co. v. California Insurance Guarantee Assn.* (2001) 84 Cal.App.4th 1410, 1421. Grammatically, however, using

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[3] The rules for formulating grammatical sentences.

"the" to particularize "care or custody" in no way limits the meaning of the sentence to a specific kind of care or custody. This is evident when one takes into consideration that the Act clearly indicates that "neglect" can be applied to "*any* person having the care or custody of an elder" (emphasis added).

If the Legislature intended to indicate the necessity for a particular relationship, then they would have specified that relationship. In the absence of such specification, we must rely on the most obvious (or "plain meaning") understanding of § 15610.57. Contrary to the assertions of Respondents, the "plain meaning" interpretation of the statute is that the term "neglect" can be applied to:

1. "Any person" who provides care for an elder or dependent adult; or
2. "Any person" who has custody of either an elder or dependent adult; or
3. Both 1 and 2 above.

The formulation of this language in the Act makes it clear that "or" is being used as an *inclusive*[4] *disjunctive conjunction* – that is, a conjunction that denotes separation or alternatives, while also allowing that both alternatives

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[4] See Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2nd ed., 1995), p. 624: "Authorities agree that [. . .] *or* has an inclusive as well as an exclusive sense [:] [. . .] A or B, or both."

may be true. In other words, "neglect" can be applied to someone who meets condition 1, or condition 2, or *both* conditions. If the Legislature had written "neglect" could only be applied to any person having the care *and* custody of an elder, then perhaps the term "neglect" would be applicable only to caregivers who have some from of custodial relationship with the elder, but this is not the case since the operative conjunction is "or," not "and."

Respondents also assert that "the Legislature's decision not to repeat the definite article 'the' before the word custody "[. . .] means that 'care' and 'custody' should be read as synonymous." This assertion is seriously flawed on two counts:

First, grammatically there is no need for "the" to be repeated. To support the claim that "'care' and 'custody' should be read as identical or synonymous," Respondent's cite Bryan A. Garner's brief note on "repeated" articles: "When two or more nouns are connected by a conjunction, it is usually best to repeat the article before each noun. When the article is not repeated, the sense conveyed is that the nouns are identical or synonymous." However, the examples that Garner present use the conjunction "and," not "or": "'The committee elected a secretary and treasurer' (one person); 'The committee elected a secretary and a treasurer' (two persons)." It is important to note that Garner's examples fail to illustrate his point: the terms "secretary

and treasurer" are neither "identical" (the exact same in substance and appearance), nor "synonymous" (expressing the same meaning or idea). This nullifies Garner's claim, despite the suggestion in the first example that both offices are to be held by one person. Similarly, the second example *suggests* that two people were elected to these offices. But in both examples ambiguity remains.

While Garner might *prefer* for the article to be repeated, a basic rule of English grammar is that "With a series of coordinate nouns, an article may appear before each noun but *is not necessary*" (emphasis added). *The Chicago Manual of Style* gives the following example: "The rose bush and hedge need trimming." In the same way, "care" and "custody" are the coordinate nouns within § 15610.57, and there is therefore no necessity for "the" to be repeated before "custody." Although the Legislature *could* have written "the care or the custody," such omissions as this one are commonplace in writing and do not alter the meaning of the sentence.

Second, all authoritative primary definitions of the word "or" indicate that it is a conjunction that emphasizes two (or more) sentence elements between which there is an *alternative*. The *Oxford English Dictionary* (3rd ed., 2004), for example, defines "or" as a conjunction that is "Used to coordinate two (or more) sentence elements between which there is an alternative."

Similarly, *The American Heritage Dictionary of the English Language* (5th ed.) defines "or" as a conjunction "used to indicate alternatives" (p. 1238).

The notion that two terms conjoined by a particular conjunction (whether "and," "or," or some other conjunction) are, without other syntactical signals, identical or synonymous is simply false. Respondents are perhaps confused by a secondary definition of the word "or," which states that "or" can be used to connect "two words denoting the same thing," in place of a phrase such as "otherwise called" or "that is,"[5] as in this example: "By early Tuesday he was dead – a victim of the most deadly of the world's culinary delicacies, the blowfish or fugu."[6] Clearly, parsing the phrase "having the care or custody" so that it reads "having the care or [otherwise called/that is] custody" defies the "plain meaning" interpretation and is therefore a distortion.

iii.) Nonetheless, Respondents qualify as "care custodians" under § 15610.17(b)

As previously mentioned, the term "care custodian" does not appear in the Act's remedial section. Even if the term had any relevance to the discussion now before this Court, the Act explicitly recognizes that this status

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5 See *Oxford English Dictionary* (3rd ed., 2004). <www.oed.com>

6 *Ibid.*

applies to Respondents in the context of the services they exclusively were providing to Mrs. Cox for a number of years.

Section 15610.17 states that a "care custodian" is "an administrator or employee of any of the following public or private facilities or agencies or persons providing *care or services for elders . . .*" The section then lists various facilities ((a) through (y)) most of which are *not* residential care centers. One class of service identified in that section are *"clinics."* §15610.17(b). That term is itself defined in *Health and Safety Code* § 1200 as an establishment providing *out-patient health services* to the public.

