Case No. B302521
Los Angeles Superior Court Case No. BC 601 979

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
Second Appellate District, Division 1

PATRICIA MELTON

Plaintiff and Appellant,

vs.

CHA HEALTH SYSTEMS, INC. AND CHA HOLLYWOOD MEDICAL CENTER, L.P., AND FAROUGH KERENDI, M.D.

Defendants and Respondents

From the Superior Court for Los Angeles County
Honorable Randolph M. Hammock, Judge
Department 47
Phone: (213) 633-0647

APPELLANT'S OPENING BRIEF
(Submitted with motion for relief under
Code of Civil Procedure §170.1(c))

RUSSELL S. BALISOK, SBN 65116
BALISOK & ASSOCIATES, INC.
330 N. Brand Blvd., Ste. 702
Glendale, CA 91203
(818) 550-7890
(818) 550-7890 (fax)

Attorneys for Plaintiff
Patricia Melton

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate. Cal. Rules of Court, Rule 8.208(d)(3).

Dated: June 16, 2020

By: _____
RUSSELL S. BALISOK,
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Statutes

California Regulations

Other Authorities

1. STATEMENT OF APPEALABILITY

Patricia Melton ("Melton") appeals from a judgment of nonsuit rendered on the day set for trial on September 9, 2019. Nonsuit was based on a lengthy series of erroneous pretrial orders in response to various defense motions for summary judgment, demurrers and a motion to strike punitive damages. Those orders were to grant summary adjudication, to sustain demurrers and to grant motions to strike without leave to amend.

In addition, nonsuit was based on the trial court's own motions for judgment on the pleadings which it granted, ultimately without leave to amend.

Finally, on the date set for trial of the surviving Fourth and Tenth Causes of Action, the trial court changed its prior ruling with respect to the viability of the Fourth Cause of Action (medical battery) instead granted its own motion for judgment on the pleadings without leave to amend and entered its judgment of nonsuit. The trial court also granted its own motion for judgment on the pleadings – or it simply dismissed – Plaintiff's Tenth Cause of Action. Appellant only appeals the nonsuit based on the trial court's disposition of the First through Seventh Causes of Action.

A judgment of nonsuit constitutes an appealable order where, as here it disposes of all remaining issues between the parties. See, e.g., *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 699.

///

///

2. STANDARD OF REVIEW

Standard of review for summary judgment: This court should independently review de novo the trial court's order granting summary judgment. *Jambazian v. Borden* (1994) 25 Cal. App.4th 836, 844. The reviewing court liberally construes opposing papers, and strictly construes moving papers in a light most favorably to the opposing party. All doubts about the propriety of granting the motion are to be resolved favorably to the appellant. *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal. 4th 713, 717.

Standard of review for order sustaining demurrer without leave to amend: The standard of review for orders sustaining demurrers without leave to amend is de novo. demurrer dismissals requires the appellate court to assume the truth of all well-pleaded facts and to reverse if any cause of action is well-pleaded without regard for the label assigned to the cause of action. This rule also applies to appeal from a judgment on the pleadings. *Kempton v. City of Los Angeles* (2008) 165 Cal. App. 4th 1344, 1347.

Standard of review for orders granting motions for judgment on the pleadings: A judgment on the pleadings is subject to the same de novo standard of review. *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal. 4th 772, 777.

Orders denying leave to amend are reviewed under the abuse of discretion standard. But the reviewing court will reverse for abuse of discretion if it determines there is a

reasonable possibility of pleading can be cured by amendment; otherwise the trial court's decision will be affirmed for lack of abuse. *Schifando v. City of Los Angeles* (2003) 31 Cal. 4th 1974, 1081.

LEGAL DISCUSSION

1. INTRODUCTION

This appeal follows writ proceedings in Cases B284199 and B284415.

This is an action including allegations of Elder Abuse against CHA Health Systems, Inc., and CHA Hollywood Medical Center, LP, (hereinafter, collectively, "CHA"), who were licensed to operate and did operate Hollywood Presbyterian Hospital, including its attached distinct part skilled nursing facility (referred to herein as the "Chalet"). The third defendant is Dr. Farough Kerendi ("Kerendi") who acted as attending physician for Plaintiff's decedent and also served as the medical director of the Chalet. App. 676.

Melton brought this action as successor in interest to her husband Dennis Lipscomb, and also as an individual. She brings this appeal solely as his successor in interest.

The procedural history leading to the judgment nonsuit of this action on the morning set for trial, has been tortuous. It is this procedural history which forms the basis for the accompanying motion for relief under Code of Civil Procedure §170.1(c).

The orders of the trial court which led to the ultimate nonsuit against each of the three defendants on the first day of trial are as follows:

- **April 12, 2017**: The trial court took CHA Defendants' demurrer and motion to strike re the First Amended Complaint under submission. App. 664.
- **April 25, 2017**: The trial court ruled on Defendant CHA's demurrer and motion to strike. The demurrer to the First Amended Complaint was sustained with 20 days leave to amend as to the First through Sixth Eighth and Ninth Causes of Action. The court accepted the defendant's argument that Melton's allegations were based on Kerendi's professional judgment in denying the requested discontinuation of Lipscomb's life, and therefore the first Sixth Causes of Action were governed by C.C.P. §340.5. The demurrer to the Ninth Cause of Action under Health & Safety Code §1430(b) was sustained based on the statute of limitations, with 20 days leave to amend.

  CHA's demurrer to the Seventh Cause of Action for Elder Abuse was sustained without leave to amend because the court found that allegations that the defendants failed to follow instructions to discontinue ventilator support did not amount to "abuse of an elder or a dependent adult" under Welf. & Inst. Code §15610.07, and did not constitute financial abuse (App. 672-673). The trial court also reasoned that to impose

liability under the Elder Abuse Act for prolonging life would raise the possibility that life support is prematurely withdrawn for fear of liability under the Elder Abuse Act–an undesirable outcome. The court relied on *Bouvia v. Superior Court* (1986) 179 Cal. App. 3d 1127, 1140. App. 673. In other words, the trial court ignored Melton's allegations that the failure to follow her instructions to disconnect Lipscomb's ventilator was due to financial incentive and that Defendants acted in bad faith. The demurrer was overruled as to the Tenth Cause of Action. The motion to strike was found moot. App. 665-674.

The net effect of the order on CHA's demurrer to the First Amended Complaint was to allow Plaintiff to amend but not with respect to the 7th cause of action for Elder Abuse. App. 665.

- **Second Amended Complaint filed**. App. 675.
- **July 17, 2017**: Ruling on demurrer and motion to strike re the Second Amended Complaint. The court sustained CHA's demurrer to the first through ninth causes of action without leave to amend (with the seventh cause of action ordered stricken) and overruled as to the tenth cause of action. App. 1018. The court granted the motion to strike as to general damages and punitive damages without leave to amend. App. 1015 – 1016; 1018-1023. As to the First through Sixth causes of action, the demurrer was sustained based on the

application of C.C.P. §340.5. App. 1018. This order left Plaintiff with only her tenth cause of action. *Plaintiff's appeal challenges the order striking general and punitive damages.*

- **August 2, 2017**: The trial court's ruling on Kerendi's motion for summary judgment. The trial court granted summary adjudication as to the first through sixth causes of action and the ninth cause of action. The trial court treated the motion for summary judgment as one for judgment on the pleadings as to the seventh and eighth causes of action. The court granted these motions for judgment on the pleadings without leave to amend. See App. 1134. The court overruled the demurrer to the Tenth Cause of Action and therefore denied summary judgment. App. 1122. As with CHA's demurrer, the trial court concluded that the first through sixth causes of action were time-barred by C.C.P. §340.5. App. 1126-1129.
- **August 16, 2017**: Plaintiff filed Petition for Writ relief re the orders benefitting the CHA defendants. App. 1138.
- **August 16, 2017**: Plaintiff also filed Petition for Writ relief re orders benefitting Kerendi. App. 1183.
- **October 6, 2017**: Court of Appeal in Case No. B284199 issued ORDER and ALTERNATIVE WRIT OF MANDATE. The court stated, the first through sixth causes of action, as pleaded, are not barred by MICRA's one-year statute of limitations. App. 1217-1218. The

court also found the allegations supporting the seventh cause of action sufficient to support a claim under the Elder Abuse. Act. App. 1219.

