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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL DIVISION

ESTATE OF ELIZABETH ALEXANDER, and CLENTON ALEXANDER, HEIR,

Plaintiffs,

v.

SCRIPPS MEMORIAL HOSPITAL LA JOLLA, a California corporation; DONALD RITT, an individual; GUSTAVO LUGO, an individual; CHRISTOPHER WIESNER, an individual; PREETI MEHTA, an individual; MARIE SHIEH, an individual; SHAWN EVANS, an individual; MARIE SHIEH, an individual; AYANA BOYD KING, an individual; ERNEST PUND, an individual; CHARLES ETTARI, an individual; KAREN KNIGHT, an individual; and DOES 1 through 15, inclusive,

Defendants.

CASE NO. 37-2014-00016257-CU-MM-CTL

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION BY SCRIPPS DEFENDANTS

IMAGED FILE

DATE:	June 3, 2016
TIME:	11 a.m.
DEPT:	C-70
IC JUDGE:	Hon. Randa Trapp
CASE FILED:	May 20, 2014
TRIAL DATE:	September 9, 2016

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **June 3, 2016, at 11:00 a.m.**, or as soon thereafter as the matter can be heard, in Department C-70 of the above-entitled court, located at 330 West Broadway, San Diego, California, defendants SCRIPPS HEALTH DBA SCRIPPS MEMORIAL HOSPITAL LA JOLLA; SHAWN EVANS, M.D.; AYANA BOYD KING, D.O.; ERNEST PUND, M.D.; CHARLES

V. ETTARI, M.D.; and KAREN KNIGHT (the "Scripps Defendants") will and do hereby move this Court, pursuant to California Code of Civil Procedure section 437c, for summary judgment or, in the alternative, summary adjudication in their favor and against plaintiffs ESTATE OF ELIZABETH ALEXANDER, CLENTON ALEXANDER, JACQUELYN McDERMET, and CHRISTOPHER ALEXANDER ("Plaintiffs").

This motion will be made upon the grounds that:

(i) Summary adjudication of Plaintiffs' seventh cause of action for professional negligence and eighth cause of action for wrongful death are appropriately granted as Plaintiffs cannot establish essential elements of negligence;

(ii) Drs. Evans, Pund, Ettari, and Boyd King, in their roles as members of the Appropriate Care Committee, are entitled to summary judgment as to the entirety of the fourth amended complaint ("FAC") for want of an applicable duty of care;

(iii) Summary adjudication is also appropriately granted as to Plaintiffs' five causes of action under the Probate Code as Plaintiffs have insufficient evidence to establish that the Scripps Defendants violated any of the Probate Code sections relied upon in the FAC;

(iv) The Scripps Defendants are entitled to summary adjudication as to each of Plaintiffs' five causes of action under the Probate Code as they are afforded immunity from liability pursuant to Probate Code section 4740(d);

(v) There are no facts to support Plaintiffs' claim of negligent misrepresentation as to the Scripps Defendants; and,

(vi) Plaintiffs cannot establish a claim of negligent infliction of emotional distress as bystanders based upon their own testimony that they were not contemporaneously aware of the alleged negligent care being rendered and that the alleged care was causing the patient harm.

This motion will be based upon this notice, the memorandum filed in support thereof, the separate statement of undisputed material facts, the notice of lodgment, the declaration of Eric Roeland, M.D., and exhibits attached thereto, the evidence filed in support of this motion, and the exhibits attached to the notice of lodgment, all concurrently filed herewith, on all pleadings and papers on file herein, and upon such further oral and/or documentary evidence as may presented at or before the

hearing.

The Court follows the tentative ruling procedure of the California Rules of Court. Tentative rulings are posted on the Internet at *www.sdcourt.ca.gov* and are available by telephone at 619.450.7381 by 4:00 p.m. the day preceding oral argument.

DATED: March 15, 2016

Respectfully submitted,

HIGGS FLETCHER & MACK LLP

By: _____

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL DIVISION

ESTATE OF ELIZABETH ALEXANDER, and CLENTON ALEXANDER, HEIR,

Plaintiffs,

v.

SCRIPPS MEMORIAL HOSPITAL LA JOLLA, a California corporation; DONALD RITT, an individual; GUSTAVO LUGO, an individual; CHRISTOPHER WIESNER, an individual; PREETI MEHTA, an individual; MARIE SHIEH, an individual; SHAWN EVANS, an individual; MARIE SHIEH, an individual; AYANA BOYD KING, an individual; ERNEST PUND, an individual; CHARLES ETTARI, an individual; KAREN KNIGHT, an individual; and DOES 1 through 15, inclusive,

Defendants.

CASE NO. 37-2014-00016257-CU-MM-CTL

THE SCRIPPS DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION

IMAGED FILE

DATE:	June 3, 2016
TIME:	11:00 a.m.
DEPT:	C-70
IC JUDGE:	Hon. Randa Trapp
CASE FILED:	May 20, 2014
TRIAL DATE:	September 9, 2016

Defendants SCRIPPS HEALTH DBA SCRIPPS MEMORIAL HOSPITAL LA JOLLA ("Scripps"); SHAWN EVANS, M.D. ("Dr. Evans"); AYANA BOYD KING, D.O. ("Dr. Boyd King"); ERNEST PUND, M.D. ("Dr. Pund"); CHARLES V. ETTARI, M.D. ("Dr. Ettari"); and KAREN KNIGHT, R.N. ("Ms. Knight") (collectively, the "Scripps Defendants"), submit the following memorandum in support of their motion for summary judgment and/or summary adjudication.

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I. INTRODUCTION

In February 2013, Elizabeth Alexander ("Ms. Alexander") was 70 years old and suffering from advanced pancreatic cancer. She was no longer able to eat and was emaciated, dehydrated, and in increasing pain. Her condition continued to worsen and she was transferred to Scripps. The physicians at Scripps determined Ms. Alexander's death was imminent and recommended she receive palliative hospice care. Ms. Alexander's family was advised of her dire condition, but insisted that the physicians administer all forms of resuscitation and life-sustaining treatment. Scripps' Appropriate Care Committee (the "Committee") was convened to help resolve the incongruence between the physicians' recommendations for optimal palliation and the family's wishes for full life-support.

After reviewing the patient's history and current clinical condition, the Committee was of the unanimous opinion that it would be unethical for the physicians to provide Ms. Alexander with care which would serve no benefit and was more likely to increase her suffering, including: chemotherapy, intubation, cardiopulmonary resuscitation ("CPR"), and other forms of resuscitation. The family, upon being advised of these recommendations, requested that Ms. Alexander be transferred to another facility. Ms. Alexander, however, passed away peacefully with her daughter by her bedside before transfer could be effectuated.

Plaintiffs ESTATE OF ELIZABETH ALEXANDER, CLENTON ALEXANDER, JACQUELYN MCDERMET, and CHRISTOPHER ALEXANDER (collectively, "Plaintiffs") assert nine causes of action, for: alleged violations of five sections of California's Probate Code, professional negligence, wrongful death, negligent misrepresentation, and negligent infliction of emotional distress.

The Scripps Defendants move for summary judgment or, in the alternative, adjudication on the following basis: (i) Plaintiffs cannot establish essential elements of negligence for their causes of action for professional negligence/wrongful death; (ii) Drs. Evans, Pund, Ettari, and Boyd King, in their roles as members of the Committee, are entitled to summary judgment for want of an applicable duty of care; (iii) Plaintiffs have insufficient evidence to establish that the Scripps Defendants violated any sections of the Probate Code; (iv) The Scripps Defendants are entitled to immunity pursuant to Probate Code section 4740(d); (v) There are no facts to support a claim of negligent misrepresentation; and, (vi) Plaintiffs' claim of NIED fails as they were not contemporaneously aware of the alleged negligent care and its causative effect.

II. FACTUAL AND PROCEDURAL BACKGROUND

The recitation of facts is as follows, with citations to the Separate Statement ("SS") filed herewith.

A. Pertinent Background Information

In May of 2012, Ms. Alexander presented to the Emergency Department at Loma Linda University Medical Center with chief complaints of weaknesses, fatigue, and a recent 20-pound weight loss. (SS1) A CT scan revealed multiple liver lesions; a dilated pancreatic duct; a well-circumscribed nodule in the pancreas at the junction of the body and tail; and, possible metastasis to the vertebral body at T10 and to the right femur. (SS2) It was suspected that Ms. Alexander had advanced pancreatic ductal carcinoma and that her long-term prognosis was poor. (SS3-SS4) By June 6, 2012, her treating oncologist explained to Ms. Alexander that she had stage IV pancreatic adenocarcinoma, for which there was no cure. (SS5) She was offered palliative chemotherapy, which she elected to begin. (SS6-SS7)

When Ms. Alexander was seen at UCLA for a second opinion in 2012, she had several new masses throughout the right and left lobes of her liver. (SS8-SS9) A repeat bone scan was suggestive of further metastatic disease in her ribs, spine, sacrum, and hip. (SS10) Biopsies suggested a poorly differentiated neuroendocrine carcinoma. (SS11) Her cancer was noted to be very aggressive. (SS12) Palliative chemotherapy was changed to a more aggressive combination; but, the patient was not able to tolerate the side effects. (SS13)

Ms. Alexander was readmitted to Loma Linda Medical Center in mid-2012 for uncontrolled pain in her right hip and leg. (SS14) Radiology studies confirmed her cancer had spread into the femoral bones of both legs. (SS15) By 2012, a repeat CT scan revealed "innumerable lesions" in the liver and an increasing mass in the pancreas. (SS16) Further consultation was thereafter made at UC Irvine, where Ms. Alexander was advised that she was not a surgical candidate. (SS17) It was noted that she had chemotherapy-refractory disease, with disease progression in her bones despite receiving aggressive second-line chemotherapy. (SS18)