In their website, www.pioneermedicalgroup.com, Respondents represent they are comprised of "qualified physicians" providing services in "seven *clinics* located in Bellflower, Cerritos, Downey, Long Beach, and South Gate." The neglect of Mrs. Cox involved the individual Respondents in two of their clinics. (AA at 70-71, ¶5) By their own admission, Respondents are "care custodians," as that term is defined in the Act.

iv.) This Court did not hold in either *Delaney* or *Covenant Care* that the Act's protection against neglect applied only to care custodians

The language in *Delaney*, again cited in *Covenant Care*, that the purpose of the Act is to protect the vulnerable elderly "from gross mistreatment in the form of abuse and custodial neglect[]" (*Delaney, supra*, 20

Cal.4th at 33) and that "neglect under the Act refers 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" (*Delaney*, at 34), is emphasized by Respondents and to a degree by the dissenting opinion. Appellants acknowledge that both *Delaney* and *Covenant Care* refer to "custodial neglect," "custodial obligations" and "custodial duties." But as previously noted, in both cases the defendants were nursing facilities that both performed custodial functions and acted as health care providers. Neither case proposed to construe the Act in any other context.

In neither *Delaney* nor *Covenant Care* was this Court called upon to determine whether the Act limited its protections only to those elders in long term care settings. Neither case states that the Act does *not* also apply to reckless neglect by healthcare providers in outpatient settings. Although this Court in *Delaney* stated "the legislative history suggests that nursing homes and other health care providers were among the primary targets of the Elder Abuse Act" (*Delaney, supra*, 20 Cal.4th at 41), that language in *Delaney* and the other cases Respondents cite, when considered in their context, do not support a broad proposition that the Act was intended to target *only* long term care facilities.

Accordingly, Respondents overstate the holdings of those cases. Cases are not authority for questions not raised or addressed. *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1517, fn. 10 ["it is axiomatic that cases are not authority for points not raised and discussed"] see also, *Covenant Care, supra*, 32 Cal.4th at 790, fn. 11 ["an unnecessarily broad holding is 'informed and limited by the facts[s]' of the case in which it is articulated"].

B. THE MAJORITY OPINION CAREFULLY MAINTAINS THE DISTINCTION BETWEEN "SIMPLE NEGLIGENCE" AND "RECKLESS NEGLECT," AND THUS PRESERVES THE INTERESTS FOSTERED BY BOTH MICRA AND THE ELDER ABUSE ACT

Respondents accuse the majority opinion of confusing the concepts of reckless neglect and "simple negligence." However, the majority opinion recognizes that the Act provides heightened civil remedies for "forms of abuse or neglect performed with some state of culpability greater than mere negligence." *Delaney, supra*, 20 Cal.4th at 32; [see also, *Mack, supra*, 80 Cal.App.4th at 975]. (Slip opn., p. 19.) Therefore, as recognized by the majority, the only form of "neglect" that entitles a plaintiff to heightened civil remedies under the Act is "reckless neglect." The majority discusses the distinction between "reckless" misconduct and simple negligence, and in so

doing harmonizes its decision with the opinion of this Court in *Delaney*. (Slip opn., pp. 16-20.)

As noted in *Delaney*, the remedial section of the Act 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 and in good standing.'" *Delaney, supra*, 20 Cal.4th at 34. This Court then explicitly held that § 15657.2 was intentionally added to emphasize that the concept of "professional negligence" is "mutually exclusive of the 'abuse' and 'neglect' defined in § 15657." *Id.* This Court said it so held based both upon the language of the statute and its history. *Id.*

Although the term "reckless" is not defined in the Act, that concept was authoritatively described in *Shell Oil v. Winterthur Swiss Inc. Co.* (1993) 12 Cal.App.4th 715. There the court interpreted the scope of the "willful acts exclusion" in Insurance Code § 533. To describe recklessness, for which insurance coverage is not precluded under § 533, the *Shell Oil* court referred to the Restatement's differentiation between "intentional misconduct" and "recklessness." In that regard, the court observed "as the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness . . ." *Id.* at 742.

"Recklessness," the court held, does not "require actual foreknowledge of the harmful consequences of the particular acts; it is enough that a reasonable person would have recognized the aggravated risk . . . (citations). A merely reckless person lacks subjective awareness of the near certainty of harm. 'While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which resulted from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, *even though he hopes or even expects that his conduct will prove harmless.*'" *Shell Oil v. Winterthur Swiss Inc. Co, supra*, 12 Cal.App.4th 742. This is consistent with how this Court has described the concept, as conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable that he knows, or should know, that it is highly probable harm will result. *See, City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.

Further, the Restatement distinguishes "recklessness" from "negligence" as follows: "Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires *a conscious*

choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man... The difference between reckless misconduct and conduct involving only such quantum of risk as is necessary to make it *negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.*" Rest.2d Torts, § 500, com. g, p. 590.

As recognized by the majority, the Amended Complaint specifically alleges that the Respondents knew (or should have known), for a number of years, that there was a strong probability that their repeated failures to provide care would likely cause Mrs. Cox harm. (AA at 71, 73, 75.) These allegations explicitly proffer the issue of recklessness, even though Respondents may have hoped (or even expected) that their decisions would not harm Mrs. Cox. This concept of "recklessness" is supported by the recognized distinction between "intentional misconduct" and "recklessness," (discussed at length in *Shell Oil Co. v. Winterthur Swiss Insurance Co., supra,* 12 Cal.App.4th at 742), as well as the difference between reckless misconduct and negligence, (described by this Court in *City of Santa Barbara v. Superior Court, supra*, 41 Cal.4th at 754, and as defined in the Restatement Second of Torts).