- **October 6, 2017**: Court of Appeal in Case No. B284415 made the same ruling as in case number B284199, but as to Kerendi. App. 1221. This order was later rescinded. App. 3168.
- **October 12, 2017**: Order of the trial court vacating the portion of its order of April 25, 2017 which sustained CHA's demurrer without leave to amend to the seventh cause of action in the First Amended Complaint; and vacating its order re the first through sixth causes of action. App. 1226-1228. This order reinstated Plaintiff's First through Seventh Causes of Action as to CHA.
- **May 1, 2018**: The trial court denied Plaintiff's motion for reconsideration of its order of August 2, 2017 as to Kerendi, but received Plaintiff's oral request for reconsideration and directed further briefing. App. 2216.
- **June 7, 2018**: The trial court ruled on its own motion for reconsideration dated August 1, 2017, now denying Kerendi's motion for summary adjudication as to the first through sixth and tenth causes of action. The trial court's ruling with respect the Seventh, Eighth and Ninth causes of action **remained granted**. App. 2503. In the trial court's final ruling it stated that "As to Issue No. 7 re the seventh cause of action, and issue No 8 re

the eighth cause of action, the court shall continue to treat this as a motion for judgment on the pleadings, which remains GRANTED without leave to amend. This ruling appears in conflict with this Court's Alternative Writ, and also in conflict with the trial court's order reinstating Plaintiff's Seventh Cause of Action against CHA.

Accordingly Plaintiff could not proceed on her Seventh Cause of Action as to Kerendi as set forth in her First Amended Complaint. *Plaintiff's appeal challenges the trial court's order granting its own motion for judgment on the pleadings as to the Seventh Cause of Action as to Kerendi.*

- **July 3, 2018**: CHA motions for summary adjudication are granted in part and denied in part. As to Issues 1, 2, 6, 7, 11, 12, 16-23, 28, 29, 36, 40, the motion is denied, and granted as to Issue No. 38 re the tenth cause of action. The motion was deemed moot as to issues 3, 4, 8, 10, 13, 15, 25-27, 30, 31, 37 and 38. *The trial court treated the motion for summary adjudication as to Issue 5 (the first cause of action, Issue 9 re the second cause of action, 14 re the third cause of action, 24 re the fifth cause of action, 32 re the sixth cause of action issue 33-35 re the seventh cause of action and issue number 41-44 (enhanced remedies under the elder abuse causes of action) as a motion for judgment on the pleadings, which it granted without leave to amend.* App. 2543-2568. The stated rationale for this ruling was the absence of

recoverable general damages, given Mr. Lipscomb's death, and absent recoverable general damages per Code of Civil Procedure §377.34, no punitive damages could be awarded. The court also found lack of pleading re justifiable reliance as to the Second and Third Causes of Action. App. 2550-2552.

That is, having initially granted summary judgment based on the statute of limitations, and then reversed that ruling when faced with this Court's Alternative Writ, the trial court again reversed its ruling and effectively struck the First through Seventh Causes of Action on different grounds. *Plaintiff's appeal also addresses this order.*

- **July 2, 2019**: The trial court granted Kerendi's motion for summary adjudication as to Issues no. 5, 7, 8 and 10. The motion was denied as to Issue No. 4 (the Fourth Cause of Action). The court treated issues number 1, 2, 3 and 6 as a motion for judgment on the pleadings which was then granted without leave to amend. App. 3063. *Plaintiff's appeal also addresses this this order.*
- **September 9, 2019 Trial**: The effect of the court's pretrial rulings on demurrers and motions for summary adjudication as set forth above, was to leave only Plaintiff's Fourth Cause of Action (medical battery) and her Tenth Cause of Action intact. On the morning of the trial call, however, the trial court changed its mind as to the Fourth Cause of Action concluding -- contrary to the case law (*Romo v. Ford Motor Co.* (2004) 113

> Cal.App.4th 738, cited in the court's own order) -- that no punitive damages could be recovered since no general damages could be recovered by operation of Code of Civil Procedure §377.34. The defendants then responded orally to questions from the court, in effect repudiating any claim to recovery from Plaintiff regarding unpaid hospital bills, and on that basis the trial court dismissed Melton's the Tenth Cause of Action. Plaintiff's appeal also addressed the trial court's ruling of September 9 (and the resulting judgment of nonsuit). See Reporters Transcript, p. 601. See Judgment entered October 3, 2019. App. 3115.

Plaintiff's notice of appeal is timely. App. 3118.

In this brief, plaintiff discuss the operative Second Amended Complaint, and will examine each of the arguments made in support of the Defendants' demurrers and motions strike, each of the arguments made in support of the defendants' motions for summary judgment and also each of the and each of the points stated by the trial court in support of its rulings on those motions.

2. THE PLEADINGS

The Second Amended Complaint:

The original complaint is at App. 54.

Plaintiff filed her Second Amended Complaint on May 8, 2017. App. 675. Plaintiff included a Seventh Cause of Action for

Elder Abuse as to Kerendi only, given the trial court's initial order sustaining CHA's demurrer to this Cause of Action without leave to amend. App. 710. As discussed above, however, only as to CHA the trial court reinstated the Seventh Cause of Action, and then later after this Court in writ proceedings opined that the Elder Abuse claim stated in the Seventh Cause of Action was properly pleaded, again found that cause of action without merit.

Summary of the Original Complaint and the Operative Second Amended Complaint

This case arises from the wrongful continuance of the life of Plaintiff Patricia Melton's ("Melton") husband Dennis Lipscomb ("Lipscomb"). There is no wrongful death claim. Instead, as set forth in Ms. Melton's Second Amended Complaint (App. 675), the defendants wrongfully refused to comply with valid instructions from her to discontinue mechanical ventilation keeping Lipscomb alive. She alleged a number of torts including Elder Abuse (Welf. & Inst. Code §15657) based on "neglect" (Welf. & Inst. Code §15610.57) and "physical abuse" (Welf. & Inst. Code §15610.63). She also sought damages for her own emotional distress.

Ms. Melton and Lipscomb had been married since 2003 and had lived together since around 1993. App. 93, 676.

Defendant CHA Health Systems, Inc. ("CHA") and CHA Hollywood Medical Center, L.P. ("CHA Hollywood") do business under the name Hollywood Presbyterian Hospital ("Presbyterian Hospital"), which is a full service hospital. App. 677. Said defendants jointly operate a "distinct part" of the hospital, a

skilled nursing facility known as the "Chalet." *Id*. See 22 Cal. Code Regs. §§70625; 70627 (specifying that Defendants' distinct part rehabilitation unit is subject to regulations applicable to skilled nursing facilities with two enumerated exceptions allowing the hospital administrator to also serve as the administrator for the distinct part, and allowing the functions of the Director of Nursing to be shared between the hospital and the distinct part.)

For Medicare patients, like Lipscomb, available Medicare benefits include payments to CHA and CHA Hollywood for post-hospital care in the Chalet, but for a period not to exceed 100 days. (See 42 U.S.C. §1395d(a)(2)).

Kerendi acted as Lipscomb's attending physician at the Chalet. In addition, Kerendi was employed by CHA and CHA Hollywood as the Chalet's Medical Director and acted as such during Mr. Lipscomb's period of residence at the Chalet. App. 677:16-19.

In the years leading up to Decedent's admission to Defendant's hospital and ultimately to the Chalet, Lipscomb had developed Muscular Dystrophy, a severe progressive neurological muscular degenerative disease. This disease confined Lipscomb to a wheelchair for two years prior to his first admission to Presbyterian Hospital. App. 677:26-681:4.

In February 2014 Lipscomb suffered a major stroke and was admitted to Presbyterian Hospital. He was placed on life support including a ventilator, at the direction of and with the consent of Patricia Melton. In addition, at that time he was

provided with a G-Tube through his stomach wall for nutrition, an IV line for necessary IV medication, and a Foley catheter to drain urine. App. 678:5. He wore restrictive mittens to prevent him from pulling out tubes. Id.

By March 11, 2004 Lipscomb's condition was stabilized and he was transferred from Presbyterian Hospital to its own distinct part rehabilitation unit, named "Chalet." App. 678:9.