On January 21, 2013, arrangements were made for Ms. Alexander to be admitted to Emeritus Skilled Nursing Facility of Carmel Valley ("Emeritus"), as she was no longer to care for herself. (SS19) As of that time, Ms. Alexander had undergone tumor genetic testing, received palliative radiation to her spine, and received a single dose of third-line chemotherapy, which was not well tolerated in the setting of declining

performance status. (SS20) She had met the qualifying criteria for hospice care, which had been started, but was subsequently discontinued by her son, Christopher Alexander, on the basis of wanting to seek more aggressive care. (SS21-SS22) The same day of Ms. Alexander's admission to Emeritus, her son Christopher Alexander completed a Physician Orders for Life Sustaining Treatment ("POLST") form, in which he indicated that he wanted his mother to be "full code," including CPR and all other life-sustaining treatments. (SS23)

On February 17, 2013, the Medical Director of Emeritus, Aboo Nasar, M.D., was asked to evaluate the patient as she had exhibited a further decline in her health since the time of her admission three weeks earlier. (SS24) Despite receiving tube feedings, Dr. Nasar noted that Ms. Alexander was extremely nutritionally compromised, cachectic (physical wasting) and weak. (SS25) Dr. Nasar felt that any efforts to revive the patient would be dismal, ineffective, and would cause her additional suffering. (SS26) Dr. Nasar discussed his opinions with Christopher Alexander, who refused to change the patient's code status to Do Not Resuscitate ("DNR"). (SS27) Later that day, Dr. Nasar issued an order for Ms. Alexander to be transferred to Scripps for further evaluation. (SS28) Dr. Nasar did not expect the patient to come back to Emeritus as he felt her death was imminent. (SS29)

B. Care and Treatment of Ms. Alexander at Scripps Memorial Hospital

Ms. Alexander was transferred to Scripps on February 18, 2013, where she was seen by Christopher Wiesner, M.D. (SS30) Dr. Wiesner documented that, per Christopher Alexander's report, the patient wanted "everything done" to save or prolong her life. A copy of the POLST as completed at Emeritus was provided and maintained by Scripps. (SS31) On exam, Dr. Wiesner noted that the patient was awake, but minimally responsive. (SS32) She had an abnormal EKG showing sinus tachycardia and she had abnormal lab values. (SS33) The patient was given hydromorphone for pain control and saline for hydration. (SS34) She was admitted to the hospital based on her uncontrolled pain and the family's request for further evaluation by an oncologist. (SS35) The plan was for Ms. Alexander to be seen by an oncologist and a palliative care physician. (SS36) Dr. Wiesner was hopeful that these doctors would help educate the patient's family to the fact that the further medical interventions they were requesting were no longer beneficial given the patient's advanced cancer. (SS37) Dr. Wiesner's recommendation to the family was to ensure the patient was as comfortable as possible. (SS38)

The patient was admitted to Scripps under the orders of hospitalist Gustavo Lugo, M.D. (SS39) Dr. Lugo indicated that it was very difficult to get any history from the patient because she was "hardly verbal," which he thought was likely because of encephalopathy (altered mental status or decline in the functioning of the brain). (SS40-SS42) Dr. Lugo did not think the patient was a candidate for any disease-directed therapies, but rather the focus of treatment should be on optimal palliation. (SS43) His note provided detailed information about the patient's physical presentation, including her decubitus ulcers (bed sores). (SS44) His plan was for Donald Ritt, M.D. ("Dr. Ritt"), to see the patient as a palliative care consultant and Marie Shieh, M.D. ("Dr. Shieh"), to see the patient for an oncology consultation. (SS45) Dr. Lugo suggested the Committee may also be needed. (SS46) Overall, Dr. Lugo felt the patient's prognosis was dismal. (SS47) He strongly urged the patient's son against prolonging her continued suffering with medically ineffective measures. (SS48) Dr. Lugo's admission orders were to ensure optimal palliation (maximal comfort). (SS49) He recommended she not be provided food by mouth given her inability to swallow and high risk for aspiration. (SS50) The patient was to be provided oxygen and medications for pain, anxiety, and nausea. He noted that her code status was "to be determined." (SS51)

When Dr. Ritt saw the patient, he described Ms. Alexander as being cachectic (wasted) and in discomfort. (SS52-SS53) She could not speak well, but could nod her head in an effort to communicate. (SS54) Dr. Ritt felt, just by looking at the patient, that her chance of surviving more than a few days was very low. (SS55) Dr. Ritt detailed some general discussions he had with the patient's son. (SS56) He explained that this was typically a situation where a patient would receive comfort care only, including the use of morphine, but "her son was very difficult." (SS57) Dr. Ritt disagreed with the patient having received placement of a feeding tube. (SS58) He felt the existence of the feeding tube made it difficult to talk Christopher Alexander about the fact that aggressive care should not be continued. (SS59) Dr. Ritt felt strongly the patient should not undergo aggressive resuscitation, cardiac compression, and/or intubation. (SS60) He also noted she was no longer a candidate for chemotherapy. (SS61) Dr. Ritt felt the problem now was "managing the patient and keeping her comfortable while dealing with the son." (SS62)

Dr. Ritt believed that the care directives expressed by the patient's son were inappropriate and that he was obligated to do what was in the patient's best interests, which would include no CPR, the use of morphine, very little in the way of IV fluids, and basic comfort care. (SS63) Dr. Ritt discussed the situation

with Dr. Evans, who was Chief of Staff for the hospital. (SS64) It was determined that the Committee would likely need to be called the following morning to help resolve the conflict between the son's wishes and what Dr. Ritt, and others, felt was medically appropriate for the patient. (SS65)

The patient was also seen by Dr. Shieh for an oncology evaluation. (SS66) Dr. Shieh noted the patient had experienced a progressive decline despite having received chemotherapy and radiation. (SS67-SS68) Dr. Shieh talked with Christopher Alexander, who seemed to understand how sick his mother was, but he insisted that he wanted to continue with any possible therapies. (SS69) Dr. Shieh, however, explained there were no further therapies which could be provided to Ms. Alexander safely and her recommendation was for hospice and palliative therapy. (SS70-SS71)

Dr. Ritt discussed with Christopher Alexander that the medical providers would not provide non-beneficial or ineffective medical care to Ms. Alexander. (SS72) He explained that such treatment would cause his mother more harm and suffering than benefit. (SS73) Dr. Ritt explained this included CPR and other similar measures, such as aggressive resuscitation, cardiac compression, and/or intubation. (SS74) Dr. Ritt executed an order for intravenous (IV) medications and tube feedings, as well as an order that the patient was to be DNR. (SS75-SS76)

On February 19, 2013, the patient was provided a fentanyl patch for her pain. (SS77) It was also ordered that the patient be transferred back to the skilled nursing facility as soon as possible. (SS78) However, later that day, Dr. Ritt executed an order to hold the patient's transfer based on information from case manager Ms. Knight, that Emeritus could not accept the patient back at that time. (SS79)

On February 20, 2013, the Committee met to discuss the patient's situation and the incongruence between the family's wishes for the patient to be full code and the medical providers' recommendations that such treatment would be medically ineffective and may cause harm. (SS80) The members of the Committee for that day were Dr. Evans (emergency medicine), Dr. Pund (cardiology), Dr. Ettari (psychiatry), Dr. Boyd King (critical care/pulmonology), and treating physician Dr. Lugo (hospitalist). (SS81) The Appropriate Care Committee reviewed the patient's history and clinical presentation. (SS82) Dr. Evans, who prepared the note for the Committee, indicated that the patient had continued to deteriorate in the hospital since her admission. (SS83) She had received IV fluids and pain medication. (SS84) She remained unable to eat. (SS85) The Committee was aware that oncologist Dr. Shieh had evaluated the

patient and determined that further chemotherapy or radiation could not be performed safely. (SS86) The Committee was also aware Drs. Wiesner, Shieh, Ritt, and Lugo all recommended against the patient receiving ICU level of care, CPR, and/or advanced life-support measures given Ms. Alexander's limited functional status and advanced, treatment-refractory cancer. (SS87) The Committee was also aware that the physicians' prior discussions with Christopher Alexander in this regard had been unsuccessful and that he still wanted the patient to receive aggressive care, including CPR (full code). (SS88)

The Committee was unanimous in their recommendation that the best course of action was to maximize the patient's comfort and to avoid anguish. (SS89) To this end, they recommended that the patient be provided with oxygen, IV fluids, pain mediation, palliative/hospice care, and pastoral/social work support. (SS90) The tube feedings were recommended to be continued. (SS91) It was recommended, however, that Ms. Alexander not receive futile care, which included further chemotherapy, transfusions, endotracheal tube placement, Bilevel Positive Airway Pressure (BiPAP), CPR, shock, defibrillation, inotropes or vasopressors (pressors), antibiotics, further labs, X-rays or other imaging, or placement of a G-tube. (SS92) The Committee had a detailed discussion with Christopher Alexander, which was documented in the Committee's dictated note. (SS93) It was noted that although Christopher Alexander understood his mother's death was imminent, her condition was terminal, and that she was in a debilitated state with no chance for survival, he still deferred to the POLST completed one month prior at Emeritus to direct her healthcare. (SS94) He was adamant that he would not agree to anything else. (SS95) The Committee indicated an ethics consultation would be obtained as soon as possible in an effort to help resolve this conflict. (SS96) The plan in the meantime was to provide Ms. Alexander with the care outlined above and as directed by the individual providers caring for her. (SS97) It was also recommended that the patient could be transferred to another facility, so long as such a transfer would not cause her further harm. (SS98) Thereafter, Christopher Alexander requested his mother be transferred to another facility and Ms. Knight, provided him with information as to how to locate another facility and doctor who may agree to accept transfer of the patient. (SS99) Of note, Ms. Knight, noted that Ms. Alexander was nonresponsive, but appeared comfortable. (SS100)