A properly instructed jury is certainly capable of distinguishing between reckless neglect and mere negligence.

C. THE GOALS OF THE ACT MUST NOT BE FRUSTRATED BY RESPONDENTS' ATTEMPT TO AVOID LIABILITY BY UNILATERALLY CLASSIFYING THEIR OWN MISCONDUCT

1. The Act Focuses on the Culpability of the Misconduct, Not the Status of the Defendant.

At pages 12-13 of their Opening Brief, Respondents seem to resurrect the argument that treating physicians cannot be held liable under the Act. Rather, the scope of the Act, as they would interpret it, is limited solely to proscribing reckless neglect at the hands of "care custodians." Such a limitation was explicitly rejected in *Delaney, supra,* 20 Cal.4th at 23. This was recognized in *Mack, supra*, 80 Cal.App.4th at 975 ["we conclude that Dr. Soung's status as a physician does not immunize him from liability for elder abuse."]

Neither is Respondents' argument aided by their citation to an excerpt from the Assembly Republican Caucus Analysis of Senate Bill No. 2199. First, that comment responded to a concern voiced by the California Medical Association to expansion of a mandated reporter's duty. This case does not in any way involve a claim for liability under § 15630 for a failure to report. Further, the response that "the only doctors who will be liable under this law will be either those with direct supervision of the elder or doctors in charge of

facilities or others with supervision over the elder" cannot reasonably be twisted to mean that a physician providing out patient care for an elderly patient could not also be liable for injury caused by his or her own "reckless neglect." A physician who is providing care to an elder clearly is the person "with direct supervision" for that care.

Finally, this Court has made clear that not even an entire sitting legislature has authority to interpret an earlier statute. *Western Security Bank v. Superior Court* (1977) 15 Cal.4th 232, 250. Therefore, not only is the excerpt from the Assembly Republican Caucus Analysis irrelevant to any issue in this action, but it is not a comment made by the legislature that enacted §§ 15610.07, 15610.37, 15610.57, or 15657. It therefore provides no guidance.

In a further effort to avoid the Act, Respondents fabricate a distinction under § 15657 between medical care and "custodial care." As noted above, they claim only those who have a custodial relationship with an elder can be liable under the Act. However, whether the neglect occurs during medical care or "custodial care" is irrelevant. The question remains whether the misconduct rises to the level of the culpability proscribed by the Act. Not only is Respondents' assertion contrary to the plain language of the statute (noted above), but it also undercuts what this Court said in *Delaney*, when it held that a healthcare provider that engages in reckless neglect is subject to the Act's

heightened remedies, without limiting that statement to any description of either the abuser, or the setting in which the neglect occurred. *Delaney, supra,* 20 Cal.4th at 27.

This Court in *Delaney* also said it was incongruous to suggest that a physician could escape liability for his or her neglect of an elderly patient, while another type of care provider could be held liable under the Act for the same type of neglect within the context of the care he or she was providing. *Delaney, supra,* 20 Cal.4th at 40-41. *(See also, Covenant Care, supra,* 32 Cal.4th 784-796). Respondents' argument is therefore at odds with how this Court has said the Act should be applied.

2. The Majority Opinion Does Not Diverge From this Court's Decisions in *Delaney* and *Covenant Care* by Agreeing with *Mack*

Although criticized by Respondents, the holding in *Mack, supra,* 80 Cal.App.4th 966 is not only entirely consistent with the statute, but it also harmonizes with the observations of this Court in both *Delaney* and *Covenant Care* focusing on liability for "reckless neglect." In *Mack,* the defendant physician claimed that he could not be liable under the Act because he was not a "custodian or caretaker." *Id.* at 973. Although the physician in *Mack* saw his patient at a nursing facility, he was not affiliated with that center. Specifically he contended that § 15610.57, subd. (a)(1), referring to "any

person having the care or custody of an elder" applies only to institutional healthcare facilities and does not apply to physicians who "merely" treat elderly patients on an "as needed" basis. *Id.* at 974. The Third District rejected this claim (now resurrected by Respondents here) in no uncertain terms.

Referring to the Act, the court in *Mack* noted that two groups of persons who routinely care for the elderly are identified and defined: health practitioners (§ 15610.37) and care custodians (§ 15610.17). The definition of "health practitioner" is not limited to any particular facility within which care is provided. "Care custodian" includes such entities as home health agencies, independent living centers, adult day care centers and *clinics*. § 15610.17. Thus the Third District recognized that the Legislature intended *both* classes of professionals could be charged with responsibility for the health, safety, and welfare of the elderly and/or dependent adults with whom they come into contact. The *Mack* court also saw that this recognition was made explicit in the Act's reporting section, § 15630, subd. (a). *Mack, supra*, 80 Cal.App.4th at 974.

Mack also noted the distinction in the Act between the terms "abuse" and "neglect." The Act imposes liability for "abuse" *only* on "care custodians." *Mack, supra*, 80 Cal.App.4th at 974. Unlike § 15610.07 subd.

(b), the section defining "neglect" is not restricted to care custodians. Instead it applies generally to anyone having "care or custody" of an elder, and specifically mentions the "[f]ailure to provide medical care." § 15610.57(b)(2). Moreover, *Mack* recognized that the heightened remedy section is *not* limited to care custodians, but targets *any* "defendant" who commits either abuse or neglect with "recklessness, oppression, fraud *or* malice." § 15657. *Id.* (italics added.)