On or about May 3, 2004, even though he was on a ventilator, he apparently stopped breathing. Staff at the Chalet again called Ms. Melton for instructions as Lipscomb's recognized surrogate healthcare decision maker. The question posed to Ms. Melton was whether to allow Lipscomb to die or on the other hand to attempt to resuscitate him. Melton instructed staff at the Chalet to transfer him back to Presbyterian Hospital for resuscitation. After a few days Lipscomb was transferred back to Chalet where he continued to deteriorate. He was no longer able to recognize family and friends and unable to perceive his environment. He had no discernible cognitive function. He was observed to stare blankly into space, mouth open. App. 678:12-22.

Prior to June 1, 2014, after returning to the Chalet for a second time, and after concluding that Lipscomb would not regain cognitive function, Ms. Melton demanded that Lipscomb be removed from life support and that his body be allowed to die. App. 678:23-26.

In response, Kerendi offered a series of sham excuses for his refusal to allow Mr. Lipscomb to die. First, even though

Presbyterian Hospital and the Chalet had previously respected and responded to Ms. Melton's instruction regarding consent to medical treatment, at a meeting on June 1, 2014, Kerendi claimed that the durable power of attorney which Ms. Melton had previously furnished to the Chalet was missing a signature page and could not be respected. App. 678:26-679:12.

Upon hearing of Kerendi's refusal to comply with her directive to remove the ventilator, at the meeting on June 1, Ms. Melton furnished another copy of Mr. Lipscomb's durable power of attorney for healthcare to Kerendi. App. 679:13-16.

Kerendi nonetheless continued his refusal, instead falsely stating that he would review the durable power of attorney with "staff," the "bio-ethics committee," and with the "risk management department." App. 679:17-20. But there was no review with the bioethics committee and risk management was not asked to review this matter. *Id*.

There was no further communication between Kerendi and Melton until approximately June 26, 2014. Ms. Melton again demanded that her husband be removed from life support. In response Kerendi did not dispute her or Mr. Lipscomb's right to terminate life support, but he nevertheless continued to refuse to comply with Ms. Melton's directive. Instead, for the first time, Kerendi told Ms. Melton that he wanted Mr. Lipscomb to have a "psyche" evaluation to determine whether Mr. Lipscomb was really unable to make decisions for himself. This explanation was false and pre-textual. Kerendi was himself easily qualified to make such a determination. Further, Kerendi and Chalet staff

had long since treated Mr. Lipscomb as unable to meaningfully respond to them or to make decisions for himself, and had, with respect to other health care decisions, sought and followed instructions from Ms. Melton. App. 679:27-680:4. Further, Kerendi did obtain a psyche consult from a Dr. Karotkin who found Mr. Lipscomb to be unable to engage in even the most basic test of cognitive function. App. 680:10-19. Even so, Kerendi still failed to follow Melton's instruction.

Even without a durable power of attorney, as Mr. Lipscomb's wife she had the right to act as his surrogate decision maker and to direct the withdrawal of life support from Mr. Lipscomb. App. 680:6-9.

No action was taken by defendants to remove life support from Mr. Lipscomb until just after his Medicare benefit was exhausted on July 16, 2014. App. 6803:10-24.

Defendants' motive for failure to respond promptly to Ms. Melton's demand that her husband be taken off life support was purely financial. Under Medicare rules, the Defendants could expect Medicare to pay for up to 100 days of subacute care at the rate of approximately $35,460.00 per month or more. App. 681:9-13.

Kerendi acted as managing agent for CHA Hollywood and CHA and acted to further their interest in increasing revenue from Medicare by keeping patients alive even when to do so contravenes valid directives from patients, or their surrogate decision makers. App. 681:21-25. Such conduct was authorized and ratified. App. 681:25-27.

Also alleged is that Mr. Lipscomb was unable to make healthcare decisions on his own (682:2-3), that defendants knew that he was unable to make health care decisions on his own (682:4-6), that they initially altered their copy of the durable power of attorney for healthcare by removing the signature page and then by a series of pretexts caused a sequence of delays in order to falsely justify their refusal to comply with Ms. Melton's direction (682:7-10).

Defendants knew or should have known that by failing to comply with the directive to disconnect his ventilator, they created the danger that Lipscomb would suffer injury, pain and mental distress. App. 682:13-17.

Defendants knew that the danger they created posed the probability of serious injury and harm in that he would be kept alive and in pain contrary to his expressed wishes and contrary to his right to control his life during its final stages. App. 682:18-21. Defendants knowingly and consciously disregarded the said peril and danger for the sake of their own profit. App. 682:22-23.

Plaintiff alleged that this conduct amounted to recklessness, oppression and malice and an award of statutory damages for Lipscomb's pain and suffering under the Elder Abuse Act (Welf. & Inst. Code §15657) and claimed punitive damages. App. 682:24-27.

The first cause of action was for recklessness. This cause of action is for a conscious disregard of the probability of injury. App. 677.

The second cause of action for fraud-concealment. App. 683. After repeating most of the allegations from the First Cause of Action, Plaintiff alleged that defendants – as health care providers -- had a fiduciary duty to Lipscomb, including the duties, inter alia, of disclosing adverse financial conflicts of interest and the duty to disclose that defendants were actually acting on their adverse financial conflict of interest when treating, planning, consulting and counseling with Lipscomb and Ms. Melton. App. 687:19-25. Breach of fiduciary duty is alleged. App. 687:26-691:1.

At App. 688:2, it is alleged that Mr. Lipscomb was misled and as a result failed to take legal and other action to compel the withdrawal of his ventilator so that he might be allowed to die.

It is also allege that he sustained personal injury (App. 688:5), that the defendants acted with intent to injure Mr. Lipscomb, and despicably, and subjected Lipscomb to cruel and unjust hardship (App. 688:11) and that defendants were guilty of oppression, fraud and malice and claimed punitive damages (App. 688:12-14).

The Third Cause of Action for fraudulent misrepresentation. App. 688:15.

After repeating many of the allegations from the First Cause of Action, Plaintiff alleged that defendants represented that they could not comply with her request to terminate Lipscomb's life support "for one or another of a sequence or [sic] reasons, comply with her request beginning with the simple representation that the power of attorney which she had provided

was missing the signature page. App. 693:3-9. Reliance is alleged. App. 693:9-12.

Defendant's misrepresentations were intentional and designed to deceive and prevent the termination of Mr. Lipscomb's life until his entitlement to Medicare benefits had been exhausted. App. 693:13-15. Motive is alleged. App. 693:15-23.

The Fourth Cause of Action for Battery. App. 694:8.

Plaintiff alleged that following the date Ms. Melton first made a valid demand that Mr. Lipscomb's ventilator be disconnected, each touching by Defendants was unpermitted and constituted a battery. App. 699:6-11. Plaintiff alleged despicable conduct which subjected Mr. Lipscomb to cruel and unjust hardship and punitive damages. App. 699:12-17.

The Fifth Cause of Action for Intentional Infliction of Emotional Distress. App. 699:19.

After repeating allegations from prior causes of action, Plaintiff alleged that the conduct alleged caused Mr. Lipscomb to suffer severe emotional distress. App. 704:18-22. Plaintiff alleged that Mr. Lipscomb was subjected to despicable conduct and cruel and unjust hardship. App. 704:25-28.

The Sixth Cause of Action for Negligent Infliction of Emotional Distress. App. 705:3.

After repeating allegations from prior causes of action, Plaintiff alleged that the conduct alleged caused Ms. Melton to suffer severe emotional distress. App. 710:10-15.

The Seventh Cause of Action for Elder Abuse against Kerendi only because in ruling on a previous demurrer by the CHA defendants, the trial court had sustained the demurrer without leave to amend. App. 710. This cause of action repeated many of the allegations in the First through Sixth Causes of Action including allegations of intent supported by allegations of motive (see e.g., ¶135), as well as allegations of recklessness, oppression, fraud or malice (see ¶142). Important to an allegation that defendants committed "neglect" (Welf. & Inst. Code §15610.57(b)(2)) was ¶140. There, Plaintiff simply alleged that the conduct of the defendants denied to Lipscomb care as he had directed. Since there is no excuse for the failure to comply with his request, as articulated by his wife Patricia Melton, there is a denial of needed care under §15610.57. In addition, Melton's Elder Abuse cause of action was predicated on "physical abuse" at §15610.63 (battery).

Appellant here dispenses with a discussion of the Eighth through Tenth Causes of Action because she does not appeal the trial court's rulings re those causes of action.

