Gabriela Ancona v. Dignity Health | Case No. 24CV00455
Hearing Date: | April 20, 2024
Demurrer to Complaint

PROPOSED TENTATIVE

On January 29, 2024, plaintiff Gabriela Anacona (through her guardian ad litem Denisse Anacona Martinez) (hereafter, plaintiff or Ms. Anacona) filed a complaint against defendant Dignity Health (dba Marian Regional Medical Center) (hereafter, defendant, Dignity Health or MRMC), advancing two causes of action – medical negligence and elder abuse. Ms. Anacona was over sixty five years old at all relevant times (she was in fact 83 at the time of the accident), has dementia, cannot speak English well, and has a significant history of falling, leading to fractures and surgery. On February 4, 2023, Ms. Anacona fell at home and presented herself to MRMC; an X-ray revealed no new fractures, and she was discharged. Ms. Anacona's pain did not subside, and she returned to MRMC on February 7, 2023, complaining of low back pain, pelvic pain, with difficulty walking. A CT scan of Ms. Anacona's pelvis "came back negative for any fractures or internal injuries." However, the CT scan revealed a "new finding of left L3 inferior endplate regions compression fraction with 20% vertebral body height loss and resulting mild central canal and bilateral foraminal stenosis. There was also her prior L4 burse fracture deformity [from 2020] and moderate right central canal stenosis." (Complaint, ¶ 26.)

Ms. Anacona was admitted "for observation," for two days/nights. Ms. Anacona's daughter informed medical personnel at the time of admittance that Ms. Anacona had dementia and apparently could not speak English fluently. Further, MRMC assessed Ms. Anacona under the Johns Hopkins Fall Risk Assessment (a test intended to assess a patient's chances of falling). Ms. Anacona received the highest number under the test – 28 – meaning she was categorized as having "an extreme[] fall risk." According to MRMC's own policies and procedures, "patients who are classified as high fall risks require extra precautions to prevent against foreseeable harm caused by a fall. Some of those preventions include but are not limited to: (1) the application of fall mats, (2) moving the patient closer to nurses POD, (3) activating the bed and chair alarms, (4) use of the Avasure virtual nurse system, and (5) for nurses to remain within the arms-length of patients when toileting." (Complaint, ¶ 33.) Instead, on February 9, 2023 after plaintiff was admitted, "different MRMC personnel" (and by that it would appear plaintiff means different personnel than those who admitted Ms. Anacona and/or performed the John Hopkins Fall Risk Assessment[1]), including a registered nurse assigned to care for plaintiff, admitted 1) she was aware plaintiff had a high fall risk; 2) saw plaintiff seated on the edge of her bed, with her legs dangling over the edge' 3) observed plaintiff was visibly agitated and refused to lay back in her bed; 4) was unable to secure plaintiff in her bed; and 5) left plaintiff unattended (leaving the room). None of the above precautions were taken. When the nurse returned, plaintiff was found on the floor, with severe leg pain (plaintiff suffered a "proximal femoral diaphysis oblique fracture of the right hip). Plaintiff has not been able to return home as a result of this injury.

[1] The operative complaint indicates that the California Department of Public Safety investigated Ms. Anacona's fall, and the testimony of RN 1 was taken during this investigation. The factual assessment apparently comes from R N1's testimony from that investigation.

Defendant demurs to the second cause of action, which alleges elder abuse, pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Welf & Inst. Code, § 15600) (the Elder Abuse Act).

A) Legal Background

` The Elder Abuse Act "affords certain protections to elders and dependent adults." (*Winn v. Pioneer Medical Group, Inc*. (2016) 63 Cal.4th 148, 152.) Welfare and Institutions Code, section 15657 (all future statutory references are to this Welfare and Institutions Code unless otherwise indicated) "provides heightened remedies to a plaintiff who can prove 'by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57,' and who can demonstrate that the defendant acted with 'recklessness, oppression, fraud, or malice in the commission of this abuse.' " (*Id.* at p. 152; see also *Oroville Hospital v. Superior Court* (2022) 74 Cal.App.5th 382, 399.) Section 15610.57 defines "neglect," insofar as relevant here, as "[t]he negligent failure of any person *having the* care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (§ 15610.57, subd. (a)(1)[2]; see *Winn*, at p. 152; *Oroville*, *supra*, at p. 399.) "Neglect" includes "[f]ailure to assist in personal hygiene," "[f]ailure to provide medical care for physical and mental health needs," "[f]ailure to protect from health and safety hazards," and "[f]ailure to prevent malnutrition or dehydration." (§ 15610.57, subds. (b)(1)-(4); *Kruthanooch v. Glendale Adventist Medical Center* (2022) 83 Cal.App.5th 1109, 1123, citing § 15657 subds. (a)(1) and (b)(3).)) Neglect thus incorporates "the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34.)

For elder abuse neglect, defendant must have a "substantial caretaking or custodial relationship [with the patient], involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant – not the defendant's professional standing – that makes the defendant potentially liable for neglect." (*Winn, supra*, at p. 152.) In construing section 15610.57, which defines neglect and contains a nonexhaustive list of examples, our high court has emphasized that most of the examples "seem to contemplate . . . the existence of a robust caretaking or custodial relationship – that is, a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Id*. at pp. 157-

[2] There is a second statutory definition of "neglect". Per section 15610.57(a)(2), neglect exists based on "negligent failure of an elder or dependent adult to exercise that degree of self-care that a reasonable person in a like position would exercise." Because plaintiff allege neglect arising in the context of medical care and not self-care, we deal only with the first definition of neglect. (*Winn, supra*, 63 Cal.4th at p. 156.)

