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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES, NORTHWEST – VAN NUYS**

12 ADELE FRANZ, an individual; MELISSA)
13 FRANZ, an individual; and GINA)
14 MARTENSON, an individual,)

15 Plaintiff,)

16 v.)

17 MOTION PICTURE & TELEVISION)
18 FUND, a business entity, form unknown;)
19 SAEED HUMAYUN, M.D., an individual;)
20 JOAN CAREY, R.N., an individual; and)
21 DOES 1 through 100, inclusive,)

22 Defendants.)

CASE NO.: LC076641

**PLAINTIFFS' OPPOSITION TO
DEMURRER TO SECOND AMENDED
COMPLAINT**

**[Submitted concurrently with Plaintiff's
Opposition to Motion to Strike Portions of
Plaintiffs' Second Amended Complaint
and Notice of Lodging]**

Hearing:
Date: August 7, 2007
Time: 9:00 a.m.
Dept.: "B"

23 COMES NOW Plaintiffs ADELE FRANZ, MELISSA FRANZ and GINA MARTENSON and
24 submit their Opposition to Defendants' Demurrer to Second Amended Complaint, as follows:

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1 **I. INTRODUCTION**

2 Plaintiffs note that despite this Court’s specific ruling that Plaintiffs’ Causes of Action for
3 Willful Misconduct and Elder Abuse, Nos. 5 and 6, respectively,¹ have been properly pled, Defendants
4 go on to waste the time of this Court and of Plaintiffs by devoting a full *one-third* of its Points and
5 Authorities to argue same. [Reporter’s Transcript of Proceedings (regarding Demurrer to First
6 Amended Complaint), dated June 5, 2007, p 3, attached hereto as **Exhibit 1**, and incorporated by
7 reference.] Defendants’ recurring theme throughout their Demurrer is that this is solely a case
8 sounding in Professional Negligence. However, Defendants’ attempt to improperly deny Plaintiffs’
9 opportunity to prove these other, properly-pled Causes of Action is legally unsupportable in their
10 Demurrer. For example, Defense argues case law holding only that only one standard of care – either
11 General Negligence or Professional Negligence – is applicable in ruling on a motion for summary
12 judgment. [See, e.g., Demurrer, p. 11, lines 4-6, arguing *Flowers v. Torrance Memorial Hospital*
13 *Medical Center*, 8 Cal.4th 992, 35 Cal.Rptr.2d 685, 884 P.2d 142 (1994) (and footnote 6), specifically
14 involving ruling on motion for summary judgment).²] Since the parties have not even gotten past the
15 pleadings stage, standard of care determinations relevant to a summary judgment proceeding are not
16 relevant. To be sure, Plaintiffs are entitled, at the pleadings stage, to assert claims in the alternative,
17 regardless of their consistency: **“We acknowledge a party is permitted – sometimes encouraged**
18 **– to plead alternative and inconsistent theories in a given proceeding.”** [Emphasis added.]
19 [*International Billing Services, Inc. v. Emigh*, 84 Cal.App. 4th 1175, 1188, 101 Cal.Rptr.2d 532, 541
20 (2000).] Further, Defendants’ absurd assertion that Plaintiffs must repeat each specific allegation and
21 factual recitation for every Cause of Action wherein it is applicable is contrary to pleadings practice.
22 **In fact, it is standard and appropriate practice to incorporate by reference factual allegations**
23 **into the latter stated Causes of Action.** [See *Cabesuela v. Browning-Feris Industries*, 68

24 _____
25 ¹
26 Willful Misconduct and Elder Abuse Causes of Action formerly pled as Nos. 3 and 5, respectively, in Plaintiffs’ First
27 Amended Complaint.