Mack had it right, and is in no sense at odds with either the Act or this Court's holdings in *Delaney* and *Covenant Care*. The statutory language simply does not support Respondents' contention that only "care custodians" can be held liable for reckless neglect. Neither, as noted above, can the holdings of this Court in *Delaney* and *Covenant Care* be so constricted. Rather, this Court's discussion of the Act within the custodial context in those cases is simply due to the fact that both involved claims against long term care facilities.

D. THE ACT PROTECTS ELDERS WHO ARE DEPRIVED OF CRITICALLY NEEDED MEDICAL CARE EVEN UNDER CIRCUMSTANCES WHERE A PHYSICIAN PROVIDES SOME CARE

1. Reckless Withholding of Care that Causes Harm is Actionable Under the Act

In its differentiation of "neglect" from "medical negligence," this Court in *Delaney* emphasized that the elder there had suffered neglect for "an extended period of time." *Delaney, supra,* 20 Cal.4th at 41. This Court noted that where neglect persists for a long duration, a jury could easily accept such facts as indicating a pattern of deliberate indifference on the part of those providing care to the elder. *Id.*

Hence, the focus of the Act is on the culpability of the offending conduct. As noted, the statutory definition of "neglect" speaks not of undertaking of medical services, but of the failure to provide medical care. *Covenant Care, supra,* 32 Cal.4th at 783; *Carter, supra,* 198 Cal.App.4th at 404-405. While a physician's negligent failure to provide healthcare is not covered by the Act, doing so recklessly, oppressively, fraudulently or maliciously is. Here, that Respondents' misconduct was reckless is highlighted by the fact that their failure to provide Mrs. Cox with needed medical care occurred repeatedly over a number of years. (AA 71-75) Their persistent failure to involve a vascular specialist over an extended period of

time occurred notwithstanding the Respondents' knowledge of Ms. Cox's serious medical condition and their knowledge that if specialized care was not summoned the patient's health would be jeopardized. (AA at 72, ¶¶10, 14; 74 ¶15-16; 75 ¶19.)

Respondents argue that a failure to provide needed medical care is "negligence," not "neglect." They cite dicta in *Carter, supra*, 198 Cal.App.4th 396, to support this claim. Their dependence on a tangential comment is not persuasive. In *Carter*, the only actionable claim against a hospital was that its staff looked for, but could not find, a proper sized endotracheal tube during unsuccessful emergent efforts to resuscitate an elderly patient. There was no allegation of prior knowledge that their efforts, as undertaken, exposed the patient to a known high probability of injury. Moreover, in *Carter* the alleged failure did not occur repeatedly over an extended period of time. Therefore, the factual allegations in *Carter* are entirely different from those now before this Court.

Carter stands solely for the proposition that a health care provider's emergent response to a rapidly deteriorating medical situation, may not constitute Elder Abuse, *unless* there are allegations that a failure to act occurred under circumstances indicating a conscious disregard for the high probability of patient injury. In *Carter*, simply an omission in the course of a

single emergent response was held insufficient. *Carter, supra,* 198 Cal.App 4th at 402, 408-409.

Of note, however, is *Carter* held that for conduct to constitute "neglect" under the Act, the defendant must have a responsibility for a "basic need" of the elder/dependent adult. The *Carter* court stated that basic "needs" included "nutrition, hydration, hygiene *or medical care*." *Carter, supra,* 198 Cal.App.4th at 404. Therefore, Respondents easily satisfy what *Carter* considered the requirement of a defendant providing a "basic need" to an elderly patient.

The *Carter* court also mentions *Nelson v. State of California* (1992) 139 CalApp.3d 72, for the proposition that a failure to provide treatment is "malpractice," not "Elder Abuse." However, the *Carter* court quickly followed that parenthetical reference with the *proviso* that such a conclusion has merit *only* in the absence of factual allegations indicating at least "recklessness." *Carter, supra*, 198 Cal.App 4th at 408.

In *Nelson*, a complaint was filed on behalf of a prisoner, who sought relief under *Government Code* § 845.6. During the course of the plaintiff's incarceration, he became diabetic and suffered a leg injury, necessitating a brace. The State moved for judgment on the pleadings on the ground the

complaint did not allege a claim under *Government Code* § 845.6. *Nelson v. State, supra*, 139 Cal.App.3d at 78.

The court upheld the dismissal, noting a failure to present a Tort Claim that included an allegation that the injury was the result of a failure to provide competent medical care. The claim merely stated that the injury was the result of a *failure* to diagnose and *treat* the patient. *Nelson v. State, supra*, 139 Cal.App 3d at 80. The court determined that failure to provide correct medication is *not* the same as a failure to summon medical care, under § 845.6. *Id.* The court noted that, at best, the complaint alleged malpractice and not a failure to summon needed medical care. *Id.* at 81

Clearly the *Nelson* court was not, in any way, addressing the fundamental distinction between "malpractice" and "neglect" under the Act, and so the case is inapt to any issue here presented. "It is axiomatic that cases are not authority for issues not raised and discussed." *Courtesy Ambulance, supra*, 8 Cal.App.4th at 1517, fn 10. Moreover, the *Nelson* court was not presented with a situation where there had been a failure to provide needed medical care to an individual for years, under circumstances where the health care providers knew that such a failure subjected the patient to a high probability of injury. *Nelson* simply does not provide any basis upon which to

conclude that a repeated failure to provide necessary medical treatment to a covered elder cannot, *as a matter of law*, support a claim for Elder Abuse.