On February 20, 2013, Preeti Mehta, M.D., decreased the patient's tube feedings as she felt it could be causing the patient additional pain. (SS101-SS103) When she discussed this change with the family,

Christopher Alexander indicated that he still wanted his mother to be a full code. (SS104-SS105) Dr. Mehta noted the Committee had already weighed in and the plan was for the ethics committee to evaluate the situation. (SS106) The plan was also for the patient to be discharged to the skilled nursing facility the following morning if possible. (SS107) Dr. Ritt executed orders on February 20, 2013, to increase the patient's hydromorphone as needed for pain, as well as lorazepam (Ativan) to ease the process of dying. (SS108) When Dr. Ritt saw the patient again on February 21, 2013, he noted that comfort care had been continued but was still noted to be incongruent with the family's wishes. (SS110) Dr. Ritt hoped the patient could be transferred soon. (SS111)

Ms. Knight was able to arrange for the transfer of the patient back to Emeritus at 4:00 p.m. on February 21, 2013. (SS112) The patient, however, passed away peacefully with her daughter at her bedside approximately one hour prior to the scheduled transfer. (SS113) Consistent with the recommendations from the Committee and Dr. Ritt's DNR order, CPR was not initiated. (SS114) The patient's death summary was prepared by Dr. Mehta on February 21, 2013. The cause of death was listed as cardiorespiratory arrest related to progressive pancreatic cancer with metastasis to the liver, cancer cachexia, anemia, and severe malnutrition. (SS115) Dr. Mehta noted that the tube feedings had been administered upon urging from the family. (SS116) The patient had received opioids titrated to the patient's comfort based on her severe cancer-related pain. (SS117) The medical records reflect that the nursing staff had continually evaluated the patient's pain level and provided her with titrated pain medication according to the physician's orders. (SS118) Dr. Mehta reiterated Ms. Alexander had been made a DNR based on several physicians' and the Committee's assessment that CPR would be medically futile (ineffective) given the patient's terminal cancer. (SS119)

C. Procedural Posture

The FAC asserts ten causes of action for: Violation of Probate Code sections 4730, 4731(a), 4732, 4736 and 4742(b); Violation of Welfare and Institutions Code section 15600; Professional Negligence; Wrongful Death; Negligent Misrepresentation; and Negligent Infliction of Emotional Distress ("NIED"). (SS120) However, a demurrer challenging the sixth cause of for violation of Welfare and Institutions Code section 15600 was subsequently sustained without leave to amend. (SS121)

During their respective depositions, each Plaintiff testified that he or she was not aware of any care

allegedly being withheld at the time their mother was hospitalized at Scripps. (SS122-SS124) Christopher Alexander further testified at his deposition that he did not change his mother's code status while she was at Scripps, despite the recommendations of the physicians in this respect. (SS125)

The Scripps Defendants move for summary judgment/adjudication on the basis that Drs. Evans, Pund, Ettari and Boyd King did not provide any direct patient care to Ms. Alexander, were not in a patient-physician relationship with Ms. Alexander, and therefore did not owe an applicable duty of care. (SS126) Further, the expert declaration of Eric Roeland, M.D. ("Roeland Dec."), filed as **Exhibit P** to the Notice of Lodgment, establishes that the care and treatment rendered to Ms. Alexander by the Scripps Defendants were well within the community standard of care at all times and were not the legal cause of Plaintiffs' injuries. (SS127)

III. LEGAL STANDARD

A defendant may move for summary judgment or summary adjudication in any case where the action has no merit. (Code of Civil Procedure ["CCP"] § 437c(a), (f)(2).) A cause of action has no merit if one or more of the elements of the cause of action cannot be separately established. (CCP § 437c(o).) The motion shall be granted if all the papers show there is no triable issue as to any material fact and that defendant is entitled to judgment as a matter of law. (CCP § 437c(c).)

IV. LEGAL ARGUMENT

The Scripps Defendants move for summary judgment/summary adjudication on the grounds delineated below. The legal arguments are presented in a different order than the causes of action in Plaintiffs' Complaint so as to avoid duplication and redundancy whenever possible.

A. Summary Adjudication of Plaintiffs' Seventh Cause of Action for Medical Negligence and Eighth Cause of Action for Wrongful Death Is Proper Because Plaintiffs Cannot Provide Essential Elements of Negligence

In a professional negligence action against a health care provider (regardless of whether couched as a survival claim for professional negligence or a wrongful death action by the heirs), plaintiffs must establish the duty of the defendants to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; a breach of that duty; a proximate causal connection between the negligent conduct and the resulting injury; and actual loss or damage resulting from the defendants' negligence. (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229-230.) Plaintiffs here are unable to prove the essential elements

of breach of duty or causation and thus they are unable to establish negligence by the Scripps Defendants.

1. Expert Testimony Required to Prove Violation of Standard of Care

"When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.)

As explained by expert Eric Roeland, M.D., the care and treatment rendered to Ms. Alexander by the Scripps Defendants met the applicable community standard of care at all times. (See SS127; **Exhibit P**, Roeland Dec., at ¶¶8-9.) Dr. Roeland explains that when Ms. Alexander first presented to Scripps, on February 18, 2013, her body was already in the active dying process. Unfortunately, as is often the case with pancreatic cancer, her poorly differentiated cancer was widespread and very aggressive. Within seven months from her initial diagnosis, her cancer had spread to her liver, her entire abdominal cavity, and her spine, hips, ribs, and sternum. Accordingly, and for the additional reasons explained further in his declaration, it is Dr. Roeland's medical opinion that the only medically effective and beneficial care for Ms. Alexander at the time she first presented to Scripps was to optimally palliate her symptoms while she was actively dying from pancreatic cancer. (See, **Exhibit P**, Roeland Dec. at ¶8(a).)

a. As to Drs. Evans, Pund, Ettari and Boyd-King:

Dr. Roeland explains that a medical provider cannot be obligated to provide care which he or she feels is unethical, non-beneficial, medically ineffective, and which would cause harm and suffering to a patient. (See, **Exhibit P**, Roeland Dec., at ¶8(g).) He therefore concludes that Drs. Evans, Pund, Ettari and Boyd King, as members of the Committee, acted reasonably, appropriately and within the standard of care in their recommendations that it would be unethical for the treating physicians to provide Ms. Alexander further chemotherapy, transfusions, intubation, CPR, shock, defibrillations, and other forms of resuscitation given her dire clinical condition as explained above. (See, **Exhibit P**, Roeland Dec., at ¶8(g),(k).) Dr. Roeland likewise finds it was well within the standard of care for the Scripps Defendants to have engaged in healthcare discussions with Ms. Alexander's son Christopher Alexander who represented himself as the durable power of attorney for the patient, given the patient's lack of capacity. (See **Exhibit P**, Roeland Dec., at ¶8(c).) Dr. Roeland's review of the records confirms the Scripps Defendants repeatedly informed

Christopher Alexander about the patient's condition and that there was no disease-directed therapy which could be rendered to cure her or significantly prolong her life. These discussions, according to Dr. Roeland, were within the standard of care. (See, **Exhibit P**, Roeland Dec. at ¶8(g), (k).)

b. As to the Scripps Nursing Staff:

Dr. Roeland finds that the nursing staff fully and appropriately complied with the physicians' orders with respect to IV hydration; routine assessments of pain; administration of pain medication; documentation of informed consent when necessary; documentation of the patient's care; and their compliance with the DNR order executed by Dr. Ritt and recommended by the Appropriate Care Committee. (See, **Exhibit P**, Roeland Dec. at ¶8(a), (g)(i)-(k).)

c. As to Ms. Knight:

Dr. Roeland further finds that the Scripps Defendants' attempts to accommodate the family's request for transfer, including those by Ms. Knight, were reasonable and within the standard of care under the circumstances of needing to first locate a facility that was willing and able to accept the patient. (See **Exhibit P**, Roeland Dec. at ¶8(m)-(n).)

Based on the above, Dr. Roeland is of the opinion that the actions of the Committee, Ms. Knight, the nursing staff, and other personnel at Scripps were appropriate and well within the standard of care for a hospital in caring for Ms. Alexander. (SS126) Accordingly, unless Plaintiffs can come forward with a declaration under penalty of perjury from a qualified expert disputing Dr. Roeland's expert opinions, there is no triable issue of fact as to the existence of negligence, and summary adjudication is properly granted as to the Scripps Defendants as to both Plaintiffs' causes of action for professional negligence (seventh) and wrongful death (eighth).

2. Scripps was Not a Legal Cause of Damage to Plaintiffs

An essential element of any cause of action for negligence is that the defendant's wrongful act or omission was a cause of the plaintiff's injury. (*Mitchell v. Gonzalez* (1991) 54 Cal.3d 1041, 1057.) When the matter in issue is within the knowledge of experts only and not within the common knowledge of laymen, expert evidence is conclusive and cannot be disregarded. (*Danielson v. Roche* (1952) 109 Cal.App.2d 832, 835.) As noted in the expert declaration of Dr. Roeland, there was nothing any of the Scripps Defendants did or failed to do which caused injury to Ms. Alexander. All of the Scripps Defendants'

actions, orders, recommendations, and communications were directed at providing only medically beneficial and medically effective care to the patient without causing her further pain, suffering, or harm. Ms. Alexander suffered from an aggressive form of cancer that could not be cured. Her death was imminent from the moment she came to Scripps. CPR in this setting has no meaningful chance of prolonging life. Moreover, if CPR had been administered to the patient, to a reasonable degree of medical probability her ribs, with known metastatic disease, would have been crushed causing excruciating pain prior to her ultimately passing. (See **Exhibit P**, Roeland Dec., at ¶8(t).) Unless Plaintiffs produce competent medical testimony stating that the conduct by the Scripps Defendants was the legal cause of harm, there is no triable issue of fact regarding causation, and summary adjudication is properly granted.