28 ²
29 Notably, it is exceedingly difficult to follow Defendants’ method of citation, since at said page 11 of its Demurrer,
30 Defendants cite “Id., 998, 1000.” However, the previous citation is to Plaintiffs’ Second Amended Complaint, which has
31 no pages or paragraphs numbered 998 or 1000. The citation prior to Plaintiffs’ Complaint is to *Murillo v. Good Samaritan*
32 *Hospital*, which commences at page 50. The only citation to which Defendants can be referring is to *Flowers v. Torrance*
33 *Memorial Hospital Medical Center*, which case commences on page 992; albeit in between the *Murillo* case and the
34 *Flowers* case, Defendants have cited the *California Civil Code*, *Business & Professions Code* and *Code of Civil Procedure*.

1 Cal.App.4th 101, 111, 80 Cal.Rptr.2d 60, 65 (1998).^{3]} The herein Causes of Action are not masked
2 by incorporating the preceding Causes of Action, and to plead otherwise would produce a ridiculously-
3 long Complaint. However, to the extent the Court has requested greater specificity within certain
4 Causes of Action, Plaintiffs have done so.

4 **II. STATEMENT OF RELEVANT AND ALLEGED FACTS**

5 Plaintiff ADELE FRANZ was admitted to Defendant MOTION PICTURE & TELEVISION
6 FUND [hereinafter "FUND"] on or about July 8, 2003, at which time she was 85 years old, pursuant
7 to a written admission agreement and other related documents in which Defendants promised Plaintiffs
8 they would provide Plaintiff ADELE FRANZ with such care as her condition reasonably required.
9 [Plaintiff's Second Amended Complaint ¶15.] Said documents are attached to Plaintiffs' Second
10 Amended Complaint as Exhibit 1. At that time, Plaintiff ADELE FRANZ was suffering from
11 Osteoporosis; Osteoarthritis with degenerative joint disease; Open reduction internal fixation right hip
12 (May 2003); and T11 compression fracture, all of which were documented and otherwise well-known
13 to Defendants. *Id.* Plaintiff ADELE FRANZ had sustained falls while under the care of Defendants
14 and was at risk for falls, as documented in the FUND'S medical records dated November 30, 2003,
15 January 15, 2004, and February 2, 2005. Defendants' medical records dated July 23, 2004, also
16 document that Plaintiff ADELE FRANZ had sustained falls prior to her admission to the FUND,
17 which facts were thus also known to Defendants. [*Id.* at ¶¶19,20,21.] Specifically, Defendants knew
18 and documented in their medical records of February 2, 2005 that "[t]he patient [Plaintiff ADELE
19 FRANZ] has had several falls in the last week, two within the last week, two within the last 24 hours.
20 These appear to happen when she attempts to get herself out of bed." [*Id.* at ¶21.]

21 Notwithstanding, on or about the evening of December 25, 2005 between the hours of 11:30
22 p.m. and 12:30 a.m., Defendants left ADELE FRANZ unattended and unrestrained in her bed, and also
23 failed to lower the bed and/or raise the bed rails. [*Id.* at ¶22.] During said time, ADELE FRANZ fell
24 from her bed onto the floor and broke both of her femurs, which could not have happened if she had
25 been properly restrained or supervised due to her known fall risk when attempting to exit bed. *Id.*

26 Upon falling from her bed, Plaintiff ADELE FRANZ was unable to move and in a completely
27 helpless state, so she was forced to lie in her own excrement for a significant duration of time before
28

1 she was found by Defendants and/or Defendants' staff, despite the fact that Plaintiff ADELE FRANZ
2 had been able to ring for assistance. [*Id.* at ¶23.] Thereafter, a physician was not summoned to aid
3 Plaintiff ADELE FRANZ, as Defendants wrongly determined that ADELE FRANZ was not hurt, when
4 she had actually broken both femurs. [*Id.* at ¶¶24, 25.] The fact that a physician was not requested
5 to come examine ADELE FRANZ is noted in Defendants' medical records, dated December 27, 2005.
6 [*Id.* at ¶24.] Instead, Defendants gave Plaintiff Tylenol, and wholly failed to provide any pain
7 medication whatsoever until ten hours after her fall. [*Id.* at ¶25.] Defendants also failed to contact
8 Plaintiff ADELE FRANZ' daughters, Plaintiffs MELISSA FRANZ or GINA MARTENSON, both of
9 whom learned of the incident only when they independently telephoned Defendants, which fact is also
10 documented in Defendants' medical records, dated December 27, 2005. [*Id.* at ¶26.]