2. Withholding Needed Care, Although Some Care is Provided, Constitutes Reckless Neglect Under the Act

Respondents claim that since they provided *some* care to Mrs. Cox, they are immune from liability under the Act for their failure to provide Mrs. Cox with the medical care she critically needed. This same argument was the focus of the opinion in *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81 ("*Sababin.*") There, the care facility took the position that their failure to provide needed care was nothing more than a claim for the negligent undertaking of care. *Id.* at 87. The *Sababin* court rejected this argument, holding that if some care is provided, but other care is not, liability still exists under the Act, because withholding care constitutes neglect. *Id.* at 90. Of critical importance to this case, the *Sababin* court recognized that a history of withholding care indicates that the pattern was the result of choice or deliberate indifference. *Id.*

There, the court found a triable issue of fact existed as to neglect because facts supported a claim that the healthcare provider failed to provide a disabled adult with needed medical care and so failed to protect her from health hazards. Of note to this case, the *Sababin* court specifically rejected the argument that liability for neglect under the Act can only be found if "there is

a total absence of care." "If some care is provided, that will not necessarily absolve a care facility of dependent abuse liability. For example, if the care facility knows it must provide a certain type of care on a daily basis, but provides that care sporadically, or is supposed to provide multiple types of care, but only provides some of those types of care, withholding of care has occurred." *Sababin, supra,* 144 Cal.App 4th at 90.

The allegations of the complaint clearly illustrate Respondents' neglect of Mrs. Cox's basic needs. §§ 15610.07(a) and 15610.57(b)(2)(3). This neglect was "reckless" because Respondents' conduct occurred repeatedly under the circumstances that evinced a disregard for the high probability that Mrs. Cox would suffer significant injury, and certain agony, due to their failure to act. See, *Delaney, supra,* 20 Cal.4th at 31-32; and *Mack, supra,* 80 Cal.App.4th at 974-975. Providing some "care," while at the same time ignoring Mrs. Cox's critical health needs, where Respondents knew Ms. Cox's well-being depended on a vascular consult, makes the neglect described in this case actionable under the Act. See, *Sababin, supra,* 144 Cal.App.4th at 899.

3. Federal Cases Addressing Claims Under 42 USC § 1983 for Withholding Needed Medical Care are Consistent with *Sababin's* Conclusion That a Persistent Withholding of Needed Care Is Deliberate Indifference Not Negligence

The *Sababin* court used the term "deliberate indifference" to describe a pattern of neglect that was sufficient to warrant invoking the protective measures of the Act. *Sababin, supra*, 144 Cal.App.4th at 90. The concept of "deliberate indifference" in the context of withholding medical care also has been addressed by Federal courts interpreting the Eighth Amendment prohibition against depriving prisoners of adequate healthcare. The analysis adopted in those cases for evaluating "deliberate indifference" mirrors how courts in this State have described the conduct that the Elder Abuse Act was intended to redress.

42 USC §1983 has been applied to protect prisoners who have been deprived of needed medical care. *Estelle v. Gamble* (1976) 429 U.S. 97, 104. Just as with the Elder Abuse Act, a §1983 claim for withholding medical care from a prisoner requires more than mere negligence or medical malpractice. *Id.* at 106 (*See also, McGuckin v. Smith* (9th Cir. 1992) 974 F.2d 1050, 1060). In § 1983 cases, a "deliberate indifference" to the medical needs of prisoners may constitute unnecessary and wanton infliction of pain, amounting to "cruel and unusual punishment," prohibited by the Eighth Amendment. *Estelle v. Gamble, supra*, 149 U.S. at 104; *Farmer v. Brennan* (1994) 511 U.S. 825, 829;

Jett v. Penner (9th Cir. 2006) 439 F.3d 1091, 1096. Under this standard, a plaintiff must prove both an objective and a subjective component. *McGuckin v. Smith, supra,* 974 F.2d at 1059.

The objective component requires that the alleged deprivation be "sufficiently serious." *Farmer v. Brennan, supra,* 511 U.S. at 834. A "serious medical need" exists if the failure to treat a prisoner's condition would result in further significant injury or the unnecessary infliction of pain contrary to "contemporary standards of decency." *Helling v. McKinney* (1993)19 U.S. 25, 32 - 35. Here it is alleged that Respondents' failure to treat Mrs. Cox's known, deteriorating lower extremity vascular disease resulted in the loss of her right leg. Clearly, then, the first prong is satisfied.

The subjective component addresses the mental state of the official. An official is deliberately indifferent to a serious medical need if the official "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan, supra,* 511 U.S. at 7. A plaintiff must "show that the course of treatment the doctors chose *was medically unacceptable under the circumstances* . . . and plaintiff must show that they chose this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson v. McIntosh* (9th Cir. 1996) 90 F.3d 330, 332. Deliberate indifference may arise

from either a purposeful act *or* a failure to respond to a medical need. *Jett v. Penner,* supra, 439 F.3d at 1096.

Under this standard, a prisoner does not have to prove he was *completely* denied all medical care in order to demonstrate "deliberate indifference." *Lopez v. Smith* (9th Cir. 2000) 203 F.3d 1122, 1132. It is sufficient if the prisoner shows that the chosen course of treatment was medically *unacceptable* under the circumstances and that it was undertaken in conscious disregard of a risk to the prisoner's health. *Jackson v. McIntosh, supra,* 98 F. 3d at 332. A pattern of "repeated examples of negligent acts" can constitute deliberate indifference. *Ramos v. Lamm* (10th Cir. 1980) 639 F.2d 559, 563; *McGuckin v. Smith, supra,* 974 F.2d at 1060-61. Indeed, a jury could infer "deliberate indifference" from the fact that a physician knew the extent of a medical condition, knew that the course of treatment was ineffective, and nonetheless declined to do anything more to improve the situation. *Hathaway v. Coughlin* (10th Cir. 1994) 37 F.3d 63, 68.