Plaintiff prayed for general damages on behalf of Lipscomb notwithstanding his death, for special damages in the sum of approximately $17,500, for punitive damages in respect to the conduct causing injury to Lipscomb. App. 726:14. Melton made the same allegations in her original complaint (App. 87)

///

///

///

3. ON APRIL 25, 2017 THE TRIAL COURT ERRED IN SUSTAINING CHA'S DEMURRER, AND IN GRANTING THE COURT'S OWN MOTION FOR JUDGMENT ON THE PLEADINGS RE THE FIRST AMENDED COMPLAINT

Initial Rulings re CHA's Demurrer, Motion to Strike re the First Amended Complaint. On April 12, 2017, the trial court took CHA's demurrer and motion to strike under submission. The court granted Plaintiff's application to continue the hearing on Kerendi's motion for summary judgment and set the hearing for July 13, 2017. App. 663-664.

On April 25, 2017 the trial court issued its minute order. The demurrer to the First Amended Complaint was sustained with 20 days leave to amend as to the First through Sixth Causes of Action. As to the First through Sixth Causes of Action, the court accepted the argument/factual assertion that Ms. Melton's allegations were based on Kerendi's professional judgment in denying the requested discontinuation of Lipscomb's life, and therefore the first Sixth Causes of Action were governed by C.C.P. §340.5.

The trial court sustained the demurrer re the Seventh Cause of Action for Elder Abuse without leave to amend because the court found that allegations the defendants failed to follow instructions to discontinue ventilator support did not amount to "abuse of an elder or a dependent adult" under Welf. & Inst. Code §15610.07. The trial court reasoned that to impose liability under the Elder Abuse Act for prolonging life would raise the

possibility that life support is prematurely withdrawn for fear of liability under the Elder Abuse Act–an undesirable outcome. The court relied on *Bouvia v. Superior Court* (1986) 179 Cal. App. 3d 1127, 1140. App. 673. In other words, the trial court ignored Ms. Melton's allegations that the failure to follow her instructions to disconnect Lipscomb's ventilator was due to financial incentive and that Defendants acted in bad faith.

Re the Eighth Cause of Action, the court found the allegations did not constitute financial abuse (App. 672-673), and sustained the demurrer without leave to amend.

The demurrer was overruled as to the Tenth Cause of Action.

The motion to strike was found moot. App. 665-674.

A. The Trial Court Erred in Sustaining Applying MICRA's One-Year Statute of Limitations to Any of Plaintiff's Claims

This court said as much in its Alternative Writ issued in Case No. B284199, citing *Noble v. Superior Court* (1987) 191 Cal. App. 3d 1189, 1190; *Unruh-Haxton v. Regents of the University of California* (2008) 162 Cal. App. 4th 343, 356; *David M. v. Beverly Hosp*. (2005) 131 Cal. App. 4th 1272, 1278; *Perry v. Shaw* (2001) 88 Cal. App. 4th 658 and *Smith v. Ben Bennett, Inc.* (2005) 133 Cal. App. 4th 1507, 1522. App. 1217. In response to this Court's alternative writ, the trial court "on its own motion" reversed its decisions with respect to the First through Sixth Causes of Action.

Although Plaintiff believes that this Court's Alternative Writ was correctly based on case law holding that MICRA's statute of limitations did not apply to intentional tort claims, such as Plaintiff's, it is also acknowledged that this Court's explanation for its Alternative Writ may not be law of the case. *Kowis v. Howard* (1992) 3 Cal. 4th 888, 894 (law of case arises only from written opinion following issuance of alternative writ, briefing and oral argument).

The dividing line between claims subject to MICRA's statute of limitations and those subject to other statutes of limitation seems to be simpler than the test urged by the Real Parties, or by the Respondent Superior Court. They argued that if the cause arises from an error in medical judgment, the claim is subject to the MICRA statute of limitations, *i.e.*, regardless of what the pleading alleges an intentional tort, or shows regarding intentionality. But the case authorities establish a clear line between negligence and intentional tort. If that latter is properly pleaded, the cause should generally be subject to the non-MICRA statute of limitations (e.g., C.C.P. §335.1).

Finally, where a claim is statutorily authorized, the statute may specify a different limitation period.

For these reasons the trial court's orders applying the MICRA statute of limitations (C.C.P. §340.5) was error and the trial court's orders with respect to any of Plaintiff's causes of action cannot be supported on the basis of the MICRA statute of limitation.

B. The Trial Court Erred in Sustaining CHA's Demurrer to the Seventh Cause of Action for Elder Abuse; Welf. & Inst. Code §15610.07 Is Not Part of the Elder Abuse Act

In this Court's Alternative Writ, it found the Seventh Amended Complaint valid as to the CHA defendants. Two grounds were identified by the trial court for sustaining the demurrer to the Seventh Cause of Action for Elder Abuse. First, the trial court found the pleading deficient because the facts alleged did not make out "abuse of an elder or dependent adult" under Welf. & Inst. Code 15610.07. This finding by the trial court is in direct conflict with the explanation attached to this Court's Alternative writ, to the effect that the Seventh Cause of Action was sufficiently pleaded under the Elder Abuse Act at Welf. & Inst. Code §15657 which generally provides remedies for "neglect," "physical abuse," or "abandonment": Not "abuse of an elder or dependent adult" under §15610.07.

Welf. & Inst. Code §15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, neglect as defined in Section 15610.57, or abandonment as defined in Section 15610.05, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

In other words, §15610.07 (abuse of an elder or dependent adult) is simply not relevant to a civil action for Elder Abuse under §15657 and the trial court's focus on 15610.07 was erroneous. Clearly, §15657 does not apply to "abuse of an elder or dependent adult."

C. The Trial Court Erred in Applying Policy Considerations Articulated in *Bouvia v. Superior Court* Because Policy Has Been the Subject of Extensive Legislation

Second, the trial court reasoned that to impose liability under the Elder Abuse Act for prolonging life would raise the possibility that life support would be prematurely withdrawn for fear of liability under the Elder Abuse Act–an undesirable outcome. The court relied on *Bouvia v. Superior Court* (1986) 179 Cal. App. 3d 1127, 1140. App. 673.

Policy considerations such as those expressed in by the trial court have been settled by legislation known as the Uniform Health Care Decisions Act at Division 4.7, Part 2 of the Probate Code, and as a whole they supersede the policy considerations settled by the Legislature. The following are provisions within the Uniform Health Care Decisions Act:

Section 4670 provides that an adult having capacity may give an individual health care instruction.

Section 4671 provides that an adult having capacity may execute a power of attorney for healthcare, authorizing the agent to make health care decisions.

Section 4674 contains requirements for the execution of the power of attorney.

Section 4675 contains requirements for the execution of the power of attorney which are specific to patients residing in skilled nursing facilities.

Section 4678 allows persons authorized to make health care decisions to have the same right as the patient to access to medical records.

Section 4682 provides that unless otherwise provided in a power of attorney for healthcare, the agent named in a power of attorney for healthcare becomes effective only on a determination that the principal lacks capacity.

Section 4683 provides that the agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make healthcare decisions if the principal had the capacity to do so.

Section 4684 provides that the agent shall make healthcare decisions in accord with the principal's individual healthcare instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accord with the agent's determination of the principal's best interest, considering the principal's personal values to the extent known to the agent. See also §4714.

Section 4687 provides that nothing in the legislative affects any right the person designated as an agent for healthcare may have apart from the power of attorney, to make or participate in the making of health care decisions for the principal. Therefore,

Ms. Melton's right to make health care decisions for her husband would not be diminished by her appointment as agent.

Section 4690 provides for the power of the agent designated in the power of attorney to consult with various people including the principal's spouse, physician, family member, with respect to matters covered by the power of attorney.

Section 4732 provides that the primary physician who knows that a patient lacks capacity, or that another condition exists affecting the individual healthcare instruction or the authority of the agent, shall promptly record the determination in the patient's health care record and communicate the determination to the patient including the person then authorized to make healthcare decisions for the patient.

Section 4733 provides that except as provided in sections 4734 and 4735, a health care provider or health care institution providing care to a patient shall do the following:

- Comply with an individual health care instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make healthcare decisions for the patient
- Comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

Section 4734(a) provides that a health care provider may decline to comply with an individual's health care instruction or

decision for reasons of conscience. Likewise subsection (b) provides a health care institution may decline to comply with an individual healthcare instruction or decision if contrary to a policy of the institution that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or other person authorized to make healthcare decisions.

Section 4735 pertains to the right of the healthcare institution to decline to comply with an individual healthcare instruction that requires medically ineffective healthcare or healthcare contrary to generally accepted healthcare standards applicable to the health care provider or institution.