11 Plaintiffs MELISSA FRANZ and GINA MARTENSON had also witnessed other instances
12 where Defendants left their mother improperly unattended or treated [*e.g., id.* at ¶34], including the
13 negligently administered catheter, which led to ADELE FRANZ contracting Septicemia immediately
14 subsequent to her discharge from the FUND on or about April 5, 2006. [*Id.* at ¶37.]

15 As a result of Defendants' acts and omissions, ADELE FRANZ sustained a broken right femur,
16 broken left femur, exacerbation of Dementia, Insomnia, Depression, severe emotional distress, weight
17 loss and Septicemia, and was forced to wear very uncomfortable bi-lateral leg braces, endure
18 significant knee and leg pain, and undergo a Tendonectomy, all of which are documented in
19 Defendants' medical records. [*Id.* at ¶¶31,32,71,100.] She continues to suffer from the detrimental
20 physical, emotional and mental effects from having sustained two broken femurs in her old age.

21 **III. SUFFICIENT FACTS AS TO ALL CAUSES OF ACTION HAVE BEEN PLED.**

22 A demurrer is a pleading used to test the legal sufficiency of other pleadings. That is, it raises
23 issues of law – *not fact* – regarding the form or content of the Complaint. [*California Code of Civil*
24 *Procedure* §§422.10 and 589; see *Donabedian v. Mercury Ins. Co.*, 116 Cal.App.4th 968, 994, 11
25 Cal.Rptr.3d 45, 64 (2004) (citing text).] Notably, it is not the function of the demurrer to challenge
26 the truthfulness of the Complaint; and for purposes of the ruling on the demurrer, all facts pleaded in
27 the complaint are assumed to be true.⁴ The sole issue raised by a demurrer is whether the facts pleaded
28 state a valid cause of action – not whether they are true. No matter how unlikely or improbable,
Plaintiffs' allegations must be accepted as true for the purpose of ruling on the Demurrer. [*Del E.*

4

Aubry v. Tri-City Hosp. Dist., 2 Cal.4th 962, 966-967, 9 Cal.Rptr.2d 92, 95 (1992); *Serrano v. Priest*, 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 605 (1971); *Adelman v. Associated Int'l Ins. Co.*, 90 Cal.App.4th 352, 359, 108 Cal.Rptr.2d 788, 792 (2001).

1 *Webb Corp. v. Structural Materials Co.*, 123 Cal.App.3d 593, 604, 176 Cal.Rptr. 824, 829 (1981).]

2 Thus, the question of Plaintiffs' ability to prove these allegations, or possible difficulties in making
3 such proof, is of no concern in ruling on the Demurrer. [*Committee on Children's Television, Inc. v.*
4 *General Foods Corp.*, 35 Cal.3d 197, 213-214, 197 Cal.Rptr. 783, 793 (1983).]

4 **IV. THE 1ST AND 2ND CAUSES OF ACTION FOR NEGLIGENCE PER SE ARE**
5 **PROPERTY PLED.**

5 **A. Plaintiffs May Plead Negligence Per Se**

6 _____ Where a negligence action is predicated on defendant's violation of a statute, ordinance or
7 public entity safety regulation, plaintiffs may be entitled to the benefit of the "negligence per
8 se" doctrine in establishing their prima facie case. This doctrine presumes defendant's duty and breach
9 (failure to exercise due care); and the only issue left for plaintiff to prove is whether the violation
10 proximately caused the injury or death. [*California Evidence Code* §669; *Satterlee v. Orange Glenn*
11 *School Dist.*, 29 Cal.2d 581, 588, 177 P.2d 279, 283-284 (1947) (overruled on other grounds in *Alarid*
12 *v. Vanier*, 50 Cal.2d 617, 621-624, 327 P.2d 897, 899-900 (1958)).] **Notably, it must appear that**
13 **the statute (or ordinance or regulation) at issue was intended to create a *duty of care*, the**
14 **violation of which could be the basis for a negligence per se instruction.** [*Rosales v. City of Los*
15 *Angeles*, 82 Cal.App.4th 419, 430, 98 Cal.Rptr.2d 144, 151 (2000).] Thus, it is entirely appropriate,
16 and in fact, necessary, for Plaintiffs to plead the Statutes at issue, which was, in fact, intended to create
17 a duty of care for persons similarly situated as Plaintiff ADELE FRANZ, and the breach of that duty.