158; *Kruthanooch, supra,* at pp. 1124, 1129 [the caretaking relationship following *Winn* must be "robust" and the measure of responsibility assumed by the caretaker must be "significant"].)

Central to the neglect calculus under the Elder Abuse Act is the distinction between "neglect" under the Elder Abuse Act and professional negligence. To implicate the Elder Abuse Act, defendant must harm the patient by failing to provide medical care or by failing to attend to her basic needs and comforts, rather than harm when undertaking medical services. (*Kruthanooch, supra,* at p. 1135.) The Legislature has "enacted a scheme distinguishing between—and decidedly not lumping together—claims of professional negligence and neglect. [Citations.] The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. [Citation.] Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra,* 63 Cal.4th at pp. 159–160; *Kruthanooch, supra,* at p. 1125.)

The Elder Abuse Act afford heightened remedies for "only egregious acts of misconduct distinct from professional negligence." (*Covenant Care, supra*, 32 Cal.4th at p. 784.) "[T]he Legislature expressly has excluded ordinary negligence claims from treatment under the Act." (*Id.* at p. 789.) For this purpose, plaintiff must prove "by clear and convincing evidence" that "the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of" the neglect. (§ 15657.) " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. [Citations.] Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to a level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' [Citation.]" (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32.) "Hence, the Act does not provide liability for simple or gross negligence by health care providers." (*Fenimore* v. *Regents of University of California* (2026) 245 Cal.App.4th 1339, 1347.)

In summary, to state a claim under the Elder Abuse Act (neglect with the enhanced or heightened remedies), a plaintiff must allege facts "establishing that the defendant: (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene, or medical care [citations]; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs [citations]; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness) [citations]." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406-407.) These facts must be alleged with

particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) The plaintiff must also allege, with particularity, that the neglect caused the elder adult to suffer physical harm, pain, or mental suffering. (*Carter, supra,* 198 Cal.App.4th at p. 407; see *Kruthanooch, supra,* 83 Cal.App.5th at p. 1134; see also *Dougherty v. Roseville Heritage Partners* (2020) 47 Cal.App.5th 93, 105, fn. 1 [citing *Carter*].)

There is one last requirement for our immediate purposes. To the extent plaintiff seeks to hold a corporate defendant liable for the acts or omissions of its employee when seeking heightened remedies, plaintiff also must satisfy the standards set forth in Civil Code section 3294, subdivision (b). (§ 15657, subd. (c)) As relevant here, that section provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).) Allegations regarding authorization or ratification must also be pled with particularity. That means "the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5; see also *Covenant Care, supra,* 32 Cal.4th at p. 790 [citing "the general rule that statutory causes of action must be pleaded with particularity"]; *College Hospital Inc v. Superior Court* (1994) 8 Cal.4th 704, 721-722.) Put another way, with respect to a corporate employer, the availability of enhanced remedies under the Elder Abuse Act requires proof of authorization, ratification or personal participation in an act of oppression, fraud or malice by an officer, director or managing agent of the corporation.

B) Parties' Arguments

Defendant generally demurs to the second cause of action for elder abuse, advancing three arguments. First, defendant contends that "failing to supervise, including failure to take proper procedures to protect plaintiff," does not constitute "neglect" under the Elder Abuse Act generally and section 15657 in particular. According to defendant, the allegations in the operative pleading do not allege "neglect" under the elder abuse, but only professional negligence. Relying on *Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331, and *Covenant Care, supra,* 32 Cal.4th 771, defendant argues as follows: "Like *Worsham* and *Covenant*, it is clear that plaintiff Anacona's allegations in this case are based on negligent performance of medical care and not withholding medical services. Plaintiff Anacona was admitted to the hospital for observation after a fall at her home. The medical staff at MRMC rendered medical care to plaintiff during her admission to the hospital with the intent to

discharge here after two days. Plaintiff Anacona's complaint alleges MRMC failed to comply with proper care requirements for 'high risk fall' patients[,] which would be covered under a claim for professional negligence. These facts do not support plaintiff's cause of action for Elder Abuse/Neglect." (Motion, p. 7.)

Second, defendant contends that plaintiff was not in its care and custody as required under section 15657. Relying on *Kruthanooch, supra*, 83 Cal.App.5th 1109, defendant contends it did not have a "robust" and "significant" caretaking relationship with plaintiff. According to defendant, the allegations show that while plaintiff was a "high fall risk" patient requiring precautions, this is not "directly related to [e]lder care or an [e]lder's basic needs. The precautions taken for 'high risk fall' patients is part of the hospitals['] medical treatment of the patient. Therefore, plaintiff Anacona's cause of action for Elder Abuser/Neglect fails due to a lack of a custodial or caretaking relationship. Even in plaintiff's complaint, it states she was only admitted to the hospital for a couple of days for observation for injuries sustained when she fell at home. Plaintiff has not presented facts that MRMC was responsible for her basic needs such as hygiene, nutrition, hydration or other basic needs on long-term relationship[;] she was there for a fall."