Section 4736 provides that if a healthcare provider or institution declines to comply with an individual healthcare instruction or decision the provider or institution shall promptly inform the patient and any person then authorized to make healthcare decisions for the patient. Unless the patient or authorized person refuses assistance, the provider or institution shall immediately make all reasonable efforts to assist in the transfer of the patient to a provider or institution that is willing to comply with the instruction or decision. The provider will provide continuing care to the patient until a transfer can be accomplished.

Section 4740 provides that a health care provider or institution *acting in good faith and in accord with generally accepted healthcare standards* is not subject to civil or criminal liability or to discipline for unprofessional conduct for any actions in compliance with this divisions including the following conduct:

- Complying with a health care decision of a person that the provider or institution believes in good faith has the authority to make a healthcare decisions for a patient including the decision to withhold or withdraw health care.
- Declining to comply with a health care decision of a person based on a belief that the person then lacked authority.
- Complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated.
- Declining to comply with an individual health care instruction or healthcare decision, per sections 4734 and 4736 (reasons of conscience)

Section 4741 provides that a person acting as agent under this part is not subject to civil or criminal liability or to discipline for unprofessional conduct or health care decisions made in good faith.

Section 4742 provides that a provider or institution that intentionally violates this part is subject to liability for damages of $2,500 or actual damages resulting from the violation, whichever is greater plus reasonable attorney fees. Subsection (b) provides that a person who intentionally falsifies, etc., an individual's advance health care directive without consent, is subject to liability for damages of ten thousand dollars or actual damage resulting from the action whichever is greater, plus attorney fees.

In sum, these provisions explicitly express public policy, and the trial court's concern based on *Bouvia* that allowing liability from the failure to comply an advance directive would "raise the possibility that life support would be prematurely withdrawn for fear of liability under the Elder Abuse Act" is baseless. Only providers such as Kerendi and CHA whose conduct cannot be characterized as in good faith or not in compliance with generally accepted health care standards, need fear liability.

Where the Legislature has acted, the trial court may not substitute its own view of "public policy." See *County of San Bernardino v. Creamery Co*. (1913) 103 Cal. App. 367, 373 ("Nevertheless, courts must be guided by the institutions charged with the formal responsibility of enacting laws to control that conduct. We may not encroach upon the lawmaking branch of government in the guise of public policy unless the challenged transaction is contrary to a statute or some well-established rule of law.")

D. All Defendants Had a Robust Caretaking Relationship with Plaintiff's Decedent Mr. Lipscomb

In addition, although not the subject of the defendants' attack on the Seventh Cause of Action, Plaintiff notes that all defendants were properly the subject of the Seventh Cause of Action because each had a robust caretaking relationship with Mr. Lipscomb. *Winn v. Pioneer Medical Group* (2016) 63 Cal. 4th

148, 165. As alleged, Kerendi acted as attending physician for Lipscomb and also as Medical Director of the CHA rehabilitation unit in which Lipscomb resided until his death.

And as set forth in opposition to Kerendi's motion for summary judgment (at App. 1040) Kerendi performed legally required services in the rehabilitation unit and was fulfilling the rehabilitation facility's obligation to provide physician services. App. 1051. See 22 Cal. Code Regs. §72307(a) (Each patient admitted to the skilled nursing facility shall be under the continuing supervision of a physician who evaluates the patient as needed and *at least* every 30 days). Further, as CHA's Medical Director had duties to the facility and to its residents including Lipscomb. App. 1041-2. See 22 Cal. Code Regs. §72305(a) (nursing facility shall have medical director who shall be responsible for standards, coordination, surveillance and planning for improvement of medical care) Kerendi's involvement was much more than the specialist physician's in *Winn*.

In conclusion the trial court erred in sustaining demurrers to the First through Seventh Causes of Action in the First Amended Complaint.

4. ON AUGUST 2, 2017 THE TRIAL COURT ERRED IN GRANTING SUMMARY ADJUDICATION TO DEFENDANT DR. KERENDI RE THE FIRST AMENDED COMPLAINT

On about February 16, 2017, Kerendi filed a Notice of Motion for Summary Judgment or in the alternative, for

Summary Adjudication, with supporting papers. App. 139; 169; 183-391. The motion for summary judgment/adjudication – like CHA's demurrer- was based on the statute of limitations (C.C.P. §340.5) and on the assertion that a plaintiff in a medical injury case can only plead professional negligence. Therefore, according to Kerendi, §340.5 barred Ms. Melton's intentional tort claims including her claims of Elder Abuse, fraud, battery inflection of emotional distress and statutory violations (Bus. & Prof. Code §17200 and Health & Safety Code §1430(b)).

Additionally, Kerendi also moved for summary adjudication on the ground that the Uniform Health care Decisions Act (particularly Probate Code §4741) provided complete immunity to Kerendi. Further, Kerendi's motion asserted that the Second and Third Causes of Action lacked proof of essential elements.

In addition, Kerendi asserted that the Fifth and Sixth Causes of Action for Emotional Distress were legally barred. A review of Kerendi's memorandum of points and authorities in support of his motion for summary judgment discloses that Kerendi also contended that Plaintiff's Elder Abuse claims were not tenable (App. 161).

On April 12, 2017, the trial court granted Plaintiff's application to continue the hearing on Kerendi's motion for summary judgment and set the hearing for July 13, 2017. App. 663-664.

Plaintiff filed her memo in opposition to Kerendi's motion for summary judgment with supporting papers. App. 1026; 1047.

Kerendi filed papers in Reply to Plaintiff's opposition to his motion for summary judgment, etc. App. 1063; 1114.

The court's ruling on Kerendi's motion for summary judgment, etc. On August 2, 2017, the court ruled on matters taken under submission on August 1, as follows: The motion for summary adjudication was granted as to the First, Second, Third, Fourth, Fifth, Sixth and Ninth Causes of action. As to Issue 7 and 8, the court treated the motion as one for judgment on the pleadings and granted that motion without leave to amend. App. 1121, 1122. The court found that Plaintiff's action was, for the majority of its causes of action, barred by the statute of limitations. App. 1123-1133. As to the Seventh and Eighth Causes of action for elder abuse, the court found that the alleged misconduct did not constitute "abuse of an elder or dependent adult" under Welf. & Inst. Code §15610.07, and therefore did not constitute elder abuse as a matter of law. App. 1133-1135. As set forth above, however, §15610.07 is not incorporated in, nor applicable to a claim under Welfare & Institutions Code §15657. Finally, the court also granted summary adjudication as to the Ninth Cause of Action under Health & Safety Code §1430(b). App. 1135. The court denied the motion for summary adjudication as to the Tenth Cause of Action. App. 1136.

This order addressed allegations in Plaintiff's First Amended Complaint even though Plaintiff had by this time filed a Second Amended Complaint following the court's order sustaining demurrers, etc., re the First Amended Complaint.

Melton has addressed each of these issues in the prior section of this brief.

5. THE TRIAL COURT'S ORDER DATED AUGUST 2, 2017 GRANTING THE COURT'S OWN MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE FIRST AND SECOND AMENDED COMPLAINTS, WITHOUT LEAVE TO AMEND AS TO THE SEVENTH CAUSE OF ACTION WAS ERROR

Kerendi's first motion for summary judgment or adjudication culminated in the court's order at App. 1122. There, at App. 1125, the trial court applied Kerendi's first motion for summary judgment (addressed to the First Amended Complaint), to the Second Amended Complaint:

> "Although the instant motion for summary judgment was filed on February 17, 2017, and was directed to the first amended complaint [fn], because the issues raised would also apply to the second amended complaint subsequently filed on Mary 8, 2017, the Court will apply the motion for summary judgment as to the second amended complaint." App. 1125.

The trial court granted Kerendi's motion for summary adjudication as to the First through Sixth Causes of Action based on the statute of limitations. App. 1125-1129. This issue has been addressed above.

6. DESERT HEALTHCARE DIST. V. PACIFICARE FHP, INC. HAS NO RELEVANCE TO PLAINTIFF'S ACTION

Further, Plaintiff observes that trial court's order at App. 1128 included its finding that to inquire into Defendant's motive in extending Mr. Lipscomb's life would be to "pull the court deep into the thicket of healthcare finance industry" (citing *Desert Healthcare Dist. v. PacifiCare FHP, Inc*. (2001) 94 Cal. App. 4th 781, 796). This finding is plainly ridiculous. The trier of fact in this case would only need to determine whether or not the defendants' motive, was, as alleged, i.e., to keep Mr. Lipscomb alive until his Medicare benefit was exhausted.