Once a plaintiff establishes the harmfulness of the delay "it is up to the fact finder to determine whether or not the defendant was indifferent to the prisoner's medical needs." *McGuckin v. Smith,* supra, 974 F. 2d at 1060. The more serious the medical need of the prisoner, and the more unwarranted the

defendant's actions in light of those needs, the more likely it is that plaintiff has established a defendant's "deliberate indifference." *Id.*

In *Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, an inmate was determined to be suffering from an orthopedic condition and surgery was recommended by a specialist. However, non-specialist physicians made a contrary determination and, as a result, surgery was delayed for several years causing additional harm. *Id.* at 987.

The *Snow* court noted that, in order to show deliberate indifference, "the plaintiff 'must show that the course of treatment the doctors chose was medically unacceptable under the circumstances.'" *Snow v. McDaniel, supra*, 681 F.3d at 988. The court concluded it was not dealing with a mere difference of opinion between medical professionals. Rather, the defendant physicians were "unreasonably relying on their own *non-specialized conclusions* with deliberate indifference to Snow's medical needs." *Id.* Where those unreasonable decisions result in delay causing further injury, such an unacceptable decision process denies medical treatment and can support a claim for deliberate indifference. *Id.* at 988.

Here, the complaint specifically pleads conscious decisions not to provide care made by providers who lacked the requisite training to make those decisions. It is also alleged that those same providers had known for

years that Mrs. Cox suffered from impaired vascular flow in her lower extremities. That awareness, coupled with their knowledge that Mrs. Cox had developed physical changes consistent with lower extremity ischemia, is evidence that Respondents' failure to act was medically unacceptable. Respondents' decision to rely upon their non-specialized conclusions was not simply unreasonable; it indicates a deliberate indifference to the increasingly urgent medical needs of Mrs. Cox.

Respondents argument, that they were merely "negligent," stands in stark contrast to the complaint's factual allegations. The foregoing recitation makes clear that a failure to provide needed medical treatment *can* reflect "deliberate indifference" for a patient's well-being. Although this Court is not bound by the decisions of the federal courts interpreting a different statutory scheme, nonetheless, how those courts have handled the distinction of "negligence" from "deliberate indifference" in the withholding of needed medical care under 42 USC § 1983 is at the very least instructive on the substantially similar analysis distinguishing negligence from reckless neglect under the Act. (*See, e.g., Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 579; *Goodstone v. Southwest Airlines* (1998) 63 Cal.App.4th 406, 422.)

E. RECKLESS NEGLECT HAS BEEN ADEQUATELY PLED SINCE RESPONDENTS ARE ALLEGED TO HAVE WITHHELD CRITICALLY NEEDED CARE FOR "AN EXTENDED PERIOD OF TIME" WITH KNOWLEDGE OF PROBABLE HARM

Respondents argue that their acts of neglect have only been alleged in a conclusory fashion. Appellants reject this mischaracterization, but note that a complaint need only state "the facts constituting the cause of action, in ordinary and concise language." Code of Civ. Proc., §425.10(a). Although the general rule requires statutory claims to be pleaded with particularity *(Covenant Care, supra*, 32 Cal.4th at 790), Appellants need only set forth the essential facts with reasonable particularity sufficient to acquaint the Respondents with the nature of this claim. *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245. "The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff." *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 879. Here, the factual basis is found in the medical charts Respondents possess. Respondents' access to the facts is, therefore, equal to or greater than Appellants'.

The Amended Complaint is reviewed by this Court *de novo*, to determine whether it alleges facts sufficient to state a cause of action. *Holiday Matinee, Inc. v. Rambus* (2004) 118 Cal.App.4th 1413, 1420. Under this standard, "All material facts that [are] properly pleaded are deemed to be true. However, the court will not assume the truth of contentions, deductions, or conclusions of fact or law." *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947. It must also accept as true those facts that may be implied or inferred from those expressly alleged. *Marshall v. Gibson Dunn & Crutcher* (1995) 37 Cal.App.4th 137, 140. All facts in the complaint are to be construed in a light *least* favorable to a defendant. *Perdue v. Crocker National Bank Co.* (1985) 38 Cal.3d 913, 922. A reviewing court will give the complaint a liberal, albeit, reasonable interpretation, reading it as a whole and its parts in their context. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Buss v. J.O. Marin Co.* (1966) 241 Cal.App.2d 123, 133-134.

The complaint alleges that for years Respondents had the requisite knowledge their failure to refer Mrs. Cox for a vascular consult was causing her harm. Respondents' knowledge of the symptoms, their import and the risk to Mrs. Cox given her age and medical history, have also been clearly stated. (AA at 71-75, ¶¶ 7, 10, 11, 12, 14, 15, 16 and 19.) Finally, it is plainly related in the complaint that the only medically responsible response to the symptoms

presented, under the circumstances, was a prompt referral to a vascular specialist. (AA at 72-75, ¶¶ 10, 14, 15, 19.) Mrs. Cox's need for this critical course of care was ignored by Respondents, and as a result she was deprived of vital health care services. She lost her right leg due to this neglect. (AA at 74, ¶ 19.)