18 Defendants improperly cite *Quiroz v. Seventh Avenue Center*, 140 Cal.App.4th 1256, 1285-
19 1286, 45 Cal.Rptr.3d 222 (2006), to support its fallacious contention that Plaintiffs may not plead
20 violations of *California Code of Regulations*, Title 22 (Cause of Action No. 1) and of *California*
21 *Health & Safety Code* §1599, et al. (statutory Patients' Bill of Rights) (Cause of Action No. 2), as
22 Negligence Per Se. The *dicta* upon which they rely – "*Accordingly, to apply negligence per se is not*
23 *to state an independent cause of action. The doctrine does not provide a private right of action for*
24 *violation of a statute*" – is expressly credited by the *Quiroz* Court to *Sierra-Bay Fed. Land Bank Assn.*
25 *v. Superior Court*, 227 Cal.App.3d 318, 333-334, 277 Cal.Rptr. 753 (1991).

26 In *Sierra-Bay*, the Court held that a state cannot permit a plaintiff to pursue a private cause of
27 action for damages for the violation of a federal law when the federal government itself has declined
28 to recognize such a cause of action. In that case, a farmer received loans through the federal Farm
Credit System that were secured by parcels of his real property. After he received notices of default

1 and elections to sell under the deeds of trust securing the loans and notices of trustees' sales under both
2 deeds of trust, the parcels were sold and a bank became the purchaser. The Court specifically found
3 that the farmer failed to plead a state law negligence cause of action, notwithstanding his reliance on
4 *California Evidence Code* §669 (presumption of failure to exercise due care on basis of statutory
5 violation). In the case *sub judice*, Plaintiffs have not made the same mistake, as evidenced by the full
6 text of Causes of Action Nos. 1 and 2, as Plaintiff is, in fact, pursuing a negligence action, and relying
7 upon Defendants' violations of the named Statutes to establish part of those Causes of Action.

8 Clearly, the adoption of a statutory standard of conduct in a negligence action may well result
9 in the imposition of liability where none might otherwise be imposed. This is so because the
10 statutorily established standard of care may be more exacting than the standard a defendant might be
11 able to convince a jury that a reasonable person would follow. In addition, a statute may impose a duty
12 where none existed at common law. "A duty of care, and the attendant standard of conduct required
13 of a reasonable man, may of course be found in a legislative enactment which does not provide for
14 civil liability." [*Vesely v. Sager*, 5 Cal.3d 153, 164, 95 Cal.Rptr. 623 (1971)⁵.]

15 **B. Plaintiffs Have Specifically Identified How Defendants Violated Said Statutes**

16 First, with respect to Cause of Action No. 1, Negligence Per Se [Violation of *California Code*
17 *of Regulations*, Title 22], Defense claims Plaintiffs failed to identify the statutory violations.
18 [Demurrer, p. 6, lines 13-14.] This is patently false. Plaintiffs direct the Court to Paragraph 44 of the
19 Second Amended Complaint as follows:

20 Specifically, and in addition to the acts and omissions of DEFENDANTS as contained
21 in the preceding paragraphs, DEFENDANTS failed, pursuant to 22 *California Code*
22 *of Regulations*, including but not limited to, the following Sections, 72301(f)(g),
23 72303(b)(7), 72307(b), 72311(a)(1)(2)(3)(b), 72313(a)(c), 72315(a)(b)(e)(f)(g)(7)(k)(l),
24 72319(b), 72501(e), regulatory Patients' Bill of Rights, commencing with 72527, et al.,
25 72543, 72545, 72547, and regulatory Patients' Bill of Rights, commencing with 73523,
26 to do the following:

- 27 a. follow, implement and adhere to their own policies and procedures;
- 28 b. follow, implement and adhere to physicians' orders;
- c. follow, implement and adhere to Plaintiff ADELE FRANZ' care plan;
- d. follow and adhere to government rules, regulations, standards and/or laws;
- e. accurately monitor Plaintiff ADELE FRANZ' in light of her care plan;
- f. monitor and record Plaintiff ADELE FRANZ' condition and report meaningful changes to the attending physician;
- g. maintain accurate records of Plaintiff ADELE FRANZ' condition and activity;

5

Partially overruled by statute on other grounds concerning consumption of alcoholic beverages rather than serving of alcoholic beverages as proximate cause of injuries inflicted upon another by an intoxicated person); *California Evidence Code* §669.

- h. accurately attend to or restrain Plaintiff ADELE FRANZ, especially at night while she was in bed;
- i. note and properly react to the emergency condition DEFENDANTS created on or about December 25, 2005, when Plaintiff ADELE FRANZ fell out of bed;
- j. treat Plaintiff ADELE FRANZ as an individual with respect and without abuse;
- k. maintain nursing and other staffing at levels adequate to meet the needs of Plaintiff ADELE FRANZ. [*Id.*]

Second, with respect to Cause of Action No. 2, Negligence Per Se [*California Health & Safety Code* §1599, et al. (statutory Patients’ Bill of Rights)], Plaintiffs direct the Court to Paragraph 54:

Specifically, and in addition to the acts and omissions of DEFENDANTS as contained in the preceding paragraphs, DEFENDANTS failed to adhere to the statutory Patients’ Bill of Rights, as provided in *California Health & Safety Code*, commencing with Section 1599, including:

- a. employ an adequate number of qualified personnel to carry out all of the functions of the facility;
- b. maintain a nurses’ call system in operating order in all nursing units and provide visible and audible signal communication between nursing personnel and patients. [*Id.*]

and

Plaintiff fully performed any and all conditions and obligations required of her by virtue of the AGREEMENT; albeit Defendant FUND and DOES 1-100, failed to perform according to the terms of the AGREEMENT, which reiterated, in many respects, the Statutory Patients’ Bill of Rights of *California Health & Safety Code* §1599, et al. For example, Defendant FUND and DOES 1-100 failed to provide, including but not necessarily limited to, the following, as required of them via the AGREEMENT:

- a. “Considerate and respectful care, and to be made comfortable” [**Exhibit 1**, Residents’ Bill of Rights, No. 1 and Patient Rights, No. 1.];
- b. “Appropriate assessment and management of your pain” [**Exhibit 1**, Residents’ Bill of Rights, No. 9. and Patient Rights, No. 9.];
- c. “Receive care in a safe setting” [**Exhibit 1**, Residents’ Bill of Rights, No. 13 and Patient Rights, No. 13];
- d. “Reasonable continuity of care” [**Exhibit 1**, Residents’ Bill of Rights, No. 15 and Patient Rights, No. 15.]; and
- e. proper maintenance of, and response to the “patient’s bedside [] signal system.” [**Exhibit 1**, Conditions of Admission Acute ¶3.] [Plaintiff’s Second Amended Complaint ¶62.]

_____ Finally, Defense alleges Plaintiffs failed to allege a “causal nexus” between these violations and the injuries sustained, and whether the injuries arose as a result of an occurrence against which the Statutes were “designed” to protect. [Demurrer, p. 7, lines 21-24.] Again, this is false. Specifically, regarding Cause of Action No. 1, Plaintiffs pled:

Further, protection of a resident/patient, such as Plaintiff ADELE FRANZ, from the risk of falling and suffering injuries is included within said *California Code of Regulations*’ general purpose of protecting the residents’/patients’ health and safety. Since Plaintiff ADELE FRANZ suffered injuries from falling out of bed due to DEFENDANTS’ failure to ensure the bed rails were raised and the bed was lowered, which was a known risk for Plaintiff, her injuries resulted from an occurrence of the nature that the *California Code of Regulations*, including Title 22, were designed to prevent. [Plaintiffs’ Second Amended Complaint ¶45; *see also* ¶47.]