Finally, defendant contends there are insufficient facts to support malice, oppression, or fraud, for purposes of supporting the heightened remedies under the Elder Abuse Act. Specifically, defendant observes that plaintiff must show, for a corporate employer, that the knowledge and conscious disregard, authorization, ratification (of oppression, malice of fraud), must be an officer, director or managing agent (all with factual specificity). It insists that plaintiff's claims in the operative pleading fall to satisfy this standard.

Plaintiff in opposition insists that it has adequately alleged "neglect" under the Elder Abuse Act because it has adequately alleged defendant's failure to protect plaintiff "from health and safety concerns," making attempts to distinguish *Worsham* and progeny. Further, plaintiff argues that she has adequately alleged per *Winn* that defendant had a "robust" and "significant" caretaking relationship with her, as she was "entirely dependent upon MRMC for assistance with her activities of daily living due in large part to her dementia, inability to ambulate, and high fall risk status," as alleged in the complaint. "By admitting [plaintiff] to the hospital, MRMC 'assumed a significant measure of responsibility for attending to one or more of an elder's basis needs that an able- bodied and fully competent adult would ordinarily b[e] capable of managing without assistance,'" citing *Winn, supra*.

Finally, plaintiff contends (again, in opposition) that the heightened remedies have been adequately pleaded. Plaintiff argues "[t]hat these events and decisions by MRMC were undertaken with a deliberate disregard of the high degree of probability that an injury [would] occur is clear. MRMC knew [plaintiff] had dementia . . . MRMC knew [plaintiff] was high-fall

risk. [] MRMC knew [plaintiff] spoke nothing but Spanish. . . . MRMC knew [plaintiff] was agitated and sitting upright on the edge of the bed . . . . Despite known all of this, among other things, the MRMC staff deliberately left [plaintiff] unattended because MRMC nursing staff were consistently 1) understaffed, 2) untrained, and 3) dismissive of patient complaints particularly when that patient cannot speak English. These issues were known to MRMC, and MRMC did nothing to remedy this situation." (Opp. p. 10.)

Defendant filed a reply on April 22, 2024, reiterating the arguments advanced in its motion.

C) Defendant's Request for Judicial Notice

Defendant asks the court to take judicial notice of the operative pleading in this case. This request is denied as unnecessary. The court has the authority to examine the operative pleading in its own trial court case file – the central and critical document at issue for immediate purposes -- irrespective of any request for judicial notice.

D) Merits

Before addressing the merits, it might be helpful to describe what is ***not*** at issue in the present demurrer. At no point do the parties attempt to disengage "neglect" from the heightened remedies (given rise to attorney's fees, etc.), under the Elder Abuse Act, or otherwise argue that elder abuse "neglect" can proceed without the heightened remedies plaintiff claims are appropriate. (See, e.g., *Carter, supra*, 198 Cal.App.4th at p. 403, fn. 6 ["There is a split of authority on whether the Elder Abuse Act creates an independent cause of action or merely provides additional remedies for some other cause of action], citing *Perlin v. Fountain Valley Management, Inc.* (2008) 163 Cal.App.4th 657, 665, fn. 9 [independent cause of action] and *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 529 [Elder Abuse Act does create a cause of action as such, put provides for attorney fees, costs, pain and suffering, and punitive damages under certain conditions].) The parties' unstated (albeit clear premise) is that a demurrer to the second cause of action is an appropriate procedural vehicle (as opposed to say, a motion to strike associated with challenges to remedies only) because the Elder Abuse Act "cause of action" requires allegations of both neglect as well as the predicate for heightened remedies based on malice, oppression or fraud. The court will assume, without deciding, that the Elder Abuse Act creates a unitary cause of action in this regard, rather than merely providing enhanced remedies for an existing cause of action.[3]

On the merits, the court is not persuaded by defendant's claim that plaintiff has failed adequately to plead elder abuse "neglect." We start with section 15610.57(a)(1) as we must,

[3] The court notes in any event that the only damages sought in the pleading by plaintiff are the heightened remedies authorized under the Elder Abuse Act.

which provides that a defendant is liable for "the negligent failure of any person having the care or custody of the elder . . . to exercise that degree of care that reasonable person in like position would exercise." Section 15610.57(b)(1) gives a nonexhaustive list of "neglect" examples, including failures "to assist in personal hygiene" or to provide "food, clothing, or shelter"; to provide "medical care for physical and mental health needs"; "to protect from health and safety hazards"; and "to prevent malnutrition or dehydration." (§ 15610.57(b)(2), (b)(3), (b)(4). As noted in *Winn*, "these examples add some context elucidating the statute's meaning – context that supports inferences about the sort of conduct the Legislature sought to address . . . – that is, a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basis needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn, supra,* 63 Cal.App.4th at p. 158.) Clearly what is at issue is plaintiff's failure to protect plaintiff from "health and safety hazards" – i.e., the fact plaintiff, given her dementia, her English language difficulties, and her proclivity to fall – was a "basic need that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Ibid.*)

