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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF REDWOOD

10 JOSEPH SMITH and MARY SMITH,

Case No. 54321

11 Plaintiffs,

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
DEMURRERS TO SECOND
AMENDED COMPLAINT

12 vs.

13 COMPETENT CARE, INC., ARALIA
HOSPITAL, and DOES 1-100,

14 Defendants.

Date:
Time:
Dept.
Complaint filed:
Trial date:

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16 _____/

17 Plaintiffs Joseph and Mary Smith sued defendants alleging dependent elder abuse,
18 fraud, and related claims. Defendants Competent Care, Inc. and Aralia Hospital have
19 demurred to the Second Amended Complaint on the grounds that the facts plaintiffs have
20 pleaded are insufficient to show that defendants acted with any greater culpability than
21 mere negligence. A careful reading of the Second Amended Complaint reveals that
22 plaintiffs have pleaded specific facts to support their claims that, in an attempt to
23 maximize their profits, defendants deliberately neglected to give plaintiff Joseph Smith
24 the level of medical care he needed. Despite defendants' assertions that the facts alleged
25 support only simple claims of negligence, plaintiffs have alleged sufficient facts to
26 support their claims that defendants treated Joseph Smith with deliberate and/or reckless
27 indifference in their failure to adhere to federal and state guidelines concerning patient
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1 treatment to avoid pressure sores. In Joseph Smith’s case, defendants’ reckless and
2 indifferent failure to adhere to these standards of care, which in plaintiff’s case meant
3 supplying a bed long enough for his 6’ 4” frame, led to his developing advanced pressure
4 sores on his feet, which later required amputation of his legs from the knee down.

5 Defendants’ demurrers to the SAC focus on what they claim is a deficiency of
6 facts alleged to demonstrate that they acted with any degree of culpability other than mere
7 negligence. But the facts alleged, and incorporated by reference into each cause of
8 action, show that defendants were aware of the dangerous probability that their policy of
9 ignoring federal and state guidelines to maximize profits would result in patient injuries
10 such as those suffered by Joseph Smith. Further, any factual deficiencies in the pleading
11 of some claims can be cured by amendment.

12 13 **ARGUMENT**

14 **1. As to any claim to which a demurrer is sustained, the Court should**
15 **grant plaintiffs leave to amend because the claimed defects can be cured**
16 **through additional amendments.**

17 In ruling on a demurrer, a court construes the complaint “liberally . . . with a view
18 to substantial justice between the parties.” Code Civ. Proc. § 452; see *Stevens v. Superior*
19 *Court* (1999) 75 Cal.App.4th 594, 601. A complaint that shows *some* right to relief, even
20 if the facts are not clearly stated, is generally held sufficient against demurrers. See, e.g.,
21 *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639. Even if a demurrer is sustained,
22 leave to amend a complaint is routinely granted. It is an abuse of discretion for the court
23 to deny leave to amend where there is any reasonable possibility that the plaintiff can
24 state a good cause of action. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349. Since
25 plaintiffs here have pleaded sufficient facts to state proper claims against defendants, the
26 Court should overrule their demurrers. But even if the Court does identify some defect in
27 any of these claims, the Court should grant plaintiffs leave to amend to cure it.

1 **2. Plaintiffs have stated a proper claim for willful misconduct.**

2 Willful misconduct is a recognized cause of action in California, and it is distinct
3 from a negligence cause of action. In *New v. Consol. Rock Products Co.* (1985) 171
4 Cal.App.3d 681, 688-690, the court explained the distinction between claims for mere
5 negligence and those involving willful misconduct:

6 “Three essential elements must be present to raise a negligent act to the level
7 of wilful misconduct: (1) actual or constructive knowledge of the peril to be
8 apprehended, (2) actual or constructive knowledge that injury is a probable,
9 as opposed to a possible, result of the danger, and (3) conscious failure to act
10 to avoid the peril.”

11 *Id.* at 689-690 (citing *Morgan v. Southern Pacific Trans. Co.* (1974) 37
12 Cal.App.3d 1006, 1012; citations omitted).

13 The distinction between negligence and willful misconduct is the defendant’s state of
14 mind. “Willful misconduct means something different from and more than negligence,
15 however gross.” *Perez v. Southern Transportation Co.* (1990) 218 Cal.App.3d 462, 470-
16 471. Willful misconduct is a cause of action an elderly patient may assert against a
17 skilled nursing facility. “Possible causes of action that might be incorporated in a
18 complaint against a skilled nursing facility include: willful misconduct in violation of a
19 statutory or regulatory duty.” CALIFORNIA ELDER LAW LITIGATION: AN ADVOCATE’S
20 GUIDE (CEB 1998) §§ 12:42-12:43. This is precisely what plaintiff’s first claim for
21 willful misconduct alleges here. SAC, ¶¶ 34-40.

22 Defendant Competent Care protests that, “[i]n the context of healthcare services,
23 wilfulness is a legal reference to the degree of intent involved in the commission of an
24 underlying tort, not a distinct cause of action in itself.” Competent’s Memorandum at
25 4:13-14. But if one ignores the title of this claim, the facts pleaded support a cause of
26 action for negligence and punitive damages based on malice and oppression as defined by
27 Civil Code § 3294. Thus even if the Court finds plaintiffs’ claim for willful misconduct
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1 inappropriate, they are entitled to leave to amend.
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3 **3. Plaintiffs have alleged sufficient facts to state a proper claim for**
4 **intentional infliction of emotional distress.**

5 Defendants' demurrer to this claim centers around the intent required to establish a
6 claim for intentional infliction of emotional distress. That element requires either an
7 actual intent to cause emotional distress in the plaintiff, or a reckless disregard of the
8 probability that harm will result. *Molko v. Holy Spirit Assn.* (1986) 46 Cal.3d 1092, 1120.