The factual allegations in the Amended Complaint show a failure to provide needed medical care, (§ 15640.57(b)) to an elder, (§ 15610.27) over an extended period of time (*Delaney, supra*, 20 Cal.4th at 36), with actual and/or constructive knowledge on the part of Respondents of (1) the risk, (2) the only appropriate medical response and (3) the probable deleterious consequences to the patient if the referral was not made. *Id.* at 31-32; *Carter, supra*, 198 Cal.App.4th at 408.

The factual basis for this claim is, therefore, far from being conclusory. Respondents have adequate notice of the reason this claim has been filed. If they need more, they may simply review their own medical chart pertaining to Mrs. Cox. The only question is whether Respondents' failure to provide Mrs. Cox with a referral to a vascular specialist was negligence or reckless neglect. Respondents do not cite any case, or describe any legitimate public policy, to support their request to have that determination made upon a demurrer under these circumstances.

F. APPLICATION OF THE ACT TO PHYSICIANS WHO CAUSE HARM TO THEIR ELDERLY PATIENTS SERVES AN IMPORTANT PUBLIC POLICY

Respondents contend that the interests of "judicial efficiency" precludes juries from determining the issue of negligence as opposed to "reckless neglect." (Opening Brief on the Merits pp. 37-41).

As has been the case whenever courts are called upon to discuss liability claims against a well funded defendant class, there is a prediction of a massive increase in litigation, now against physicians who treat the elderly. This Court must not be misled by such arguments.

California courts have frequently rejected the "contention that the rule permitting the maintenance of the action would be impractical to administer and would flood the courts with litigation [as being] but argument that the courts are incapable of performing their assigned tasks . . ." *Emden v. Vitz* (1948) 88 Cal.App.2d 311, 319. However, "courts not only compromise their basic responsibility to decide the merits of each case individually, but destroy the public's confidence in them by using the broad broom of 'administrative convenience' to sweep away a class of claims, a number of which are admittedly meritorious." *Dillon v. Legg* (1968) 68 Cal.2d 728, 737; *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1057.

By enacting the Elder Abuse Act, our Legislature has determined that both the elderly *and* dependent adult populations are especially vulnerable and disadvantaged classes. *ARA Living Centers v. Superior Court* (1993) 18 Cal.App. 4th 1556, 1560. The heightened remedies afforded in § 15657 were adopted to correct a significant problem affecting each of these separate, and oftentimes victimized, segments of our society. The Act's remedies carry out this important public purpose by creating civil incentives for the representation of these victims. *Delaney, supra,* 20 Cal.4th at 33; *Covenant Care, supra,* 32 Cal.4th at 784-785; *Bickel v. Sunrise Assisted Living* (2012) 206, Cal.App.4th 1, 6.

By contrast, the impetus for MICRA was an effort to stem a perceived "over use" of medical malpractice litigation and to impede the rising cost of medical malpractice insurance. *Roa v. Lodi Medical Group, Inc. (*1985) 37 Cal.3d 920, 931-32. The "response was to pass the very statutes that comprise MICRA to limit damages for lawsuits against a healthcare provider based on *professional negligence." Delaney v. Baker, supra*, 20 Cal.4th at 33-34. The difference in focus between the Elder Abuse Act and MICRA can be understood by considering the different types of conduct with which § 15657 and MICRA are concerned. MICRA is directed solely to protecting healthcare providers in professional negligence actions. Section 15657 concerns

protecting the elderly from "reckless neglect," "physical abuse," and "fiduciary abuse." The Act supercedes the limitations on a claimant's recovery in an action pertaining to medical care when a healthcare provider has acted with reckless neglect. *Id.* at 42; *Knox v. Dean* (2012) 205 Cal.App.4th 417, 425.

This Court in *Covenant Care, supra*, 32 Cal.4th at 787 stated that the fundamental purpose that underlies the Elder Abuse Act and MICRA, respectively, would *not* be promoted for the two regimes to be linked. Indeed, the linkage strenuously advocated by Respondents would undermine the purpose of the Act, and interfere with its protection of the elderly.

Respondents' proposed treatment of the Act runs counter to and in fact inhibits its remedial purpose. They acknowledge that the enhanced remedies of § 15657 apply in cases where it is proven by clear and convincing evidence that a defendant who is not a statutorily-defined healthcare provider has committed reckless neglect of an elder. Yet, Respondents suggest such awards are prohibited if the defendant is a health care provider. Such an interpretation would yield an anomalous result. *People v. Jenkins* (1995) 10 Cal.4th 234, 246 [statute should not be interpreted in a manner that would lead to absurd results].

Any deterrence intended by the Legislature's enactment of the Act also would be undercut by Respondents' interpretation. (See Sen. Com. on

Judiciary, 3d reading analysis of Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended Sept. 10, 1991.) Healthcare providers are some of the entities and individuals that care for the elderly on a recurring and continuing basis. Permitting enhanced remedies against such defendants would not simply compensate the victims of neglect, but it also could be expected to influence future conduct.