Plaintiff when admitted was unable to meet her most basic needs (as would a fully competent adult without assistance). Further, at issue is not a medical or professional service, giving rise to more traditional tort liability, such as failure to proscribe the right medicine, or failure to refer a patient to a specialist, irrespective of any caretaking function, but what appears to be a "basic need". Plaintiff, given her vulnerabilities, depended on others for all of her most basic requirements (food, hydration, and safety protections), even on a temporary basis, including fall procedures to protect herself from (essentially) herself, necessitating defendant's continued oversight. (*Winn, supra,* 63 Cal.4th at p. 160.) The court is simply not persuaded that defendant's acts involved "professional negligence" rather than a failure to provide plaintiff with basic care under these circumstances – the *sine qua non* of elder abuse. (*Covenant Care, supra,* 32 Cal.4th at p. 783 [under the Elder Abuse act, "neglect" refers not to substandard medical services, but to the failure of those responsible for attending to the basic needs and comforts of elderly, regardless of their professional standing, to carry out their custodial obligation; neglect speaks not of the undertaking or medical services, but of the failure to provide medical care].)[4]

[4] To put a fine point on it, the neglect at issue here does not involve the assessment, diagnosis, and/or treatment of plaintiff's medical ailment that necessitated her hospital stay in the first instance – on February 7, 2023 (i.e., low back pain, pelvic pain, and difficulty walking, as well as a CT scan of plaintiff's lumbosacral spine). The problem at issue has nothing to do with her continuing medical care in this regard, but her present and future basic custodial care (akin to hydration and nourishment), as part of the defendant's agreement to "observe" plaintiff upon admittance. (*Covenant Care, supra,* 32 Cal.4th at p. 786 [claims under the Elder Abuse Act are not brought against health care providers in the capacity as providers but, rather, against custodians that abuse elders as custodians; the fact that some health care institutions in perform custodial functions, such as nursing homes, provide both does not mean the two functions are the same].) Plaintiff as alleged depended on defendant to provide (even for the two- day brief stay) her fundamental needs – dressing, food, medications, and (as relevant for our purposes), implementation of safety protections and protocols based on plaintiff's particular and acute vulnerable situation. Whether this ultimately is true after discovery is not the issue at this time.

Defendant's reliance on *Covenant Care, supra,* 32 Cal.4th 771 and *Carter,* supra, 198 Cal.App.4th 396, seems misplaced. In *Covenant Care,* our court (as relevant for our purposes) concluded a skilled nursing facility was subject to liability under the Elder Abuse Act by failing to provide an elderly man suffering from Parkinson's disease with sufficient food and water and necessary medication; left him unattended and unassisted for longer periods of time; left him in his own excrement so that ulcers exposing muscle and bone became infected; mispresented and failed to inform the his children of his true conditions. (*Covenant Care, supra,* 32 Cal.4th at p. 778.) At least for pleading purposes, the injuries here seem more akin to those identified in *Covenant Care* (although perhaps not as egregious).

In *Carter,* the court found nothing in plaintiff's pleading to indicate that defendant Hospital "did anything sufficiently egregious to constitute neglect . . . . " (*Carter, supra,* at p. 407.) Plaintiff alleged three hospital stays as the basis for the elder abuse cause of action. During the first stay, however, nothing was alleged "about the Hospitals denial or withholding of any care or about any injury [decedent] suffered." (*Id.* at p. 407.) As for the second stay, plaintiff alleged "no facts . . . as to any care or treatment the Hospital denied or withheld from [decedent] – indeed, the allegations that various conditions were diagnosed and that [decedent] was able to be discharged either days after submission suggest the Hospital actually provided adequate treatment. Further, although it is alleged that during this hospitalization [decedent] suffered additional pressure ulcers on his heels, which were falsely documented, there are no allegations as to how the Hospital or its false documentation caused the ulcers or any other injury to [decedent]." And as to the third and final stay, plaintiff alleged Hospital failed to administer antibiotics and did not have the proper size endotracheal tube (despite a search). According to the Carter court, although "the failure to infuse the proper antibiotics and failure to locate the proper size endotracheal tube in time to save [decedent] *might* constitute professional negligence [citations], neither failure constitutes abuse or neglect within the meaning of the Elder Abuse Act. [Citations.]" (*Id.* at p. 408, italics in original.) Here, the alleged failures by defendant are qualitatively different than that third hospital stay in Carter, similar in fact to the acts in *Covenant Care,* at least for pleading purposes.

The court acknowledges that *Worsham v O'Connor Hospital, supra,* 226 Cal.App.4th 331, relied upon by defendant, makes the issue more nuanced (and thus closer). In *Worsham,* plaintiff entered O'Connor Hospital to undergo hip surgery for a fractured hip; following surgery, she was discharged to O'Connor's transitional care unit for rehabilitative care. While in rehabilitative care, plaintiff fell, breaking her right arm and rebreaking her hip. Plaintiff alleged a violation of the Elder Abuse Act, based on claims that the transitional care unit was "understaffed and undertrained, and that the lack of sufficient well-trained staff caused [plaintiff's] fall." (*Id.* at p. 334.) The trial court sustained the demurrer to the second amended complaint, and the appellate court affirmed.