Specifically, regarding Cause of Action No. 2, Plaintiffs pled:

Further, protection of a resident/patient, such as Plaintiff ADELE FRANZ, from the risk of falling and suffering injuries is included within the general purpose of *California Health & Safety Code*, commencing with Section 1599, to protect the residents'/patients' health and safety. Since Plaintiff ADELE FRANZ suffered injuries from falling out of bed due to DEFENDANTS' failure to ensure the bed rails were raised and the bed lowered, which was a known risk for Plaintiff, her injuries resulted from an occurrence of the nature that *California Health & Safety Code*, Section 1599, et al., was designed to prevent. [Plaintiffs' Second Amended Complaint ¶55; *see also* ¶57.]

V. **THE 3RD CAUSE OF ACTION FOR NEGLIGENCE IS PROPERLY PLED.**

Being at the discovery phase of the litigation, Plaintiffs assert an argument exists that **much of the care rendered to ADELE FRANZ was actually *non-medical*; for example, raising/lowering bed rails, raising/lowering the bed, et al., performed by unskilled, non-professional, non-medical personnel such as aides and assistants**, as is extremely common in facilities such as Defendants':

Defendants DOES 1-100 and/or other persons were employees and/or agents of Defendant MOTION PICTURE & TELEVISION FUND, who were responsible for, among other things, the non-medical, custodial care of Plaintiff ADELE FRANZ. Defendants DOES 1-100 and/or other persons were acting within the course and scope of their employment and/or agency in the capacity of, including but not limited to, nursing home aides, assistants, caregivers, nurses' aides, and other such persons acting in those capacities, regardless of title given by the FUND, when they harmed Plaintiff ADELE FRANZ. [Plaintiff's Second Amended Complaint ¶67.]

The pleadings also allege the existence of an agency relationship between the FUND and the unskilled, non-medical types of employees and/or agents, as well as the approval/authorization/ratification of the conduct of said employees/agents by the FUND:

Defendant FUND learned of the acts and omissions of Defendants DOES 1-100 and/or other persons, who were acting as their employees and/or agents providing non-medical, custodial care to Plaintiff ADELE FRANZ, yet approved, authorized and/or ratified that conduct. [*Id.* at ¶76]

Defense argues the case of *Flowers v. Torrance Memorial Hospital Medical Center*, 8 Cal.4th 992, 35 Cal.Rptr.2d 685, 884 P.2d 142 (1994), which concerned an appeal regarding the applicable standard of care and analysis of materiality *in a summary judgment case*. At the outset, the issue at bar herein concerns proper pleading, not a determination of a standard of care applicable to ruling on a motion for summary judgment. In fact, the *Flowers*' Court stated the following relative to the propriety of a distinction between ordinary and professional negligence: **"While this distinction may be relevant and necessary for purposes of statutory construction and application [citations omitted], it is misplaced in resolving a motion for summary judgment in which the question is whether the moving party has demonstrated or negated negligence as a matter of law."**

1 [Emphasis added.] [*Id.* at 8 Cal.4th 997, 35 Cal.Rptr.2d at 687.] Hence, *Flowers* expressly recognized
2 an appropriate distinction between ordinary and professional negligence in certain circumstances,
3 while noting, “[t]he need to draw a statutory distinction between ordinary and professional
4 **negligence is not presented on the facts of this case . . .**” [Emphasis added.] [*Id.* at 8 Cal.4th 1000,
5 35 Cal.Rptr.2d 689 (footnote 3).] Notwithstanding the fact that the *Flowers*’ Court did not deal with
6 the issue presented by Plaintiff’s pleadings, Defense cites *Flowers* as dispositive on the issue of
7 Plaintiffs’ pleadings! If the facts ultimately show that professional negligence is not the proper
8 standard in the case at bar, since, e.g., the conduct involved was non-medical and custodial performed
9 by non-medical personnel, the *Medical Injury Compensation Reform Act* [“MICRA”] damages’
10 limitations would not apply, which is Defendants’ motivation in asserting such an irrelevant argument.