9 Plaintiffs have pleaded facts sufficient to establish that defendants acted with a
10 reckless disregard of the probability that Joseph Smith would suffer severe emotional
11 distress as a result of their deliberate neglect while he was in their care. The complaint
12 explains that there are elaborate federal and state guidelines as to what treatment patients
13 require to avoid pressure sores. It also alleges that defendants made a deliberate choice
14 not to supply a bed of proper length to meet that standard of patient care, and instructed
15 its employees not to follow the guidelines.

16 Defendants' reliance on *Christiansen v. Superior Court* (1991) 54 Cal.3d 868 is
17 inapposite. Although that decision does state that the defendant's conduct at issue must
18 be directed at the plaintiff (*id.* at 904-905), the plaintiffs in that case were survivors of
19 deceased persons suing for mishandling of their loved ones' corpses. Here, the
20 outrageous and reckless treatment of Joseph Smith was directed at him. Therefore he has
21 stated a proper claim for intentional infliction of emotional distress.
22

23 **4. Plaintiffs have pleaded a proper claim for fraud.**

24 Defendants contend that plaintiffs are required to "name names" to meet the
25 specificity requirement for pleading a claim for fraud. Courts have long recognized that
26 the purpose of the specificity requirement is to give defendants explicit notice of the
27 conduct alleged as fraudulent, but that "the requirement of specificity is relaxed when the
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1 allegations indicate that the defendant must necessarily possess full information
2 concerning the facts of the controversy [] or when the facts lie more directly in the
3 knowledge of the opposite party [].” *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2
4 Cal.App.4th 153, 157-158. Defendants’ own records contain the information about the
5 misrepresentations and concealments about which plaintiffs complain.

6 Additionally, the complaint pleads that defendants, as health care professionals,
7 owed Joseph Smith a fiduciary duty based on their custodial relationship. SAC, ¶ 51.
8 See *Estate of Shinkle* (2002) 97 Cal.App.4th 990, 992 (nursing home facilities fall within
9 code definitions of custodians of the elderly, invoking presumption that any donative
10 transfer to them is invalid as under duress or fraud). Under these circumstances,
11 justifiable reliance on defendants’ statements can be presumed.

12 The complaint pleads facts sufficient to place defendants on notice of the false
13 representations and concealments alleged against them. SAC, ¶¶ 50-53. The identities of
14 their employees directly responsible in Joseph Smith’s case are more readily accessible to
15 defendants than to plaintiffs, and are matters for discovery. The Court should thus
16 overrule the demurrers to plaintiffs’ third claim for fraud.

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18 **5. Plaintiffs’ fifth and sixth claims for intentional violation of federal and**
19 **state laws and regulations allege facts sufficient to state proper claims.**

20 Defendants contend that plaintiffs’ fifth and sixth causes of action fail to plead
21 specifically the particular conduct of defendants that violated the statutes. This ignores
22 the fact that these claims incorporate by reference the detailed allegations appearing
23 earlier in the complaint. See SAC, ¶¶ 67, 72.

24 Defendants’ other disputes with these claims are purely a matter of semantics. As
25 explained in plaintiffs’ opposition to defendants’ demurrers to their First Amended
26 Complaint, no matter how these statutory claims are titled, they plead proper claims for
27 negligence per se accompanied by a request for punitive damages because the conduct
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1 alleged was intentional and/or reckless. The complaint alleges that the specified federal
2 and state regulations imposed a particularized duty of care on defendants, which they
3 willfully and consciously disregarded. Those explicit regulations were designed to
4 protect patients against precisely the sort of injury Joseph Smith suffered. Thus, the facts
5 pleaded state proper claims for negligence per se under Evidence Code § 669, coupled
6 with claims for punitive damages under Civil Code § 3294. The Court should overrule
7 the demurrers to these claims, or, in the alternative, grant plaintiffs leave to amend.

8
9 **CONCLUSION**

10 The federal and state governments have issued explicit guidelines on patient
11 treatment to avoid development of pressure sores. In the case of an elderly diabetic such
12 as plaintiff Joseph Smith, the risks of developing pressure sores are even more acute than
13 in the average patient. Defendants deliberately and recklessly ignored these regulations
14 in caring for plaintiff until his infection became so severe that it required partial
15 amputation of his legs. Despite defendants' repeated attempts to excuse their
16 mistreatment of plaintiff Joseph Smith as mere negligence, the facts pleaded show that
17 their conduct recklessly disregarded his health and safety. Further, despite defendants'
18 arguments that various claims are not proper based on how they are titled, the facts
19 pleaded support proper claims. For these reasons, as well as those set forth above,
20 plaintiffs respectfully request that the Court overrule defendants' demurrers to their
21 Second Amended Complaint, or, if it sustains the demurrers, that it grant leave to amend.

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23 Dated:

Respectfully submitted,

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26 Attorney for Plaintiffs
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