As relevant for our purposes, the *Worsham* court concluded as follows: "Like *Carter* [and the third hospital stay therein], the allegations in the present case concern O'Connor's

alleged negligent undertaking of medical services, rather than a failure of those responsible for attending to Ms. Worsham's basic needs and comforts to carry out their custodial or caregiving obligations. According to the second amended complaint, O'Connor was required to maintain specific staff-to-patient ratios to address the needs of patients and to ensure compliance with state and federal law. O'Connor was chronically understaffed, and did not adequately train the staff it did have. The allegations include the fact that O'Connor was aware that Ms. Worsham had a risk of falling, and failed to have the proper staffing in place to prevent Ms. Worsham's fall. As a result of O'Connor's insufficient staffing, Ms. Worsham suffered a fall that resulted in a broken arm and a rebreak of her right hip. [¶] The allegations in the second amended complaint are not sufficient to render O'Connor's conduct in failing to provide adequate staffing anything more than professional negligence. The allegations, if true, demonstrate O'Connor's negligence in the undertaking of medical services, nota 'fundamental '[f]ailure to provide medical care for physical and mental needs.'" (*Worsham, supra,* at p. 338 [the allegation that the Hospital should have provided a "sitter" to ensure plaintiff did not fall is "like that of understaffing and undertraining," amounting to professional negligence].)

Although not cited by either party, *Feinmore, supra,* 245 Cal.App.4th 1339 is relevant here. There, plaintiff was a patient at Resnick Neuropsychiatric Hospital when he fell and suffered a hip injury from which he never recovered, ultimately causing death. The trial court sustained the demurrer to the amended complaint advancing a cause of action under the Elder Abuse Act.

The appellate court reversed. "Here, the [first amended complaint] alleged the Hospital committed neglect by allowing [plaintiff] to fall minutes after entering the facility, failing to treat [decedent] fractured hip for four days, and violating certain state regulations for acute psychiatric hospitals. [¶] If the [plaintiffs] alleged only the first two things, we might agree that the trial court correctly sustained the demurrer." (See also *Fenimore v. Regents of University of California* (2020) 44 Cal.App.5th 740, 742-743 [*Fenimore II*][5].) However, according to the *Fenimore* court, the "allegations that the Hospital's regulatory violations constituted elder abuse add more to the story . . . ." Citing to *Norman v. Life Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, and *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, the court concluded that "a violation of staffing regulations [6] here may provide a basis for finding neglect. Such a violation might constitute negligent failure to exercise the care that similarly situated reasonable person would exercise, or it might constitute a failure to protect from health

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[5] The court in *Fenimore II* summarized its early decision in 245 Cal.App.4th 1339 as concluding that plaintiff was barred for raising elder abuse based exclusively on decedent's fall within minutes of the facility, for at most that would be professional negligence. A different result occurred, however, as there was pleaded a practice of violating staffing regulations and improperly understaffing to cut costs. (*Id.* at p. 741.)

[6] In *Fenimore* the regulations involved California Code of Regulations, title 22, section 71225, subdivision (c), requiring a sufficient number of appropriate personnel to be provided for the safety of patients in an acute psychiatric hospital. In Norman, the regulations at issue were California Code or Regulations, title 22, section 72311. (*Norman, supra,* at p. 1240.) And in Gregory, the regulations involved California Code of Regulations, title 22, sections 72315 and 72528, as well as 42 C.F.R. §§ 483.10, 483.15, and 483.25. (*Gregory, supra,* at p. 519.)

and safety hazards ([decedents] known fall risk). The former is the definition of neglect under the [Elder Abuse Act], and the latter is just one nonexclusive example of neglect under the [Elder Abuse Act]." (*Id*. at pp. 1348-1349.)

Critical for our purposes is the fact that *Fenimore* court expressly distinguished *Worhsam*. It noted that "while *Worsham* focused on a 'fundamental failure to provide medical care,' 'as the way to show neglect under the Act, that is not the only way to prove neglect." (*Worsham, supra*, 226 Cal.App.4th at p. 338, quoting *Delaney, supra*, 20 Cal.4th at p. 34.). "The [Elder Abuse] Act defines neglect generally as the negligent failure of custodian or care providers to exercise the degree of care a similarly situated reasonable person would exercise, and then provides examples of neglect, including but not limited to the '[failure to provide medical care for physical and health needs.' As Norman and Gregory teach, violations of standards of care set by health facility regulations may provide a basis for finding the requisite failure. . . . ." (*Fenimore, supra,* at pp. 1350-1351.)

The case seems more akin to *Fenimore* than *Worsham,* although admittedly not jot-for-jot. First, as was done in both *Worsham* and *Fenimore*, plaintiff alleges a "top-down system failure in MRMC's training and supervision of nurses, agents, and staff." (See, e.g., *Worsham, supra*, 226 Cal.App.4th at p. 338 ["the allegations in the second amended complaint are not sufficient to render O'Connor's conduct in failing to provide adequate staffing anything more than professional negligence"].) Second, the victim here (unlike the victim in *Worsham*), seems particularly vulnerable, given her dementia and past medical history, admitted for "observation" based upon her problems with mobility and danger of falling. "Observation" (the reason for plaintiff's admittance)and agreed to by defendant) arguably encompasses an attendant custodial obligation not present in *Worsham*.