7. THE TRIAL COURT AGAIN ERRED IN FINDING THAT A CIVIL ACTION UNDER WELF. & INST. CODE §15657 REQUIRED PROOF OF "ABUSE OF AN ELDER"

Having granted summary adjudication as to the first through sixth causes of action, the court denied Kerendi's motion for summary adjudication as to the seventh cause of action (elder abuse). App. 1134; 1136. In the court order at App. 1136, the court seems to imply that a triable issue of fact exists, precluding summary adjudication as to the Seventh Cause of Action: "For the reasons discussed above re Issue No. 7, a triable issue of material fact exists as to the applicability of Probate Code §4740 immunity, which preclude [sic] summary adjudication of this issue."

Nonetheless, the trial court concluded that it would grant its own motion for judgment on the pleadings as to the elder abuse claims based on its earlier findings that Plaintiff's "allegations in this action cannot constitute 'elder abuse,' as a matter of law." The earlier findings related to the failure of the allegations to allege "abuse of an elder or dependent adult." Welf. & Inst. Code §15610.07.

But in her Seventh Cause of Action, Plaintiff alleged that Mr. Lipscomb was an elder, that he was in the care and custody of Kerendi and the skilled nursing facility operated by the CHA defendants (the Chalet) and which Kerendi served as its Medical Director, that Mr. Lipscomb was denied appropriate care, and that in that denial the defendants acted intentionally, motivated by the financial incentive of exhausting Mr. Lipscomb's Medicare benefit. Plaintiff alleged that the defendants acted with oppression, fraud or malice. That is sufficient and any attack on the pleading of elder abuse in the Seventh Cause of Action should have been rejected. Welf. & Inst. Code §15657.

8. THE TRIAL COURT ERRED IN REFUSING TO REVOKE ITS PRIOR ORDER GRANTING ITS OWN MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SEVENTH CAUSE OF ACTION FOR ELDER ABUSE

On December 28, 2017 Plaintiff had filed her motion for reconsideration, etc., of the trial court's order dated August 2, 2017 (App. 1122) and for a different order rescinding and

changing its order of that date. App. 1231. The basis for the motion for reconsideration was this Appellate Court's Alternative Writ issued in this case, explaining that the proper statute of limitations in this action was not C.C.P. §340.5, but instead the two-year statute at C.C.P. §335.1, as to Plaintiff's First through Eighth Causes of Action and this Court's finding that the Seventh Cause of Action for Elder Abuse was sufficiently pleaded. On or about April 18, 2018, Kerendi filed opposition to Plaintiff's motion for reconsideration, etc., App. 2117. Plaintiff filed her Reply memorandum on April 24, 2018. App. 2193.

At the hearing on May 1, 2018, the trial court directed further briefing. App. 2214-2216. The parties complied. App. 2217 (Kerendi's further memorandum); 2261 (Melton's further memo). On June 7, 2018, prior to the scheduled hearing on Plaintiff's motion for reconsideration, the trial court issued its order reconsidering its order of August 1, 2017. Upon reconsideration, the trial court reversed its earlier ruling granting summary adjudication as to the First, Second, Third, Fourth, Fifth, Sixth and Tenth Causes of action. App. 2503. The trial court affirmed its earlier ruling granting its own motion for judgment on the pleadings regarding The Seventh, Eighth and Ninth causes of action, without leave to amend. Accordingly, this appeal is in part addressed to the appropriateness of the trial court's order granting summary adjudication as to the Seventh, Cause of Action as stated in both the First and Second Amended Complaint.

Simply because this action is not barred by C.C.P. §340.5 and because the First through Seventh Causes of Action are sufficiently pleaded to withstand demurrer or motion for judgment on the pleadings, the First through Seventh Causes of Action should be reinstated and the trial court's judgment of nonsuit as to defendant Kerendi should be reversed.

9. THE TRIAL SUSTAINED CHA'S DEMURRER TO THE SECOND AMENDED COMPLAINT BUT REVERSED ITS RULING FOLLOWING THIS COURT'S ALTERNATIVE WRIT, AND THEN SUBSEQUENTLY AND ERRONEOUSLY GRANTED ITS OWN MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SECOND AMENDED COMPLAINT ON JULY 3, 2018

Plaintiff filed her Second Amended Complaint on May 8, 2017. App. 675. Plaintiff included a Seventh Cause of Action for Elder Abuse as to Kerendi only, given – and in respect to -- the trial court's order sustaining CHA's demurrer to this Cause of Action without leave to amend. App. 710.

CHA filed their demurrer to the Second Amended Complaint (App. 729; 732). CHA argued:

- The First Cause of Action was duplicative of the elder abuse action which the court had previously dismissed and there is no cause of action for Recklessness.

- Even if there were a cause of action for Recklessness, the Second Amended Complaint did not contain allegations to support that the defendants were engaged in reckless behavior or that Defendants harmed the decedent. Factual allegations in that by providing life support against decedent's wishes that he was harmed, are said to be insufficient or improper.
- Plaintiff's Second and Third Causes of Action for Fraudulent Concealment and misrepresentation fail because Plaintiff failed to plead facts to satisfy the elements of detrimental and justifiable reliance and resulting injury. CHA acknowledged Plaintiff's allegation that he was misled and as a result, failed to take legal or other action to compel the withdrawal of the ventilator so that he might be allowed to die. Defendants argue this allegation is nonsensical given Plaintiff's other allegations that decedent was not capable of making healthcare decisions. (Of course, decedent was misled through his agent, his wife.)
- CHA defendants also filed their motion to strike re the Second Amended Complaint. App. 751 with supporting papers at 754; 763; 770; 952.

Opposition to CHA'S demurrer and motion to strike. Plaintiff filed opposition to CHA's demurrer to the Second Amended Complaint. (App. 956) and opposition to CHA defendants' Motion to Strike. App. 982.

CHA's Reply to Plaintiff's opposition to demurrer and motion to strike re Second Amended Complaint is at App. 988 and App. 1004.

The trial court's June 17, 2017 ruling on CHA's demurrer and motion to strike re the Second Amended Complaint. The court heard CHA's demurrer and motion to strike on July 17, 2017 and sustained CHA demurrers to the First through Ninth Causes of Action (with the Seventh Cause of Action stricken), without leave to amend. In response to CHA's motion to strike the court denied the motion as to ¶183, and granted the motion to strike the prayer for general and punitive damages without leave to amend. App. 1019; 1022. Kerendi gave notice of entry of the order re its demurrer and motion to strike re the Second Amended Complaint. App. 1059.

Plaintiff sought review by the court of appeal in regard to the orders of the trial court on CHA's demurrer in Case No. B284199 (Patricia Melton v. Superior Court (CHA Health Systems, et al. Plaintiff filed her Petition for review of the trial court's order in CHA's favor on demurrer (App. 1138) and the Court of Appeal issued its Alternative Writ. App. 1217.

On October 21, 2017, the trial court reversed its order sustaining CHA's demurrer in accord with alterative writ. App. 1225.

Undeterred, on March 30, 2018, CHA Hollywood Medical Center, L.P.'s motion for summary judgment, etc., together with supporting papers, was filed. App. 1257; 1267; 1292; 1334; 1339;

1625; 1710; 1714; 1716; 1718. The motion was based on a number of grounds including (again) the statute of limitations.

On April 2, 2018, CHA Health Systems, Inc., filed a similar motion for summary judgment etc. together with supporting papers. App. 1720; 1730; 1755; 1800; 1805; 2102; 2106; 2111; 2113; 2115.

Plaintiff filed combined opposition to the motions by CHA Hollywood Medical Center, L.P. and CHA Health Systems, Inc., for summary judgment, etc. App. 2269; 2339; 2413; 2427; 2495.

CHA Hollywood Medical Center, L.P., filed its Reply. App. 2508. CHA Health Systems files its Reply. App. 2519. The CHA defendants jointly filed evidentiary objections. App. 2530.

The trial court's ruling on CHA Hollywood Medical Center's motion for summary judgment or summary adjudication was based on findings that recoverable compensatory damages was a predicate for the award of punitive damages, and because plaintiff had failed to allege change of position or reliance in her fraud causes of action.