B. Drs. Evans, Pund, Ettari, and Boyd King Are Entitled to Summary Judgment for Want of an Applicable Duty of Care

It is well established that an essential element for a cause of action against a health care provider is the existence of a physician-patient relationship giving rise to a duty of care. (*Felton v. Shaeffer* (1991) 229 Cal.App.3d 229, 279; *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466.) The question of the existence of a legal duty of care presents a question of law which is to be determined by the courts alone. (*Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 822.) Since the existence of a duty of care is an essential element in any assessment of liability, entry of summary judgment in favor of the defendant is proper where the plaintiff is unable to show that the defendant owed such a duty of care. (*Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 542.)

The undisputed evidence in this case reveals that Drs. Evans, Pund, Ettari and Boyd-King's did not enter into a physician-patient relationship with Ms. Alexander. (SS125) Rather, their *only* involvement was volunteering to serve on the Committee so as to provide further recommendations regarding Ms. Alexander's medical care when the plan of care developed by her treating physicians was incongruent with the family's directives. Members of such advisory committees are not typically considered to be the patient's treating physicians. (See Roeland Dec., **Exhibit P**, at ¶8 (k).) Dr. Boyd King confirmed the same during her deposition when she testified: "*We [the Committee]) **are not in direct patient care at all**. So we are making a recommendation. They can go with our recommendation or not. So it's not our decision at all.*" (SS126) Dr. Ettari, in explaining how the Committee worked, was also clear that the Committee was

formed to provide independent recommendations and, "***we are <u>not</u> the patient's treating doctors***." (SS126)

California case law is in accord. In the case of *Rainer v. Grossman*, (1973) 31 Cal.App.3d 539, the Court of Appeal affirmed the trial court's entry of summary judgment in favor of a defendant doctor, noting that there was no physician-patient relationship between defendant and plaintiff. Defendant had been giving a lecture as a professor of medicine when plaintiff's physician approached him with plaintiff's X-rays and presented the facts of her history. Defendant opined that surgery was indicated. Plaintiff alleged in her complaint that defendant had served as a consultant and that he negligently recommended surgery which was eventually performed, but was later found to be unnecessary. The court held that there was no physician-patient relationship between plaintiff and defendant. It further held that although defendant's opinion became part of the total information on which plaintiff's doctor relied when he recommended surgery, defendant was entitled to assume in discussing cases that the doctors attending his lecture would "rely on their own ultimate opinions following proper medical procedures." (*Rainer, supra*, 31 Cal.App.3d 539 at 544; see also *Clarke v. Hoek* (1985) 174 Cal.App.3d 208 [no duty of care between patient and physician serving as a proctor to another physician]; *Townsend v. Turk* (1990) 218 Cal.App.3d 278 [no duty of care between patient and radiologist asked to provide a second opinion regarding patient's films].

The same is true here. Drs. Evans, Pund, Ettari and Boyd King did <u>not</u> provide any direct care or treatment to Ms. Alexander. (SS126) Rather, they were asked by Ms. Alexander's treating physicians to provide further <u>recommendations</u> as to the most appropriate care plan for the patient in light of her clinical condition. As the Court in *Rainer* noted, physicians, like other professionals, frequently consult their colleagues, seeking them out as "sounding boards," exchanging information in various settings, and this "exchange of information is of great social benefit. (*Rainer, supra*, 31 Cal.App.3d 539.) The court in *Ranier*, in declining to find a duty, stated the imposition of liability in such circumstances "would not be prophylactic but instead counter-productive by stifling efforts at improving medical knowledge" and, by extension, patient care. (*Id.*)

Thus, since Drs. Evans, Pund, Ettari and Boyd-King did not enter into a physician-patient relationship with Ms. Alexander by serving on the Committee, and did not provide direct patient care, it follows that they did <u>not</u> owe the applicable duty of care necessary to support Plaintiffs' causes of action.

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C. Plaintiffs Have No Evidence That the Scripps Defendants Violated the Respective Probate Code Sections and Summary Adjudication Is Appropriately Granted

The Scripps Defendants request summary adjudication as to each of Plaintiffs' causes of action for violations of the respective Probate Code sections as cited in the FAC as follows:

1. Summary Adjudication of the First Cause of Action Is Properly Granted as Plaintiffs have No Evidence that the Scripps Defendants Violated Probate Code Section 4730

Probate Code section 4730 provides: "Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision." (Cal. Prob. Code § 4730.) "Supervising health care provider" is defined by the Probate Code as "the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for a patient's health care." (Cal. Prob. Code § 4641.)

Here, section 4370 has **no** application to the Scripps Defendants as none of these individuals was "a supervising health care provider" for Ms. Alexander as that term is defined. To be sure, Drs. Evans, Ettari, Pund and Boyd King's *only* involvement was in serving as a volunteer member of the Committee and making recommendations as to the appropriate treatment plan for Ms. Alexander. Drs. Evans, Ettari, Pund and Boyd King neither provided direct care to Ms. Alexander nor undertook primary responsibility for the patient. (SS126) The same holds true for Ms. Knight, whose involvement with the patient was in helping to coordinate transfer to another facility. (SS79, SS99-SS100 and SS112) Certainly, and by definition, the *nurses* caring for Ms. Alexander were not serving as the primary *physician* for Ms. Alexander. The Scripps Defendants request summary adjudication be granted on this ground alone.

But, even assuming Drs. Evans, Ettari, Pund and Boyd King could somehow be construed as having served as Ms. Alexander's "supervising health care providers," the undisputed evidence confirms that the Committee informed Christopher Alexander about the patient's condition and that there was no disease-directed therapy which could be rendered to cure her or significantly prolong her life. The reasons why palliative and comfort care were recommended were explained to Christopher Alexander in detail. The Committee also explained why aggressive care, including CPR, aggressive resuscitation, cardiac compression, and/or intubation, would cause harm and suffering. Dr. Roeland has opined that these

discussions with Christopher Alexander were reasonable and within the standard of care. (SS93-SS98; **Exhibit P**, Roeland Dec., at ¶¶7(r) and 8(f).) Along the same lines, Dr. Roeland explains that the standard of care does not require a nurse inform the family every time the treating physicians issue new orders for the patient, nor would it be feasible for them to do so. (**Exhibit P**, Roeland Dec., at ¶8(h).) Thus, Plaintiffs have no evidence to support their first cause of action for violation of probate code section 4730, and summary adjudication is appropriately granted as to the Scripps Defendants.

2. Summary Adjudication of the Second Cause of Action Is Properly Granted as Plaintiffs Have No Evidence That the Scripps Defendants Violated Probate Code Section 4731(a)

Probate Code section 4731(a) provides: "A supervising health care provider who knows of the existence of an advance health care directive ... shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy. If a copy is furnished, the supervising health care provider shall arrange for its maintenance in the patient's health care record."

Again, section 4731(a) has no application to the Scripps Defendants as none of the individuals was "a supervising health care provider" for Ms. Alexander for the same reasons addressed in the preceding section. What is more, Dr. Roeland's review of the records reveals that it **was** documented in Ms. Alexander's chart that she had an advanced directive. A copy of the POLST as completed by Christopher Alexander was also maintained by Scripps. (SS31; **Exhibit P**, Roeland Dec., at ¶8(j).) Dr. Roeland is of the opinion that the documentation by the Scripps Defendants that Ms. Alexander had an advanced directive, and the maintenance of a copy of the POLST complied with the community standard of care in this respect. (**Exhibit P**, Roeland Dec., at ¶8(j).) Thus, Plaintiffs have no evidence to support their second cause of action for violation of probate code section 4731(a), and summary adjudication is appropriately granted as to the Scripps Defendants.

3. Summary Adjudication of the Third Cause of Action is Properly Granted as Plaintiffs Have No Evidence That the Scripps Defendants Violated Probate Code Section 4732

Probate Code section 4732 provides: "A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity ... shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to the person then authorized to make health care decisions for the patient."

Plaintiffs here have no evidence, nor will they be able to present any evidence, that the Scripps Defendants were Ms. Alexander's primary physicians. The Probate Code defines primary physician as: "the physician designated by a patient to have primary responsibility for the patient's health care or, in the absence of a designation ... a physician who undertakes the responsibility." (Probate Code § 4631.) Without belaboring the point, Drs. Evans, Ettari, Pund and Boyd King, in their role as members of the Committee, neither provided direct care to Ms. Alexander nor undertook primary responsibility for the patient. Ms. Knight and the nursing staff are also obviously excluded from this section by the fact they are not physicians.

But, even assuming this section were applicable, Dr. Roeland explains that a physician's determination that a patient lacks capacity can be made in several different ways without having to specifically use the words, "lacks capacity." For example, several providers documented Ms. Alexander's waxing and waning mental state while she hospitalized at Scripps, which is known to be consistent with delirium. Other physicians used the term encephalopathy, to indicate decline in functioning of the brain. Dr. Roeland explains that such documentation is consistent with the patient lacking decision-making capacity. (**Exhibit P**, Roeland Dec., at ¶8(j).)

4. Summary Adjudication of the Fourth Cause of Action Is Properly Granted as Plaintiffs Have No Evidence that the Scripps Defendants Violated Probate Code Section 4736

Probate Code section 4736 provides that a health care provider who declines to comply with an individual health care instruction shall promptly so inform the patient or the person then authorized to make health care decisions for the patient; make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision; provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. In all cases, appropriate pain relief and other palliative care shall be continued. (See Cal. Prob. Code § 4736.)