Third, and perhaps most critically, plaintiff here, similar to the plaintiff in *Fenimore* but unlike the plaintiff in *Worsham*, alleges that defendant's conduct violated its own policies and procedures that apply when it determines that an elderly patient is at a high risk of falling. In paragraph 33 of the operative pleading, for example, plaintiff alleges that MRMC has its *own "policies and procedures*" when an elderly patient is determined to be at high risk, including use of fall mats, moving the patient closer to the nurses POD, activation of bed and chair alarms, use of the "Avasure virtual nurse system," and the requirement that nurses remain within "arms-length of patients when toileting." Plaintiff claims that none of these procedures and policies was followed. These "policies and procedures" as implemented by MRMC are not medical procedures, but seem custodial, similar in scope and meaning to the "staffing regulations" at issue in *Fenimore, Norman,* and *Gregory,* at least to the extent they establish a standard of *custodial care* for patients that defendant itself agreed to follow.[7] Any concomitant failure to

[7] There is no case law the court can find that indicates there is a legal difference between a regulatory rule (at issue in *Fenimore, Norman,* and *Gregor*y) and an internal policy/procedure formulated by the defendant itself (at

implement/follow these procedures (in *Fenimore*'s lexicon) could support a finding of "neglect" under the Elder Abuse Act because it shows either 1) failure to exercise the care that a similarly situated reasonable person would exercise; or 2) show a failure to protect from health and safety hazards (based on the fact plaintiff was a known fall risk). This, unlike the situation in *Worsham*, comports with the general explanations offered by our high court, to the extent that "neglect" within the meaning of the Elder Abuse Act refers to "the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults . . . to carry out their custodial obligations." (*Delaney, supra*, 20 Cal.4th at p. 34.) In this critical way, *Worsham* is distinguishable. Plaintiff has essentially alleged that defendant failed to attend to her basic needs because it failed to ensure that she received the safety protocols necessary for her continuing health and welfare, despite her two-day stay in the hospital, all of which was necessary to prevent plaintiff from falling based on her dementia, exacerbated by her inability to speak and understand English. The court is unwilling at this pretrial stage to conclude that plaintiff has not adequately pleaded "neglect" as contemplated by the Elder Abuse Act, and finds *Fenimore*, rather than *Worsham*, controlling.

Nor is the court persuaded by defendant's claim that it is did not have a "robust" and "significant" custodial obligation as to plaintiff, as discussed and required by *Winn* and progeny. Defendant, relying on *Winn*, argues that this standard is satisfied only when there is an "ongoing responsibility for one or more basic needs, with the elder patient." (*Winn, supra*, 63 Cal.4th at p. 152.) That is, according to *Winn*, "the focus of the statutory language is on the nature and substance of the relationship between an individual and an elder or a dependent adult. The focus supports the conclusion that the distinctive relationship contemplated by the [Elder Abuse Act] must be more than casual or limited interactions." (*Id.* at p. 158.) Defendant contends that plaintiff in her pleading provides that she "was admitted to the hospital for a couple of days for observations for injuries sustained when she fell at home. Plaintiff has not presented facts that [defendant] was responsible for her basic needs such as hygiene, nutrition, hydration, or other basic needs on a long-term relationship[;] she as there for a treatment from a fall."

Winn makes it clear that an individual (and thus an institution) "might assume the responsibility for attending to an elder's basic needs in a variety of contexts and locations, including beyond the confines of residential care facility." (*Winn, supra*, 63 Cal.4th at p. 158.) Ultimately, *Winn* indicated that the focus "of the statutory language is on the nature and substance of the relationship between an individual an elder or dependent adult." (*Ibid*.) In the end what is contemplated "is the existence of robust caretaking or custodial relationship – that is, a relationship where a certain party as assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Ibid.*) And as observed in

issue here). For pleading purposes, therefore, the existence of such an internal rule (regulatory or otherwise) sufficiently distinguishes *Worsham.*

Oroville Hospital, supra, 74 Cal.App.4th at page 405, defendant need not be a caretaker for *all* of the elder's needs, and it must "be determined on a case-by-case basis whether specific responsibilities assumed by a defendant were sufficient to give rise to substantial caretaking or custodial relationship." "The fact that [another] provided for a large number of decedent's basic needs does not, in itself, serve to insulate defendant from liability under the Elder Abuse Act if the services they provided were sufficient to give rise to a substantial caretaking or custodial relationship. Nowhere in *Winn* is there any suggestion that only one person or entity can be in a qualifying caretaking or custodial relationship with an elder or dependent adult at any given time, although such will often be the case. In other words, while [another person] had a caretaking relationship with [the elder patient], that in itself does not establish that defendant did not also have such a relationship [with the elder patient]." (*Id.* at p. 405.)

The situation discussed in *Oroville* seems to be the situation here, at least as pleaded. While it may be true generally that the guardian ad litem and Ms. Anacona's daughter (Denisse Anacona Martinez) had the custodial care of plaintiff generally, at least for two days, while Ms. Anacona was admitted to defendant's hospital for "observation," defendant took on that responsibility. Two days of observation reasonably contemplated oversight for ensuring Ms. Anacona's most basic needs, including food, water, hygiene, and (as relevant for our purposes) protecting her from health and safety hazards, as she was particularly vulnerable (and unable to provide and/or protect herself). Just because the stay was for a limited duration does not mean that during that limited time defendant did not have a robust and significant caretaking relationship with plaintiff.