11 Second, *Flowers* dealt with the standard of care rendered at a hospital – *Torrance Memorial*
12 *Hospital Medical Center*. Notably, ADELE FRANZ was not in the hospital; rather, she was a
13 permanent resident of a Skilled Nursing Facility/Intermediate Care Facility where *non*-medical duties
14 are often performed by unskilled, non-professional, non-medical personnel such as aides and
15 assistants. [See Second Amended Complaint ¶¶4,67,76.]

16 In *Gopaul v. Herrick Memorial Hospital*, 38 Cal.App.3d 1002, 113 Cal.Rptr. 811 (1974), the
17 Court determined that “‘professional malpractice’ was not involved” because “[t]he situation required
18 no professional ‘skill, prudence and diligence’” and “[t]he need to strap plaintiff to the gurney while
19 she was ill and unattended would have been obvious to all.” [*Id.* at 38 Cal.App.3d 1007.] The 4th
20 District Court reached a conclusion contrary to *Gopaul*, albeit agreed with *Gopaul*’s premise that “**not**
21 **every act of negligence by a professional is an act of professional negligence, even where the**
22 **victim is a client[.]**” [Emphasis added.] [*Murillo v. Good Samaritan Hospital*, 99 Cal.App.3d 50,
23 56, 160 Cal.Rptr. 33 (1979).] **The California Supreme Court in *Flowers* specifically declined to**
24 **resolve the conflict between *Gopaul* and *Murillo*, because the issue was not squarely presented.**
25 [*Flowers v. Torrance Memorial Hospital Medical Center*, 8 Cal.4th at 1001 (footnote 6.)]

26 *California Code of Civil Procedure* §340.5(2) has defined professional negligence as “a
27 negligent act or omission to act by a health care provider in the rendering of professional services,
28 which act or omission is the proximate cause of a personal injury” Whether the acts and
omissions complained of by Plaintiffs were a) “by a health care provider” in b) “the rendering of
professional services” are directly at issue in the herein case, and Plaintiffs have, therefore, properly
pled both ordinary and professional negligence.

1 Defense cites the case of *Budd v. Nixen*, 6 Cal.3d 195, 200, 98 Cal.Rptr. 849 (1971) for the
2 proposition that a health care provider has but one duty.⁶ [Demurrer, p. 9, lines 11-13.]
3 However, not only is the citation presented not in the text of that opinion, *Budd* dealt with
4 attorney malpractice, not professional negligence of a health care provider! Furthermore,
5 Defendants curiously omit any citation whatsoever for the bald statement: “The administering,
6 monitoring, or supervising of plaintiff’s health and medical needs constitute medical services.”
7 [Demurrer, p. 11, lines 1-2.] Just because Defense says it is so does make it so.

8 Finally, a Wisconsin case is instructive on the issue. Therein, the court stated that a
9 determination of whether a nursing home is negligent in situations such as those where a nurse or aide
10 leaves a patient unattended (as herein) or under inadequate restraining (herein no bedrails raised/bed
11 lowered), is a determination of routine, not professional care. [*Kujawaski v. Abor View Health Care*
12 *Center*, 139 Wis.2d 455, 407 N.W.2d 249, 251 (1987).⁷]

13 **VI. THE 5TH CAUSE OF ACTION FOR WILFUL MISCONDUCT IS PROPERLY PLED.**

14 _____ Amazingly, despite this Court’s specific ruling that Plaintiffs’ Cause of Action for Willful
15 Misconduct was satisfactorily pled [**Exhibit 1**], Defendants brazenly seek in their Demurrer to directly
16 challenge the Judge’s ruling. Therefore, Plaintiffs necessarily reiterate their argument previously
17 presented in reference to the First Amended Complaint.