The undisputed facts reveal that the Scripps Defendants fully complied with the requirements of section 4736. That is, as established through the expert declaration of Dr. Roeland, the Committee communicated with Christopher Alexander about the fact that the care he was requesting for his mother was medically ineffective and would cause harm to the patient. Christopher Alexander was told that the

physicians would not provide care that was medically ineffective, which Dr. Roeland finds provided adequate and prompt/timely notice that such care would not be undertaken. (SS93-SS98; **Exhibit P**, Roeland Dec. at ¶8(d)(e) and (g).)

Further, as is specifically addressed in Dr. Roeland's expert declaration, the Scripps Defendants' actions in connection with the transfer of the patient were reasonable, appropriate, and within the standard of care. Ms. Knight attempted to facilitate transfer of the patient back to Emeritus on February 19, 2013, but was informed the facility would not accept the patient. (See SS78-79, SS99, SS107; **Exhibit P**, Roeland Dec., at ¶8(m) and (s).) As explained by Dr. Roeland, the Scripps Defendants were not obligated to find a facility that would accept the patient. Instead, and in accordance with the applicable standard of care, Ms. Knight provided Christopher Alexander the number of Ms. Alexander's insurance so that they could help him find a facility within her insurance network. (*Id.*) As explained by Dr. Roeland, there are times when a transfer cannot be accomplished because the patient is not stable enough for transfer or there is no facility which will accept the patient for transfer. These are circumstances beyond the control of the medical provider. Further, Ms. Knight was ultimately able to arrange for Ms. Alexander's transfer on February 21, 2013. (SS112) Accordingly, Dr. Roeland finds the Scripps Defendants made more than reasonable efforts to assist in the transfer of the patient. (**Exhibit P**, Roeland Dec., at ¶8(m) and (s).)

Finally, Dr. Roeland has clarified, by way of his declaration, that the standard of care did not require the Scripps Defendants to provide Ms. Alexander with anything more than comfort care while the patient's transfer was pending. Quite the opposite, it would have been unethical for the providers to provide care they had determined to be non-beneficial, even if a transfer was pending. Dr. Roeland noted that throughout the patient's admission at Scripps Memorial Hospital she received the continuing care which was required by the standard of care. He further opined that the medical management provided by the defendants in this case did everything possible to improve the quality of Ms. Alexander's life for the short time she had left. (**Exhibit P**, See Roeland Dec. at ¶8(n)-(r).) Based on the above, the undisputed facts of this case and the declaration of Dr. Roeland establish that the Scripps Defendants fully complied with the provisions of section 4736, entitling them to summary adjudication of the fourth cause of action.

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5. Plaintiffs Have no Evidence That the Scripps Defendants Violated Probate Code Section 4742(b) to Support the Fifth Cause of Action

Probate Code section 4742(b) provides: "A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's advance health care directive or a revocation of an advance health care directive without the individual's consent, or who **coerces** or fraudulently induces an individual to give, revoke, or not to give an advance health care directive, is subject to liability to that individual...." In support of this cause of action, Plaintiffs allege defendants, "intentionally attempted to coerce Ms. Alexander's agent and surrogate, Christopher Alexander, to revoke her advance directive...." (See **Exhibit A**, FAC, at ¶129.)

This cause of action fails as to the Scripps Defendants for several reasons. To start, there is no evidence Ms. Knight or any of the nurses had any conversations with Christopher Alexander regarding his mother's code status. Further, as to the Committee, Dr. Roeland explains that the applicable standard of care required the Committee to discuss the patient's condition and the need for a change in her code status with the patient's family; but these discussions do not amount to coercion in the context of this case. (See **Exhibit P**, Roeland Dec., at ¶8(f).) Further, Christopher Alexander testified that he did **not** change Ms. Alexander's advance directive as a result of the discussions with the physicians at Scripps. (SS125) Given that section 4742(b) requires actual coercion resulting in plaintiffs or the patient changing the patient's advance directive, and the undisputed facts here show there was no actual coercion, Plaintiffs cannot succeed in their cause of action, and the Scripps Defendants respectfully requested this cause of action be adjudicated in their favor.

D. The Scripps Defendants Are Immune From Liability Pursuant to Probate Code Section 4740(d)

Pursuant to Probate Code section 4740(d):

> ***A health care provider or health care institution acting in good faith and in accordance with generally accepted health care standards** applicable to the health care provider or institution **is not subject to civil liability**...for unprofessional conduct for any actions in compliance with this division, including, but not limited to, any of the following conduct:*
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> ***
>
> ***(d) Declining to comply with an individual health care instruction or health care decision, in accordance with Sections 4734 to 4736, inclusive.*** (See Cal. Prob. Code § 4740 [emphasis added].)

As discussed in the sections above, the expert declaration of Dr. Roeland confirms that the care and treatment rendered to Ms. Alexander by all of the Scripps Defendants met the standard of care with respect

to declining to keep Ms. Alexander as a "full code." (SS127; **Exhibit P**, Roeland Dec. at ¶¶8-9.) Dr. Roeland likewise finds no evidence in his review of the materials suggesting that any of the Scripps Defendants acted in bad faith. Quite the opposite, Dr. Roeland finds that the care and treatment rendered to Ms. Alexander by the Scripps Defendants and others was aimed only at *improving* the quality of Ms. Alexander's life for the short time she received care at Scripps. Stated another way, Dr. Roeland believes the providers in this case acted in the patient's best interest at all times. (**Exhibit P**, Roeland Dec. at ¶¶8(o)-(q).) Under these facts, and unless Plaintiffs can present competent evidence to the contrary, the Scripps Defendants are entitled to immunity pursuant to section 4740 for alleged violations of the Probate Code.

E. Plaintiffs Cannot Succeed in Their Ninth Cause of Action for Misrepresentation

In order to recover for negligent misrepresentation, plaintiff must prove defendant made a misrepresentation of fact, honestly believing it to be true, but without a reasonable ground for such belief. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408.) Additionally, the plaintiff must show he justifiably relied on the defendant's representation and was damaged by his reliance. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062.)

Plaintiffs have not and cannot proffer any competent evidence that any of the Scripps Defendants made any misrepresentation of fact without reasonable ground for such belief. Instead, Plaintiffs allege generally "[o]n February 20, 2013, members of the committee [referring to the Appropriate Care Committee] made verbal representations regarding Ms. Alexander's continuing treatment which comprised an oral contract between defendants ... and Plaintiff .... The committee represented that 'oxygen would be provided' to Ms. Alexander and Scripps would provide to Ms. Alexander 'IV fluids." (See **Exhibit A**, FAC, at ¶¶175-177.) However, Plaintiffs have now been afforded an opportunity to depose each of the members of the Committee, and no such misrepresentations have been identified. Instead, Dr. Roeland's review of the records confirms that Ms. Alexander did, in fact, receive the appropriate treatment for her condition while at Scripps—including the appropriate amount of IV hydration and pain medication for her condition. (See **Exhibit P**, Roeland Dec., at ¶8(b),(i) and (p).) Thus, absent competent evidence to the contrary, summary adjudication is properly grated as to Plaintiffs' ninth cause of action for negligent misrepresentation.

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F. Plaintiffs Cannot Succeed in Their Tenth Cause of Action for NIED

A plaintiff seeking to recover for NIED "must … show she or he fits into one of two narrowly defined classes of emotional injures—either a 'bystander' to a traumatic incident injuring a close relative or a 'direct victim'." (*Kossel v. Superior Court* (1986) 186 Cal.App.3d 1060, 1064.) According to the FAC, Plaintiffs are attempting to proceed under a "bystander" theory (See, **Exhibit A**, FAC, at ¶¶184-185), and therefore must establish the following elements: (1) that they are closely related to the victim; (2) that they were present at the scene of the injury-producing event at the time it occurred and were then aware that defendant's conduct was causing injury to the victim; and (3) that, as a result, they suffered serious emotional distress. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 667; *Ra v. Superior Court (Presidio International Inc.)* (2007) 154 Cal.App.4th 142, 148.) In medical malpractice actions, the plaintiff must actually be present during the medical care and appreciate that it is being performed negligently to recover under an NIED cause of action. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920-921.)

Here, Plaintiffs cannot establish the second prong of *Thing v. La Chusa.* Specifically, Christopher Alexander testified he was unaware of the care which was being rendered and/or allegedly withheld at the time of his mother's care and any connection of this care to her symptoms of pain. (SS122) Similarly, Clenton Alexander testified he was unaware of any issues surrounding the medical providers discussing recommendations to change the patient's code status until after this lawsuit was even filed. (SS123) Similarly, Ms. McDermet testified she did not even think about or consider that resuscitation should have been attempted until after her mother had passed away and when her brother asked if resuscitation had been attempted. (SS124) Thus, based on each of their respective deposition testimony, Plaintiffs cannot succeed on their tenth cause of action, and the Scripps Defendants request this cause of action be adjudicated in their favor.

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V. CONCLUSION

As addressed above, the undisputed evidence in this case establishes that the Scripps Defendants are entitled to summary judgment or, in the alternative, summary adjudication be entered in their favor.

DATED: March 15, 2016

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL DIVISION

ESTATE OF ELIZABETH ALEXANDER, and CLENTON ALEXANDER, HEIR,

Plaintiffs,

v.

SCRIPPS MEMORIAL HOSPITAL LA JOLLA, a California corporation; DONALD RITT, an individual; GUSTAVO LUGO, an individual; CHRISTOPHER WIESNER, an individual; PREETI MEHTA, an individual; MARIE SHIEH, an individual; SHAWN EVANS, an individual; MARIE SHIEH, an individual; AYANA BOYD KING, an individual; ERNEST PUND, an individual; CHARLES ETTARI, an individual; KAREN KNIGHT, an individual; and DOES 1 through 15, inclusive,

Defendants.