Respondents claim that the interpretation adopted by the majority will prompt an insurance crisis similar to that which precipitated the enactment of MICRA. The Act's history shows, however, that the Legislature considered these concerns and declined to adopt a public policy of exempting healthcare providers. Instead the Legislature reassured the medical community that it was adequately protected by the "clear and convincing evidence" standard and the limited applicability of the enhanced remedies to claims of reckless neglect. (See Assem. Subcom. On the Administration of Justice, Statement to Present Sen. Bill No. 679 (July 16, 1991; Sen Com. on Judiciary, 3d reading of analysis of Sen. Bill No. 679; Assem. Ways & Means Com., Statement to Present Sen. Bill No. 679, (Aug. 29, 1991).)

Moreover, Respondents are unequivocally wrong when they state on page 39 that the 2004 Legislature rejected a proposed amendment to AB 2611 that would eliminate MICRA from the Act. In fact, a thorough review of all

published bill versions of AB 2611 reveals that there was no proposed amendment to AB 2611 that would have eliminated the $250,000 cap for the entire Act. Nor was there one that would have specifically repudiated § 15657.2. Obviously, the Legislature could not have rejected an amendment that had never been proposed in the first place.[7] The broad statement by the Assembly Republican Caucus analysis, excerpted by Respondents, was preceded on page one of that analysis with the following: "[t]he 7/6/04 version of the bill eliminated the $250,000 [sic] *in an obscure reference on the last page of an eleven-page bill.*" [emphasis added.] That amendment attaches to the then newly proposed § 15657.5(b)(1) which only addresses *financial* abuse. That amendment struck the Civil Code § 3333.2 MICRA limit as excerpted below. Unfortunately, the Assembly Republican Caucus analysis overlooked that important and limiting qualifier. Apparently so did Respondents. The upshot of this misunderstanding is their incorrect conclusion that the proposed $250,000 MICRA cap exemption was to apply to *all* claims filed under the Act, not just financial abuse claims. The actual July 6, 2004, amendment provided: "(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not

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[7] Legislative History, California Statutes of 2004, Chapter 886, AB 2611 (hereafter: AB 2611 (2004) Legislative History) all published bill versions, AB 2611 (2003-2004 Reg. Sess.), PAGE 2004-886, Pages 2-139 of 566.)

apply." Notably, the July 6, 2004, bill version did *not* strike that same limitation in § 15657(c).[8] The final version of AB 2611 reveals that the Legislature *adopted* the July 6, 2004, amendment to 15657.5(b)(1) and *did not* adopt that exemption for § 15657. (Cal. Stats. 2004, Chapter 886, Secs. 3, 4 (2003-2004 Reg. Sess.)

The statement from the Assembly Republican Caucus Analysis relied upon by Respondents in effect serves to dismantle whatever might be left of their argument regarding the legislative history of AB 2611. That statement proves that the Legislature was aware of, and did not affect, the accepted pleading practice of concurrently filing both elder abuse and medical negligence claims in appropriate cases.

Reckless neglect committed by physicians against elders must end. The Legislature intended this result through its passage of the Elder Abuse Act. This Court's decisions in *Delaney* and *Covenant Care*, and now the majority opinion in *Winn* further that policy goal. These opinions, together, enable the Act to fulfill its purpose, without regard to the status of those whose neglect harms a protected elder, or the location where that neglect takes place.

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AB 2611 as amended 7/6/2004: AB 2611 (2004) Legislative History, AB 2611 (2003-2004 Reg. Sess.) As amended in the Senate July 6, 2004, page 10. PAGE 2004-886, Page 116 of 556.

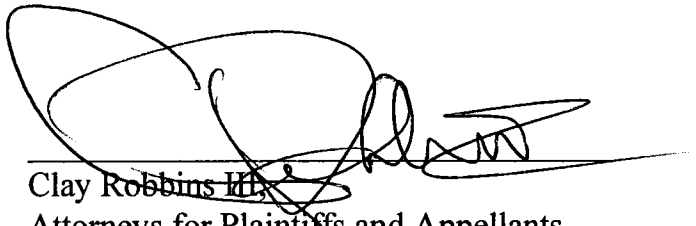
The statutory scheme set forth in MICRA continues to govern negligence claims against healthcare providers. However, if a finder of fact should conclude by clear and convincing evidence that an elderly patient was subjected to neglect committed with "recklessness, oppression, fraud *or* malice," the provisions of MICRA do not preclude recovery of the enhanced remedies in § 15657.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the majority opinion of the Second District Court of Appeal, Division Eight, be affirmed.

Dated: December 30, 2013

Respectfully submitted,
MAGAÑA, CATHCART & McCARTHY

By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief, including headings and footnotes, consists of 13,926 words as counted by the Corel Wordperfect version 12-word processing program used to generate this brief.

DATED: December 30, 2012

MAGANA, CATHCART & McCARTHY

By: _____
CLAY ROBBINS III

PROOF OF SERVICE

Winn, et al. v. Pioneer Medical Group, Inc., et al.
California Supreme Court Case No. S211793
2nd Appellate District Court Case No. B237712
Los Angeles Superior Court Case No. BC455808

I, the undersigned say: I am and was at all times herein mentioned a resident of the County of Los Angeles and employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067-5801.

On **January 7, 2014,** I served the within **ANSWER BRIEF ON THE MERITS** on the interested parties in this action or proceeding by placing a true and correct copy thereof, enclosed in a sealed envelope addressed as stated on the attached service list:

[See Attached Service List]

X **BY MAIL:** I caused a true copy of each document, placed in a sealed envelope with postage fully paid, to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with this firm's business practice for collection and processing of mail, that in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service on that same day. I understand that the service shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.

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Executed on **January 7, 2014,** at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Susan M. Simpson

SERVICE LIST

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