On July 3, 2018, the Court denied the motion for summary adjudication as to the First, Second, Third, Fifth, Sixth, and Seventh causes of action but granted the motion for summary adjudication as to the tenth cause of action. **However, the court treated the motion for summary adjudication as to the First, Second, Third, [omitting the Fourth] Fifth, Sixth, Seventh Causes of Action as a motion for judgment on the pleadings, and granted that motion without leave to amend**.

A. Punitive Damages Are Not Dependent on the Recovery of Compensatory Damages

The new basis for this ruling was that in the absence of recoverable general damages there could be no award of punitive damages, and therefore without any recoverable damages, there could be no viable action. This was error. That ruling quixotically left only the Fourth Cause of Action for Battery intact (since if the other causes of action were not valid because of the operation of Code of Civil Procedure §377.34 barring general damages upon death, the same would apply to the Fourth Cause of Action for Battery). App. 2543-4.

The trial court's ruling on the motion for summary judgment/adjudication by CHA Health Systems, Inc. The Court made the identical ruling with respect to CHA Health Systems, Inc. as it had in respect to CHA Hollywood Medical Center's motion. App. 2543-4. Then, commencing at the bottom of App. 2547 the trial court applied its own rule (without citation to authority) that without recoverable compensatory damages the Plaintiff is not entitled to punitive damages. Ironically in its minute order the trial court quoted from *Romo v. Ford Motor Co.* (2002) 99 Cal. App. 4th 1115 (, cert. granted, judgment vacated, 538 U.S. 1028, 123 S. Ct. 2072, 155 L. Ed. 2d 1056 (2003), and disapproved of by *People v. Ault*, 33 Cal. 4th 1250 (2004)) for the proposition that "the rule of proportionality must focus on the relationship of punitive damages to the harm to the deceased victim, not merely to compensatory damages awarded." See App. 2548. *State Farm Mutual Auto Ins. Co. v. Campbell* (2003) 538

U.S. 408, 422 is to the same effect (punitive damages must bear relation to harm).

And, since each of plaintiff's First through Sixth Causes of Action contain the elements necessary to recover the enhanced remedies in the Elder Abuse Act (Welf. & Inst. Code §15657), which Plaintiff pleaded on the assumption that the Elder Abuse Act provides for enhanced *remedies* available in such causes of action the trial court's perception that no recoverable compensatory damages were available in the First through Sixth Causes of Action would be simply incorrect. See discussion of the split of authority as to whether civil Elder Abuse actions based on Welf. & Inst. Code §15657 are remedial or whether the Elder Abuse Act establishes a new cause of action for neglect or physical abuse, at Balisok, Elder Abuse Litigation, ¶9:11 (The Rutter Group). Section 15657 provides for enhanced remedies include general damages notwithstanding the death of the victim.

The trial court also cited *Kizer v. County of San Mateo* (1991) 53 Cal. 3d 139, 147 for the proposition that actual damages are an absolute predicate for an award of punitive damages. App. 2549-2551. *Kizer* is plainly inapposite, as it discusses the question whether a county operating a skilled nursing facility is subject to penalties in the Health & Safety Code. Even so, *Kizer* quotes from *Fields v. Napa Milling Co* (1958) 164 Cal. App. 2d 442, 447-448 for the proposition that punitive damages requires *actual injury,* not compensable damages.

B. Plaintiff Sufficiently Alleged Reliance or Change of Position; or Her Second and Third Causes of Action Could Be Amended to Allege Reliance

As to the second and third causes of action, the trial court found that Plaintiff did not plead how she would behaved differently had she known the allegedly concealed information and how she changed her position in reliance on the misrepresentations. App. 2550. However, at ¶43 of the Second Amended Complaint (App. 688), Plaintiff alleged that Lipscomb was misled by the failure of disclosure and as a result, failed to take legal and other action to compel the withdrawal of the ventilator so that he might be allowed to die. Plaintiff believes this allegation in the Second Cause of Action is sufficient. If not, however, Plaintiff could amend the Second Cause of Action to state that through his agent Ms. Melton, Lipscomb was lulled into not firing Kerendi and hiring a physician of choice who would recognize his or her duty to follow Mr. Lipscomb's wishes as expressed through Ms. Melton. Mr. Lipscomb was entitled to select the physician of his choice at any time. See 22 Cal. Code Regs. §72303(a) "All persons admitted or accepted for care by the skilled nursing facility shall be under the care of a physician selected by the patient or patient's authorized representative.") See also, 42 C.F.R. §483.10(d) ("The resident has the right to choose his or her attending physician."), and the right to refuse treatment. See 22 Cal. Code Regs. §72527(a)(4).

Further, Defendants had a duty to inform Ms. Melton of her husband's right to discharge Dr. Kerendi and to hire a physician of her choice because that information was material to the decision to refuse further treatment. See 22 Cal. Code Regs. §72527(a)(5) (the right to receive all information that is material to an individual patient's decision concerning whether to accept or refuse any proposed treatment or procedure).

The same allegation re reliance and causation applies to the Third Cause of Action.

As to the Fourth Cause of Action for Battery, the trial court denied Defendant's motion. App. 2555. (The court would go on to grant its own motion for judgment on the pleadings on the morning of trial as to this Fourth and the remaining Tenth Cause of Action.)

As to the Fifth Cause of Action, the court again found that since there were no recoverable compensatory damages there could be no punitive damages. App. 2556.

Turning to the discussion of the Seventh Cause of Action, once again, the trial court found the pleadings deficient because the facts alleged do not constitute "abuse of an elder or a dependent adult" as defined at Welf. & Inst. Code §15610.07. This point was in the record before this Court in considering whether to issue an Alternative Writ. At that time this Court found the Seventh Cause of Action to be sufficiently alleged. Plaintiff should not have to face this repeated and unviable theory time and again.

Where compensatory damages are not available to the plaintiff the plaintiff is entitled to punitive damages in reasonable relationship to the injury or harm suffered by the plaintiff. *Romo v. Ford Motor Co.* (2003) 113 Cal. App. 4th 738, 761; *Gagnon v. Continental Cas. Co.* (1989) 211 Cal. App. 3d 1598, 1605; *State Farm Mutual Auto Ins. Co. v. Campbell*, *supra*, 538 U.S. at 422.

For these reasons, the trial court's ultimate nonsuit based on the pretrial orders of the trial court of causes of action number 1-3, 5, 7 and 10, should be reversed.

10. THE TRIAL COURT ERRED IN GRANTING. KERENDI'S SECOND MOTION FOR SUMMARY JUDGMENT

Kerendi filed a second motion for summary judgment on or about April 18, 2019. Kerendi's motion for summary judgment and supporting papers is at App. 2570; 2604; and 2671.

Plaintiff's opposition to Kerendi's Second MSJ. Plaintiff filed opposition to Kerendi's motion for summary judgment. See App. 2834; 2840; 2882; 2885.

Kerendi filed a reply to Plaintiff's opposition. Kerendi filed a Reply memo and evidentiary objections in response to Plaintiff's opposition. App. 3020; 3054.

The trial court's order on Kerendi's motion for summary judgment: The court's order is at App. 3063. The trial court denied Kerendi's motion for summary judgement, but granted Kerendi's alternative motion for summary adjudication as to the First, Second, Third, Fifth, and Sixth. The grounds for these

motions were the same as for the order granting CHA's motion for summary adjudication. See, e.g., App. 3068. That is, once again the trial court employed its own rule that without recoverable compensatory damages, no punitive damages could be recovered. Without any available remedy at law whatsoever, the cause of action itself could not survive. Plaintiff refers the court to the discussion of the merits of CHA's motion at pp. 49-52 above.

In addition the trial court granted Kerendi's motion for summary adjudication as to Plaintiff's claim of punitive damages against him. Since the only remaining viable claim against Kerendi was the Fourth Cause of Action for Battery, the court's explanation of its ruling focused on the availability of punitive damages for that claim. App. 3077-3078.

The motion was, like CHA's motion, denied as to the Fourth Cause of Action (Battery). The court treated the motion as the First, Second, Third and Sixth Causes of Action as a motion for judgment on the pleadings which it then granted without leave to amend. App. 3063. Even though Plaintiff's counsel called the court's attention to the ruling in *Gagnon v. Continental Cas. Co.* (1989) 211 Cal. App. 3d 1598 (actual awardable damages not necessary predicate for award of punitive damages) the trial court's decision granting its own motion for judgment on the pleadings with respect to the First through Third, and Sixth Causes of Action appears to be based on the absence of awardable compensatory damages given Lipscomb's death, citing C.C.P. §377.34.