CASE NO. 37-2014-00016257-CU-MM-CTL

THE SCRIPPS DEFENDANTS' SEPARATE STATEMENT IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION

IMAGED FILE

DATE: June 3, 2016
TIME: 11:00 a.m.
DEPT: C-70
IC JUDGE: Hon. Randa Trapp

CASE FILED: May 20, 2014
TRIAL DATE: September 9, 2016

Defendants SCRIPPS HEALTH DBA SCRIPPS MEMORIAL HOSPITAL LA JOLLA ("Scripps Memorial"); SHAWN EVANS, M.D. ("Dr. Evans"); AYANA BOYD KING, M.D. ("Dr. King"); ERNEST PUND, M.D. ("Dr. Pund"); CHARLES V. ETTARI, M.D. ("Dr. Ettari"); and KAREN KNIGHT ("Ms. Knight") (collectively, the "Scripps Defendants," unless otherwise noted) submit this Separate Statement of Undisputed Material Facts and Supporting Evidence in support of

their Motion for Summary Judgment or, in the alternative, Motion for Summary Adjudication as to the operative complaint filed by plaintiffs ESTATE OF ELIZABETH ALEXANDER, CLENTON ALEXANDER, JACQUELYN McDERMET, and CHRISTOPHER ALEXANDER (collectively "Plaintiffs"):

ISSUE 1: **SUMMARY ADJUDICATION OF PLAINTIFFS' SEVENTH CAUSE OF ACTION FOR MEDICAL NEGLIGENCE AND EIGHTH CAUSE OF ACTION FOR WRONGFUL DEATH IS PROPER BECAUSE PLAINTIFFS CANNOT PROVIDE ESSENTIAL ELEMENTS OF NEGLIGENCE**