The court finds *Kruthanooch, supra,* 83 Cal.App.4th 1109, relied upon by defendant, to be factually distinguishable. In *Kruthanooch*, plaintiff presented at defendant's acute care hospital for weakness and lightheadedness; he was ultimately admitted to the hospital. Several hours later, plaintiff underwent an MRI scan and sustained a burn to his abdomen due to defendant's failure to screen plaintiff for electronically conductive materials prior to the scan; plaintiff was discharged two days later. Plaintiff sued, *inter alia*, for elder abuse. Following a jury trial (in which the jury found for plaintiff on the elder abuse cause of action), the trial court granted a judgment notwithstanding the verdict, concluding, amongst other things, that plaintiff failed to prove that defendant had a "robust" and "significant" caretaking relationship with plaintiff, as contemplated by *Winn, supra*.[8]

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[8] The *Kruthanooch* trial court also found there was no "neglect" under the Elder Abuse Act; in this regard the appellate court agreed, concluding there was insufficient evidence to show that defendant failed to provide medical care or failed to attend to plaintiff's basic needs and comforts. "Rather, the evidence at trial supports that [defendant medical service] harmed [plaintiff] when *undertaking* medical services [i.e., failing to check for conductive metal before the MRI]." (Italics in original.) Plaintiff "cannot evade the limitations in *Covenant Care* simply by characterizing a claim based on the undertaking medical services as a failure to protect a patent from health and safety hazards." The appellate court went on to note in particular that an "MRI is not a basic need . . . ." (*Kruthanooch, supra,* 83 Cal.App.5th at pp. 1135-1136.) Although defendant in its motion and in reply does not

The appellate court affirmed. "There is no question that [plaintiff] was ill when he presented at the emergency department. He reported weakness and lightheadedness and his medical records state that Kruthanooch's lower extremity weakness rendered him 'essentially' unable to walk by that evening. While in the hospital, Kruthanooch received IV fluids to treat his dehydration and rhabdomyolysis, and he was transported to and from his MRI scan by hospital employees. However, there is no substantial evidence in the record supporting that [plaintiff] was cognitively impaired. His medical records state that he was alert, 'oriented to person, place, time, and situation,' cooperative, and pleasant. Further, [plaintiff] did not elicit testimony at trial concerning whether and the extent to which Kruthanooch's diagnoses rendered him unable to attend to his basic needs. There is no substantial evidence that, at the time he presented at [defendant's medical service], Kruthanooch sought or required ongoing assistance with eating, drinking, toileting, or any other basic needs. Rather, Kruthanooch's son Daniel testified that, prior to his burn injury, Kruthanooch was "very independent" and "did everything himself", and his son Sam similarly testified that Kruthanooch 'did everything on his own.'" (*Kruthanooch, supra,* at pp. 1128–1129.) Further, there was "no substantial evidence of an explicit assumption of ongoing caretaking responsibilities under the circumstances present here." (*Id.* at p. 1131.)

Of particular note to defendant here are the following observations made by the *Kruthanooch* court: "We are not persuaded that a hospital necessarily assumes a robust caretaking or custodial relationship and ongoing responsibility for the basic needs of every person admitted. In *Winn*, the Supreme Court rejected the argument that where a defendant fits within the definition of 'care custodian' under section 15610.17, the defendant 'will, as a matter of law, always satisfy the particular caretaking or custodial relationship required to show neglect under section 15610.57. [Citation.]" In fact, "*Winn* does not state that the protections and heightened remedies available under the [Elder Abuse Act] are available to any inpatient who receives assistance, however briefly, with one or more basic needs. This would result in a 'lumping together' of professional negligence and neglect claims, contrary to the Supreme Court's pronouncement that the Act was intended to distinguish between such claims. [Fn. and citation omitted.] As discussed, the Supreme Court rejected the assertion that 'circumscribed engagement' and 'limited interactions' are sufficient to establish the caretaking relationship required under the law. (*Id.* at p. 158 [].) Thus, [defendant's] assistance with these needs on a limited basis during its provision of medical treatment to Kruthanooch is not substantial evidence of the custodial or caretaking relationship required by *Winn*." (*Kruthanooch, supra,* 83 Cal.App.5th at p. 1132.)

The *Kruthanooch* court underscored its conclusion by comparing and contrasting Kruthanooch with a hypothetical elder patient: "As an example, one can imagine an able-bodied

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rely on *Kruthanooch* when advancing its challenges to claims of elder abuse neglect, as discussed above, it seems *Kruthanooch* nevertheless supports the court's conclusion (discussed in the body of this order, *ante*); that is, given plaintiff's particular and individualized vulnerabilities, the fall procedure was a basic need, not the undertaking of a medical service. Simply put, the MRI scan at issue in *Kruthanooch* is not similarly situated to the fall procedures at issue here.

and cognitively unimpaired young woman who sustains a back injury while hiking on a hot day. Because the injury renders her unable to walk without difficulty and she is weak from dehydration, she presents at an acute care facility for treatment and is admitted. As noted above, her admission to such a facility alone is sufficient to render her a "dependent adult" under section 15610.23, subdivision (b). This woman might, like Kruthanooch, receive IV hydration, be transported for an MRI scan via a gurney, and sustain a burn wound from the MRI because the technologist did not properly screen her for electrically conductive materials. *If an acute care facility's temporary assistance with hydration and mobility is sufficient to establish the requisite caretaking or custodial relationship, there is no reason why this woman could not also recover under the Act, even though she is not 'particularly vulnerable and reliant' and thus is not in the class of people that the Act was intended to protect.* (*Winn, supra*, 63 Cal.4th at p. 160, 202 [])" (*Kruthanooch, supra*, 83 Cal.App.5th at p. 1132, fn. 6, italics added.)