Since a plaintiff may be entitled to punitive damages in relation to his or her injury or harm, even in the absence of recoverable general damages, each of the rulings respecting Kerendi's motion for summary adjudication (or the resulting order granting the court's own motion for judgment on the pleadings) is error and addressed in this appeal. And of course, the Seventh Cause of Action which was adequately stated, allowed for the recovery of general damages, notwithstanding death. Welf. & Inst. Code §15657.

11. THE TRIAL COURT ERRED IN GRANTING ITS OWN MOTION FOR JUDGMENT ON THE PLEADINGS RE THE REMAINING FOURTH AND TENTH CAUSES OF ACTION AND IN GRANTING DEFENDANTS' MOTION TO STRIKE GENERAL AND PUNITIVE DAMAGES

A. The Fourth Cause of Action for Battery Was Correctly Pleaded

The morning set for trial, after the court mandated Final Status Conference, after final trial preparation including expert witness discovery, the parties answered ready for trial. In response the court stated that during its just concluded vacation it had second thoughts about the viability of the Fourth Cause of Action and that since there were no recoverable damages, like its assassinated brethren, it too, should be dismissed.

This was error. Plaintiff's Fourth Cause of Action included allegations regarding each element of a claim for battery.

Second, it contained allegations of financially motivated conduct. Motive is evidence of intent. As such, the inference of intent stemming from motive is clearly established in California law. *People v. Smith* (2005) 37, Cal. 4th 733,741-742. A battery which is intentional may be a proper basis for a finding of "malice" under Civil Code §3294(c):

> "As used in this section, the following definitions shall apply:
>
> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."

As alleged, the intentional maintenance of Mr. Lipscomb's life on a mechanical ventilator in violation of Ms. Melton's instruction, in violation of their established duty including their duty to respect patient autonomy, and for the sake of their own profit well amounts to conduct described by the concept, "malice." Malice is defined at Civil Code §3294: "(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." The conduct alleged, i.e., deliberately refusing to comply with Plaintiff's request to discontinue treatment in the form of ventilator support, is conduct intended to cause injury,

supporting a finding of malice. Even without such intent Defendants' conduct amounted to "despicable conduct."

Defendants' conduct was "despicable" because placing their own interests in revenue and profit over their duty to Mr. Lipsomb and his established right to autonomy in determining what healthcare he would receive and especially in determining how he would live out his final days and how he would die, was "'base,' 'vile,' or 'contemptible.' (4 Oxford English Dict. (2d ed. 1989) p. 529.) As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, "malice" requires more than a "willful and conscious" disregard of the plaintiffs' interests. The additional component of "despicable conduct" must be found." [Citations.] *College Hosp. Inc. v. Superior Court* (1994) 8 Cal. 4th 704, 725, as modified (Nov. 23, 1994)

Therefore, Plaintiff was entitled to general damages as well as punitive damages on her First through Seventh Causes of Action and it was error for the trial court to strike Plaintiff's claims for general and punitive damages.

12. A CAUSE OF ACTION FOR ELDER ABUSE BASED ON PHYSICAL ABUSE IN THE FORM OF MEDICAL BATTERY IS PROPER

The trial court found that Plaintiff's allegation of "physical abuse" as part of her cause of action for Elder Abuse (Welf. & Inst. Code §15657) was invalid because "battery" as defined at Welf. & Inst. Code §15610.63 only refers to criminal battery at

Penal Code §242, and not to civil battery. Reporters Transcript, p. 605:21-606:7; 631:7-19. This distinction drawn by the trial court is without a difference.

Penal Code §242 defines criminal battery: "A battery is any willful and unlawful use of force or violence upon the person of another." The statutory definition of "battery" is substantially the same as the common law definition of battery. 17A Cal. Jur 3d Criminal Law: Crimes Against the Person §454.

In this case, the alleged battery was not the result of negligence or criminal negligence, but was an intended act that causes harm. The only intent required is to do the act which causes harm. See *James v. State of California* (2014) 229 Cal. App. 4th 130, 142 and *People v. Lara* (1996) 44 Cal. App. 4th 102, 107-108.

Therefore, there is no distinction between criminal and civil battery in this case.

13. CONCLUSION

As to the First through Seventh Causes of Action in the Second Amended Complaint, each was properly pleaded, and none were subject to the one-year statute of limitations at C.C.P. §340.5. The trial court's rulings, each were erroneous and the grounds seized upon by the trial court were plainly inapplicable and or erroneous. For these reasons, the nonsuit entered in favor of the CHA defendants and Kerendi should be reversed. The trial court should be instructed to reinstate Plaintiff's First through Seventh Causes of Action, and to reinstate Plaintiff's allegations

that punitive damages should be assessed against all defendants. Plaintiff allowed to proceed on her First through Seventh Causes of Action, as pleaded.

Respectfully Submitted,

BALISOK & ASSOCIATES, INC.

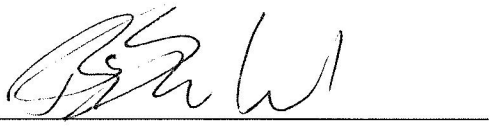
By:_____
RUSSELL S. BALISOK,
Attorneys for Appellant

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 11,620 words, as counted by the Microsoft Word 2013, word processing program used to generate this brief.

Dated: June 16, 2020



RUSSELL S. BALISOK

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 330 North Brand Boulevard, Suite 702, Glendale, California 91203.

On **June 16, 2020** I served the document described as **APPELLANT'S OPENING BRIEF** on all interested parties by sending a true copy addressed to each through TrueFiling, the electronic filing portal of the California Court of Appeal, pursuant to Local Rules, which will send notification of such filing to the email addresses denoted on the case's Electronic Service List.

Scott D. Buchholz, Esq. Evan A. Kalooky, Esq. Dummit, Buckholz & Trapp 101 W. Broadway, Ste. 1400 San Diego CA 92101 (619) 231-7738 (619) 231-0886 (fax) Scott.buchholz@dbt.law evan.kalooky@dbt.law	Counsel for Defendants/Respondents: CHA Health Systems, Inc. and CHA Hollywood Medical Center, L.P.
George E. Nowotny, Esq. Lewis, Brisbois, Bisgaard & Smith, LLP 633 W. 5th St., Ste. 4000 Los Angeles CA 90071 (213) 250-1800 (213) 250-7900 (fax) George.Nowotny@lewisbrisbois.com	Counsel for Defendants/Respondents: CHA Health Systems, Inc. and CHA Hollywood Medical Center, L.P.

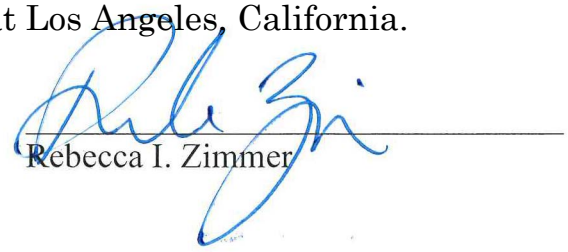
Jeffry A. Miller, Esq. Lann G. McIntyre, Esq. Lewis, Brisbois, Bisgaard & Smith, LLP 701 B St., Suite 1900 San Diego, CA 92101 (619) 233-1006 (619) 233-8627 (fax) Jeff.Miller@lewisbrisbois.com Lann.McIntyre@lewisbrisbois.com	Counsel for Defendant CHA Health Systems, Inc. and CHA Hollywood Medical Center, L.P.
Kenneth R. Pedroza, Esq. Matthew S. Levinson, Esq. Cole Pedroza LLP 2295 Huntington Drive San Marino CA 91108 (626) 431-2787 (626) 431-2788 (fax) kpedroza@colepedroza.com mlevinson@colepedroza.com	Counsel for Defendant/Respondent Farough Kerendi, M.D.

As the below recipients are not able to be served electronically via TrueFiling, I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed below and placed the envelope(s) for collection and mailing, following our firm's ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with post-age fully prepaid.

Hon. Randolph M. Hammock Stanley Mosk Courthouse Dept. 47 111 No. Hill St. Los Angeles, CA 90012	Trial Court

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 16, 2020** at Los Angeles, California.



Rebecca I. Zimmer