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
1. In May of 2012, Elizabeth Alexander presented to the Emergency Department at Loma Linda University Medical Center with chief complaints of weaknesses, fatigue, headaches and a recent 20 lbs. weight loss. ***Supporting Evidence***: See **Exhibit C**, excerpts from Elizabeth Alexander's medical records from Loma Linda University Medical Center (Loma Linda recs."), as attached to the Notice of Lodgment ("NOL") filed concurrently herewith, at pp. 600-608.	
2. A CT scan revealed: multiple liver lesions; a dilated pancreatic duct; a well-circumscribed nodule in the pancreas at the junction of the body and tail; and, possible metastasis to the vertebral body at T10 and to the right femur. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 671-675.	
3. It was suspected that she had advanced pancreatic ductal carcinoma. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 677-678.	
4. It was felt at that time that the patient had a poor long term prognosis. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 735-738. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
5. By June 6, 2012, her treating oncologist explained to Ms. Alexander that she had stage-IV pancreatic adenocarcinoma, for which there was no cure. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 1334-1336.	
6. She was offered palliative chemotherapy. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 1338-1342.	
7. The patient elected to proceed with combination palliative chemotherapy. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 1338-1342.	
8. In July of 2012, Ms. Alexander was seen at UCLA for a second opinion. ***Supporting Evidence***: See **Exhibit D**, excerpts from Elizabeth Alexander's medical records from UCLA Medical Center (UCLA recs."), as attached to the NOL, at pp. 35-36.	
9. At that time, she had several new masses throughout the right and left lobes of her liver. ***Supporting Evidence***: See UCLA recs., attached as **Exhibit D** to the NOL, at pp. 35-36.	
10. A repeat bone scan was suggestive of further metastatic disease in the 4th and 5th ribs, L4, the sacrum and left iliac bone. ***Supporting Evidence***: See UCLA recs., attached as **Exhibit D** to the NOL, at pp. 35-36.	
11. Biopsies suggested a poorly differentiated neuroendocrine carcinoma. ***Supporting Evidence***: See UCLA recs., attached as **Exhibit D** to the NOL, at pp. 35-36.	
12. Her cancer was noted to be very aggressive. ***Supporting Evidence***: See UCLA recs., attached as **Exhibit D** to the NOL, at pp. 35-36.	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
13. Palliative chemotherapy was changed; however, the patient was not able to tolerate the side effects. ***Supporting Evidence***: See UCLA recs., attached as **Exhibit D** to the NOL, at pp. 35-36; See **Exhibit E**, excerpts from Elizabeth Alexander's medical records from UC Irvine Medical Center ("UCI recs.") attached to the NOL, at pp. 2-3.	
14. Ms. Alexander was readmitted to Loma Linda University Medical Center in mid-September 2012 for uncontrolled pain in her right hip and leg. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 1852-1853, 1862-1863, 1883-1884.	
15. Radiology studies confirmed her cancer had spread into her femur. ***Supporting Evidence***: See Loma Linda recs, attached to the NOL as **Exhibit C**, at pp. 1852-1853, 1862-1863, 1883-1884.	
16. By October of 2012, a repeat CT scan revealed "innumerable lesions" in the patient's liver and an increasing mass in her pancreas. ***Supporting Evidence***: See UCI recs., attached to the NOL as **Exhibit E**, at p. 4.	
17. Further consultation was thereafter made at UC Irvine in which Ms. Alexander was advised that she was not a surgical candidate given the number of metastatic lesions. ***Supporting Evidence***: See UCI recs., attached to the NOL as **Exhibit E**, at pp. 6-8.	
18. It was noted that she had chemotherapy-refractory disease with disease progression in her bones despite aggressive second-line palliative chemotherapy. ***Supporting Evidence***: See UCI recs., attached to the NOL as **Exhibit E**, at pp. 6-8. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
19. On January 21, 2013, arrangements were made by the family to have Ms. Alexander transferred to Emeritus Skilled Nursing Facility ("Emeritus"), as she was no longer to care for herself. ***Supporting Evidence***: See **Exhibit F**, excerpts from Elizabeth Alexander's medical records from Emeritus of Carmel Valley ("Emeritus") as attached to the NOL, at pp. 6, 16 and 150-152	
20. As of that time, Ms. Alexander had undergone tumor genetic testing, received palliative radiation to her spine and received a single dose of third-line chemotherapy, which was not well tolerated in the setting of declining performance status. ***Supporting Evidence***: See **Exhibit G**, excerpts from Elizabeth Alexander's medical records from Hematology Oncology Consultants ("Hem. Recs."), as attached to the NOL at pp. 87-88; See UCI recs., attached to the NOL as **Exhibit E**, at pp. 6-8; See Loma Linda records attached to the NOL as **Exhibit C**, at pp. 89-90.	
21. She had also met the qualifying criteria for hospice care. ***Supporting Evidence***: See **Exhibit H**, excerpts from Elizabeth Alexander's medical records from Inland Empire Home Health & Hospice ("Hospice recs."), as attached to the NOL at pp. 51, 72-73 and 113-144.	
22. Hospice care had been started, but was subsequently discontinued by her son on the stated basis of seeking more aggressive care. ***Supporting Evidence***: See Hospice recs., attached to the NOL, as **Exhibit H**, at p. 12. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
23. The same day of her admission to Emeritus, her son, Christopher Alexander, filled out a Physician Orders for Life Sustaining Treatment ("POLST") form, in which he indicated that he wanted his mother to be "full code," including cardiopulmonary resuscitation ("CPR") and full medical treatment. ***Supporting Evidence***: See Emeritus recs., attached to the NOL as **Exhibit F**, at pp. 8-9.	
24. On February 17, 2013, the Medical Director of Emeritus, Aboo Nasar, M.D., was asked to evaluate the patient as she had exhibited a further decline in her health since the time of her admission three weeks earlier. ***Supporting Evidence***: See Emeritus recs., attached to the NOL as **Exhibit F**, at pp. 168-169; See, **Exhibit I**, excerpts from the deposition of Aboo Nasar, M.D. ("Nasar depo."), as attached to the NOL, at pp. 35-39:10-16.	
25. Despite placement of a feeding tube and commencement of tube feedings as of February 15, 2013, Dr. Nasar noted that Ms. Alexander was still extremely nutritionally compromised, very cachectic (physical wasting with loss of weight and muscle mass in the setting of metastatic, treatment-refractory cancer) and weak. ***Supporting Evidence***: See Emeritus recs., attached to the NOL as **Exhibit F**, at pp. 168-169; See, Nasar depo., attached to the NOL as **Exhibit I**, at pp. 35:10-39:16.	
26. He felt that any efforts to revive the patient would be dismal, ineffective and would cause her additional suffering. ***Supporting Evidence***: See Emeritus recs., attached to the NOL as **Exhibit F**, at pp. 168-169; See, Nasar depo., attached to the NOL as **Exhibit I**, at pp. 35:10-39:16. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
27. Dr. Nasar recalls discussing his opinions with Christopher Alexander, who refused to change the patient's code status to Do Not Resuscitate ("DNR"), which Dr. Nasar felt was better aligned with the patient's poor clinical condition. ***Supporting Evidence***: See Emeritus recs., attached to the NOL as **Exhibit F**, at pp. 168-169; See, Nasar depo., attached to the NOL as **Exhibit I**, at pp. 35:10-39:16 and 47:8-19.	
28. Later that day, Dr. Nasar issued an order for the patient to be transferred to Scripps Memorial Hospital La Jolla for further evaluation. ***Supporting Evidence***: See Emeritus recs., attached to the NOL as **Exhibit F**, at p. 4; See, Nasar depo., attached to the NOL as **Exhibit I**, at p. 40: 4-18.	
29. Dr. Nasar did not expect the patient to come back to Emeritus as he felt she was "on the brink of precipice" and that her death was "imminent." ***Supporting Evidence***: Nasar depo., attached to the NOL as **Exhibit I**, at pp. 45:22-46:8 and 139:12-15.	
30. Ms. Alexander presented to the Emergency Department at Scripps Memorial Hospital La Jolla on February 18, 2013, via ambulance and was seen by Christopher Wiesner, M.D. ***Supporting Evidence***: See **Exhibit J**, excerpts of Elizabeth Alexander's medical records from Scripps Memorial Hospital La Jolla ("Scripps recs."), as attached to the NOL, at pp. 1 and 12-15.	
31. Dr. Wiesner documented that, per Christopher Alexander's report, the patient wanted "everything done" to save or prolong her life, including placement of a feeding tube and full resuscitation. A copy of the POLST from Emeritus was provided and maintained by Scripps. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15; **Exhibit S**, Scripps Responses to Request for Production of Documents, Set One, at pp. 11-12.	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
32. On exam, Dr. Weisner noted that the patient was awake, but minimally responsive. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
33. She had an abnormal EKG showing sinus tachycardia and she had abnormal lab values. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
34. The patient was given hydromorphone (Dilaudid) for pain control and normal saline for hydration. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
35. She was admitted to the hospital based on her uncontrolled pain and the family's request for further evaluation by an oncologist. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
36. The plan was for Ms. Alexander to be seen by an oncologist and a palliative care physician. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
37. Dr. Wiesner was hopeful that these doctors would help educate and guide the patient's family that further medical interventions they were requesting were no longer medically beneficial given the patient's advanced, treatment-refractory cancer. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
38. His recommendation was to ensure the patient was as comfortable as possible. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	
39. The patient was admitted to Scripps Memorial Hospital La Jolla under the orders of hospitalist Gustavo Lugo, M.D. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 12-15.	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
40. Dr. Lugo prepared an admission history and physical. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
41. Dr. Lugo noted that it was very difficult to get any history from the patient because she was "hardly verbal," although she could understand some questioning and tried to answer with facial expressions, at times. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
42. Dr. Lugo thought her inability to respond was likely impacted by encephalopathy (altered mental status or decline in the functioning of the brain). ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
43. He did <u>not</u> think the patient was a candidate for any disease directed therapies, but rather the focus of the treatment should be on optimal palliation, including hospice support. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
44. His note provided detailed information about the patient's physical presentation, including her decubitus ulcers (bed sores), and his assessment of the same. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
45. His plan was for Dr. Ritt to see the patient as a palliative care consultant and Marie Shieh, M.D., to see the patient for an oncology consultation. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
46. Dr. Lugo suggested the Appropriate Care Committee may also be needed. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27. ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
47. Overall, Dr. Lugo felt the patient's prognosis was dismal. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
48. He strongly urged the patient's son against prolonging her continued suffering with medically-ineffective measures. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27.	
49. Dr. Lugo's admission orders were to ensure optimal palliation (maximal comfort). ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27 and 53-59.	
50. He recommended she not be provided food by mouth given her inability to swallow and high risk for aspiration. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27 and 53-59.	
51. The patient was to be provided oxygen and medications for pain, anxiety, and nausea. He noted that her code status was "to be determined." ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 24-27 and 53-59.	
52. Dr. Ritt also saw the patient on February 18, 2013. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
53. He described Ms. Alexander as being cachectic (wasted) and in discomfort. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
54. She could not speak well, but could nod her head in an effort to communicate. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33. /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
55. Dr. Ritt felt, just by looking at the patient, that her chance of surviving more than a few days was very low. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
56. Dr. Ritt detailed some general discussions he had with the patient's son. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33; See, **Exhibit K**, Declaration of Donald Ritt, M.D., in support of Motion for Summary Judgment, as attached to the NOL.	
57. He explained that this was typically a situation where a patient would receive comfort care including the use of morphine, but "her son was very difficult." ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
58. Dr. Ritt disagreed with the patient having received placement of a feeding tube. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
59. He felt the existence of the feeding tube made it difficult to talk Christopher Alexander about the fact the tube should not be used. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
60. Dr. Ritt felt strongly the patient should not undergo aggressive resuscitation, cardiac compression, and/or intubation. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
61. He also noted she was no longer a candidate for chemotherapy. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
62. Dr. Ritt felt the problem now was "managing the patient and keeping her comfortable while dealing with the son." ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
63. Dr. Ritt believed that the care directives expressed by the patient's son were inappropriate and that he was obligated to do what was in the patient's best interests, which would include no CPR, the use of morphine, very little in the way of IV fluids, and basic comfort care. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
64. Dr. Ritt discussed the situation with Shawn Evans, M.D., who was serving as Chief of Staff for the hospital at the time. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
65. It was determined that the Appropriate Care Committee would likely need to be called the following morning to help resolve the conflict between the son's wishes and what Dr. Ritt, and others, felt was medically appropriate for the patient. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 32-33.	
66. The patient was also seen by oncologist Marie Shieh, on February 18, 2013. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 34-36.	
67. Dr. Shieh noted the patient had received multiple lines of palliative chemotherapy and radiation. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 34-36. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
68. Ms. Alexander had experienced a progressive decline in her functional status and advancement of her disease. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 34-36.	
69. Dr. Shieh talked with Christopher Alexander who seemed to understand how sick his mother was, but he insisted that his mother had always "been a fighter" and wanted to continue with any possible therapies. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 34-36.	
70. Dr. Shieh, however, explained there were no further therapies that could be provided to Ms. Alexander safely. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 34-36.	
71. Accordingly, Dr. Shieh recommended the patient receive hospice and palliative therapy. ***Supporting Evidence***: See Scripps recs. attached to the NOL as **Exhibit J**, at pp. 34-36.	
72. Dr. Ritt discussed with Christopher Alexander that the medical providers would not provide non-beneficial or ineffective medical care to Ms. Alexander. ***Supporting Evidence***: See, Ritt Dec., attached to the NOL as **Exhibit K**, at ¶ 4.	
73. He explained that such treatment would cause her more harm and suffering than benefit. ***Supporting Evidence***: See, Ritt Dec., attached to the NOL as **Exhibit K,** at ¶ 4.	
74. Dr. Ritt explained that this included CPR or other similar measures such as aggressive resuscitation, cardiac compression, and/or intubation. ***Supporting Evidence***: See, Ritt Dec., attached to the NOL as **Exhibit K**, at ¶ 4. /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
75. Dr. Ritt prepared an order for intravenous (IV) medications, as well as an order that the patient was to be Do Not Resuscitate ("DNR"). ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 60; Ritt Dec., as attached to the NOL as **Exhibit K**, at ¶ 4.	
76. He also ordered administration tube feedings at 20ml/hour increased by 20 ml every four hours to a max goal rate of 60 ml /hour. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 61.	
77. On February 19, 2013, the patient was provided a fentanyl patch for her pain. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 64.	
78. It was also ordered that the patient be transferred back to the skilled nursing facility as soon as possible with the feeding tube in place. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 64-65.	
79. Dr. Ritt agreed with trying to get the patient back to the skilled nursing facility; however, later that day, he executed an order to hold the patient's transfer based on information from Case Manager Karen Knight, R.N., that Emeritus could not accept the patient back at that time. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 64-65, 71; See, **Exhibit L**, excerpts from the deposition of Karen Knight, R.N. ("Knight depo."), at 47:25-49:7. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
80. On February 20, 2013, the Appropriate Care Committee—which is a team of volunteer physicians in place to provide further recommendations as to whether certain treatment is appropriate care for a patient—met to discuss the patient's situation and the incongruence between the family's wishes for the patient to be full code and the medical providers' recommendations that such treatment would be medically ineffective and may cause harm. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
81. The members of the Appropriate Care Committee for that day were: Shawn Evans, M.D. (emergency medicine), Ernest Pund, M.D. (cardiology), Charles Ettari, M.D. (psychiatry), Ayana Boyd King, M.D. (critical care/pulmonology) and treating physician Gustavo Lugo, M.D. (hospitalist). ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
82. The Appropriate Care Committee reviewed the patient's history and clinical presentation. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
83. Dr. Evans, who prepared the note for the Appropriate Care Committee, indicated that the patient had continued to deteriorate in the hospital since her admission. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
84. She had received intravenous fluids and pain medication. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
85. She remained unable to eat. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31. /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
86. The Appropriate Care Committee was aware that oncologist Dr. Shieh had evaluated the patient and recommended a focus on palliative care as chemotherapy or radiation could not be performed safely. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
87. The Appropriate Care Committee was also aware Drs. Wiesner, Shieh, Ritt, and Lugo all recommended against ICU level of care, CPR and/or advanced life support measures given Ms. Alexander's limited functional status and advanced, treatment-refractory cancer. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
88. The Appropriate Care Committee was aware that the physicians' prior discussions with Christopher Alexander in this regard had been unsuccessful and that he still wanted the patient to receive aggressive care, including CPR (full code). ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
89. The Appropriate Care Committee was of the unanimous decision, based on Ms. Alexander's disease and her dire current clinical condition, that the best course of action was to maximize the patient's comfort (mentally and physically) and to avoid anguish. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
90. To this end, they recommended that the patient be provided with: oxygen, intravenous fluids, pain mediation, palliative/hospice care, and pastoral/social work support. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
91. The tube feedings were not considered to be harmful to the patient and, based on the family's strong preference that Ms. Alexander receive tube feedings, the feedings were recommended to be continued. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
92. It was recommended, however, that Ms. Alexander not receive further chemotherapy, transfusions, endotracheal tube tube placement, Bilevel Positive Airway Pressure (BiPAP), CPR, shock, defibrillation, inotropes or vasopressors (pressors), antibiotics, further labs, x-rays or other imaging, or placement of a G-tube. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
93. The Appropriate Care Committee had a detailed discussion with Christopher Alexander, which was well-documented in the dictated note. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
94. It was noted that although Mr. Alexander understood his mother's death was imminent, her condition was terminal and that she was in a debilitated state with no chance for survival, he still deferred to the POLST completed one month prior at Emeritus to direct her healthcare. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
95. He was adamant that he would not agree to anything else. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
96. The Appropriate Care Committee indicated an ethics consultation would be obtained as soon as possible in an effort to help resolve this conflict. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
97. The plan in the meantime was to provide care to Ms. Alexander as outlined above and as directed by the individual providers caring for her. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
98. It was also recommended that the patient could be transferred to another facility, so long as such a transfer would not cause her further harm. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 28-31.	
99. Thereafter, Christopher Alexander requested his mother be transferred to another facility and Case Manager Karen Knight, R.N., provided Mr. Alexander with information as to how to find another facility and doctor who may agree to accept transfer of the patient. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 279; See, Knight depo., attached to the NOL as **Exhibit L**, at 56:8-57:1 and 60:23-62:17.	
100. Of note, Karen Knight, R.N., noted that Ms. Alexander was non-responsive, but appeared comfortable. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.6.	
101. On February 20, 2013, Preeti Mehta, M.D., saw the patient. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	
102. Dr. Mehta determined further nutrition by tube feeding was unnecessary and could be causing the patient additional pain. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	
103. Dr. Mehta accordingly decreased the patient's tube feedings to 30ml/hour. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
104. She discussed this change with the family. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	
105. Mr. Alexander advised Dr. Mehta that he still wanted his mother to be a full code. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	
106. Dr. Mehta noted the Appropriate Care Committee had already weighed in and the plan was for the ethics committee to evaluate the situation. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	
107. The plan was also for the patient to be discharged to the skilled nursing facility the following morning, if possible. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p.47.	
108. Dr. Ritt executed orders on February 20, 2013, to increase the patient's hydromorphone (Dilaudid), as needed for pain, as well as lorazepam (Ativan) to ease the process of dying. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 72.	
109. Dr. Ritt saw the patient again on February 21, 2013. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 49.	
110. Comfort care had been continued and was still incongruent with the family's wishes. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 49.	
111. Dr. Ritt hoped the patient could be transferred soon. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 49. ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
112. Case Manager Karen Knight, R.N., documented that she had been able to arrange for the transfer of the patient back to Emeritus for February 21, 2013, at 1600. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 279.	
113. The patient passed away peacefully with her daughter at the bedside one hour prior to the scheduled transfer. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at p. 48.	
114. Consistent with the recommendations from the Appropriate Care Committee and Dr. Ritt's DNR order, CPR was not initiated. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 8-10.	
115. The patient's death summary was prepared by Dr. Mehta on February 21, 2013. The cause of death was listed as cardiorespiratory arrest related to progressive pancreatic cancer with metastasis to the liver, cancer cachexia, anemia, and severe malnutrition. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 8-10.	
116. Dr. Mehta noted that the tube feedings had been administered upon urging from the family. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 8-10.	
117. The patient had received opioids titrated to the patient's comfort based on her severe cancer-related pain. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 8-10.	
118. The medical records reflect that at all times during Ms. Alexander's hospitalization at Scripps from February 18, 2013, until the time of her passing, the nursing staff continually evaluated the patient's pain level and provided her with titrated pain medication according to the physician's orders.	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
Supporting Evidence: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 92-95, 99-101, 140, 151 and 154.	
119. Dr. Mehta reiterated Ms. Alexander had been made a DNR based on several physicians' and the Appropriate Care Committee's assessment that it would be medically futile (ineffective) given the patient's terminal cancer. ***Supporting Evidence***: See, Scripps recs., attached to the NOL as **Exhibit J**, at pp. 8-10.	
120. The operative complaint asserts ten causes of action for: Violation of Probate Code section 4730; Violation of Probate Code section 4731(a); Violation of Probate Code section 4732; Violation of Probate Code section 4736; Violation of Probate Code section 4742(b); Violation of Welfare & Institutions Code section 15600; Professional Negligence; Wrongful Death; Negligent Misrepresentation; and, Negligence Infliction of Emotional Distress. ***Supporting Evidence***: See, **Exhibit A**, Plaintiffs' Fourth Amended Complaint as filed August 24, 2015, as attached to the NOL.	
121. A demurrer challenging the sixth cause of for Violation of Welfare & Institutions Code section 15600 was subsequently sustained without leave to amend and that cause of action is no longer at-issue. ***Supporting Evidence***: See, **Exhibit B**, Court's Minute Order of October 30, 2015, at 11:00 a.m., on Defendants' Demurrer to Fourth Amended Complaint and Motion to Strike. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
122. Christopher Alexander testified at his deposition that he was unaware of any care which was allegedly being withheld by the Scripps Defendants until after his mother's passing. ***Supporting Evidence***: See, **Exhibit M**, excerpts from the deposition of Christopher Alexander, as attached to the NOL at pp. 134:5-135:12 and 166:6-169:9.	
123. Clenton Alexander testified at his deposition that he was unaware of any care which was allegedly being withheld by the Scripps Defendants until after his mother's passing. ***Supporting Evidence***: See, **Exhibit N**, excerpts from the deposition of Clenton Alexander, as attached to the NOL at: pp. 219:25-223:6; 139:23-141:7.	
124. Jacquelyn McDermet testified at her deposition that she was unaware of any care which was allegedly being withheld by the Scripps Defendants until after her mother's passing. ***Supporting Evidence***: See, **Exhibit O**, excerpts from the deposition of Jacquely McDermet, as attached to the NOL at: p. 148:6-23.	
125. Christopher Alexander testified that he was never convinced to change his mother's status to DNR based upon the conversations he had with the physicians at Scripps. ***Supporting Evidence***: See, **Exhibit M**, excerpts from the deposition of Christopher Alexander, as attached to the NOL at: pp. 199:9-205:9. /// /// ///	