Despite *Kruthanooch*'s facial appeal, it is factually distinguishable from the present case. First, and not inconsequentially, *Kruthanooch* did not involve a challenge to any allegations in the complaint via demurrer, but the sufficiency of evidence following trial. This is a crucial procedural distinction (particularly as there is no indication in *Kruthanooch* that the operative pleading was defective about defendant's robust and significant caretaking function). Second, while both Kruthanooch and plaintiff were admitted to a hospital stay for two days, they are not similarly situated. Kruthanooch was not cognitively impaired; in fact, he could fully care for himself as to all basic needs, without need of assistance (ongoing or otherwise), such as eating, drinking, and other basic needs. That is manifestly untrue with regard to plaintiff (at least as pleaded), for plaintiff suffered from dementia and was prone to falling without assistance. This was a critical distinction offered by the *Kruthanooch* court, and is a critical fact here. Further, defendant admitted plaintiff for "observation" – which must by logic include not only her medical well-being with regard to past injuries, but oversight about plaintiff's ability to care for her health and safety *presently and in the future*, accounting for her high risk of falling (unrelated to actual treatment of her past medical injuries). Under the circumstances this seems to be a basic need, even if plaintiff's durational stay was but two days. Finally, plaintiff's situation seems akin to the hypothetical elderly patient discussed by the *Kruthanooch* court in footnote 6 of its opinion (detailed above), rather than Kruthanooch himself. The *Kruthanooch* court clearly acknowledged the possibility that a robust and significant caretaking relationship could exist, even on a temporary basis, when an elderly patient is *"*particularly vulnerable and reliant" and thus otherwise within the class of people that the Elder Abuse Act was intended to protect. At least at the pleading stage, plaintiff is just such a person, as she was vulnerable and reliant on defendant's custodial care, and thus a member of the class the Elder Abuse Act was intended to protect. Plaintiff's allegations in this regard thus survive demurrer.

The court, however, will sustain defendant's demurrer because as to Dignity Health plaintiff has failed to allege malice based on recklessness. Under the Elder Abuse Act, "recklessness" "refers to a subjective state of culpability greater than simple negligence, which

has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur [citations]. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' [Citation.]" (*Worsham, supra,* 226 Cal.App.4th at p. 337, quoting *Delany, supra,* 20 Cal.4th at pp. 31-32.) As Dignity Health seems to be a corporate employer (see, e.g., *St. Myers v. Dignity Health* (2019) 44 Cal.App.5th 301, 306 [Dignity Health is a national health care system, consisting of more than 40 hospitals and care centers]), plaintiff must allege conduct essentially equivalent of conduct that would support recovery of punitive damages to obtain the Elder Abuse Act's heightened remedies. (*Covenant Care, supra,* 32 Cal.4th at p. 789.) The punitive damages statute, Civil Code section 3294, subdivision (b), which is incorporated into the Elder Abuse Act by section 15657, subdivision (c), requires plaintiff to plead that an officer, director, and/or managing agent authorized the wrongful acts by said agents and employees, with factual particularity. (*Id.* at p. 790; see *CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [discussing the requirements of a managing agent].) Even if the court were to assume that plaintiff's allegations of recklessness were sufficient as to defendant's employees, the conclusory allegations in the complaint are insufficient to establish Dignity Health's liability for heightened remedies *as an employer*. All that is alleged is that MMRC "continuously and recklessly, maliciously, and fraudulently made the decision to withhold from Plaintiff the most basic level of care'. . . ." and MRMC "withheld necessary safety measures from Plaintiff"; and MRMC "caused physical and mental harm to Plaintiff" through "flagrant disregard . . . ." These bare allegations are insufficient, as they fail to identify an officer, director or managing agent, authorized or ratified the conduct. There are no allegations about the identity of a managing agent or that agent's authority to bind defendant. There likewise are no allegations that the unidentified managing agent was aware of these problems at all.

Plaintiff in opposition does not address the issue in any meaningful way, arguing simply (as detailed above) that "MRMC nursing staff deliberately left [plaintiff] unattended because MRMC were consistently 1) understaff, 2) untrained, and 3) dismissive of patient complaint complaints particularly when the patient cannot speak English. These issues were known to MRMC, and MRMC did nothing to remedy the situation." Plaintiff overlooks the fact that she must plead with specificity that an officer, director, and/or managing agent of defendant acted recklessly (and thus ratified or authorized the employee's conduct). The complaint consists entirely of legal conclusions, rather than necessary facts, on this critical issue. Merely asserting an elder's injury was the product of corporate recklessness, without more, does not satisfy the requirement for enhanced elder abuse remedies. (*Covenant Care, supra,* at p. 790.)

The court will afford plaintiff an opportunity to remedy the deficiency, and thus the court sustains the demurrer with leave to amend.

E) Summary

The court denies defendant's request to take judicial notice of the operative complaint as unnecessary.

The court rejects defendant's claims that plaintiff has failed to adequately plead "neglect" under the Elder Abuse Act; the court also rejects defendant's claims that plaintiff has failed to plead a sufficiently "robust" and "significant" caretaking relationship with plaintiff. The court, however, sustains the demurrer with leave to amend based on plaintiff's failure to plead as to Dignity Health (as a corporate employer) that an officer, director or managing agent acted with recklessness, all with factual specificity. The court will sustain the demurrer with leave to amend, affording plaintiff 30 days from today's date to file an amended pleading.