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
126. In serving on the Appropriate Care Committee for Ms. Alexander's case, Drs. Evans, Pund, Ettari and Boyd-King's did not provide any direct patient care to Ms. Alexander. ***Supporting Evidence***: See, **Exhibit P**, Declaration of Eric Roeland, M.D., as attached to the NOL at ¶8(k); See, **Exhibit Q**, excerpts from the deposition of Ayana Boyd King, D.O., as attached to the NOL at p. 111:3-12; See **Exhibit R**, excerpts from the deposition of Charles Ettari, M.D., attached to the NOL at p. 28:10-15.	
127. The care and treatment rendered to Ms. Alexander by the Scripps Defendants was well-within the community standard of care at all times and was not the legal cause of Plaintiffs injuries. ***Supporting Evidence***: See, **Exhibit P**, Declaration of Eric Roeland, M.D., with attached exhibits ("Roeland Dec."), attached to the NOL, at ¶¶8-9.	

ISSUE 2: **DRS. EVANS, PUND, ETTARI, AND BOYD KING ARE ENTITLED TO SUMMARY JUDGMENT FOR WANT OF AN APPLICABLE DUTY OF CARE**

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
The Scripps Defendants incorporate SS126 above, as follows: 126. In serving on the Appropriate Care Committee for Ms. Alexander's case, Drs. Evans, Pund, Ettari and Boyd-King's did not provide any direct patient care to Ms. Alexander. ***Supporting Evidence***: See, **Exhibit P**, Declaration of Eric Roeland, M.D., as attached to the NOL at ¶8(k); See, **Exhibit Q**, excerpts from the deposition of Ayana Boyd King, D.O., as attached to the NOL at p. 111:3-12; See **Exhibit R**, excerpts from the deposition of Charles Ettari, M.D., attached to the NOL at p. 28:10-15.	

ISSUE 3: **PLAINTIFFS HAVE NO EVIDENCE THAT THE SCRIPPS DEFENDANTS VIOLATED THE RESPECTIVE PROBATE CODE SECTIONS AND SUMMARY ADJUDICATION OF EACH OF FIRST, SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION IS APPROPRIATELY GRANTED**

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
The Scripps Defendants incorporate by this reference SS1 through SS127 as above with all citations to supporting evidence.	

ISSUE 4: **THE SCRIPPS DEFENDANTS ARE IMMUNE FROM LIABILITY FOR THE ALLEGED VIOLATIONS OF THE PROBATE CODE (FIRST, SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION) AS THEY ACTED IN GOOD FAITH AND IN ACCORDANCE WITH THE STANDARD OF CARE**

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
The Scripps Defendants incorporate by this reference SS1 through SS127 as above with all citations to supporting evidence.	

ISSUE 5: **PLAINTIFFS CANNOT SUCCEED IN THEIR NINTH CAUSE OF ACTION OF MISREPRESENTATION**

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
The Scripps Defendants incorporate by this reference SS1 through SS127 as above with all citations to supporting evidence.	

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ISSUE 6: PLAINTIFFS CANNOT SUCCEED IN THEIR TENTH CAUSE OF ACTION FOR NIED.

MOVING PARTIES' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTIES' RESPONSE AND SUPPORTING EVIDENCE
The Scripps Defendants incorporate by this reference SS122-SS124 as follows:	
122. Christopher Alexander testified at his deposition that he was unaware of any care which was allegedly being withheld by the Scripps Defendants until after his mother's passing. ***Supporting Evidence***: See, **Exhibit M**, excerpts from the deposition of Christopher Alexander, as attached to the NOL at pp. 134:5-135:12 and 166:6-169:9.	
123. Clenton Alexander testified at his deposition that he was unaware of any care which was allegedly being withheld by the Scripps Defendants until after his mother's passing. ***Supporting Evidence***: See, **Exhibit N**, excerpts from the deposition of Clenton Alexander, as attached to the NOL at: pp. 219:25-223:6; 139:23-141:7.	
124. Jacquelyn McDermet testified at her deposition that she was unaware of any care which was allegedly being withheld by the Scripps Defendants until after her mother's passing. ***Supporting Evidence***: See, **Exhibit O**, excerpts from the deposition of Jacquelyn McDermet, as attached to the NOL at: p. 148:6-23.	

DATED: March 15, 2016

HIGGS FLETCHER & MACK LLP
By: _____
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