18 In order to ultimately prevail on a Cause of Action for Willful Misconduct, Plaintiffs must,
19 according to Defendants, establish: 1) actual or constructive knowledge of the peril to be apprehended;
20 2) actual or constructive knowledge injury is a probable, as opposed to possible, result of the dangers;
21 and 3) conscious failure to act to avoid the peril. [Demurrer, p. 11, lines 17-21, citing *Nazar v.*
22 *Rodeffer*, 184 Cal.App.3d 546, 552 (1996).] In fact, Plaintiffs have properly pled according thereto
23 in their Second Amended Complaint at Paragraphs 15 and 19-22, which allege **Defendants knew**
24 **about the peril (fall risk); documented the peril and its likelihood (e.g., February 2, 2005 record);**
25 **yet consciously failed to take steps to avoid the peril, resulting in the accident of December 25/26,**

26 _____
27 ⁶
28 Defense cites: “[T]he duty of the professional to use skill, prudence, and diligence as other members of his profession
commonly possess and exercise.” [Demurrer, p. 9, lines 11-13.] This citation is completely erroneous and inapplicable to
medical malpractice in any event.

⁷
In that case, the plaintiff brought an action against a nursing home for injuries resulting when she fell from a wheelchair.
The plaintiff had poor vision, poor hearing, arthritis and was overweight and unable to walk. She also had a significant
ventral hernia. The nursing home caring for the plaintiff noted several incidents involving the plaintiff during her stay (as
herein), including several falls from her wheelchair. The testimony indicated that the nursing home did not use safety belts
on wheelchairs to keep the residents from slipping.

1 **2005. Hence, Defendants’ conduct was reckless**, pursuant to *New v. Consolidated Rock Prod. Co.*,
2 which states: “Willful or wanton misconduct is intentional wrongful conduct, done either with a
3 knowledge that serious injury to another will probably result, or with a wanton and reckless disregard
4 of the possible results.” [*New v. Consolidated Rock Prod. Co.*, 171 Cal.App.3d 681 (1985) citing
5 *O’Shea v. Claude C. Wood Co.*, 97 Cal.App.3d 903, 912 (1979).]

6 Also, authority exists supporting a civil action for violation of *California Penal Code* §368,
7 in favor of a crime victim. Violation of a criminal statute embodying a public policy is generally
8 actionable even if no specific civil remedy is provided in the criminal statute. Any injured member
9 of the public for whose benefit the statute is enacted may bring an action. [*See Angie M. v. Superior*
10 *Court*, 37 Cal.App.4th 1217, 1224, 4 Cal.Rptr.2d 197 (1995).] According, nursing home residents
11 who are victims of criminal abuse or neglect as defined in *California Penal Code* §368 have a Cause
12 of Action for personal injury. Indeed, this Statute broadly proscribes the conduct that forms the basis
13 for most personal injury actions brought by a resident/patient, such as ADELE FRANZ. One is guilty
14 of violating *California Penal Code* §368(b) if it was known or should have been known, that another
15 person is an elder (or dependent adult) and: 1) under circumstances or conditions likely to produce
16 great bodily harm or death, willfully causes or permits the elder to suffer, or inflicts unjustifiable
17 physical pain or mental suffering on that person; *or* 2) having the care or custody of an elder, willfully
18 causes or permits the person or health of the elder to be injured, or willfully causes or permits the elder
19 to be placed in a situation that endangers his/her person or health.⁸

20 The *Angie M.* Court found that the *Penal Code* prohibited the acts alleged therein by the
21 plaintiff; that plaintiff was a member of the class intended to be protected by those criminal statutes;
22 and that plaintiff was entitled to bring a civil action for said violations. [*Angie M. v. Superior Court*,
23 37 Cal.App.4th at 1224.] Herein, finding of a Section 368 violation would necessarily mean
24 Defendants’ conduct was malicious.

25 **VII. THE 6TH CAUSE OF ACTION FOR ELDER ABUSE IS PROPERLY PLED.**

26 Again, despite this Court’s specific ruling that Plaintiffs’ Cause of Action for Elder Abuse was
27 satisfactorily pled [**Exhibit 1**], Defendants brazenly seek in their Demurrer to directly challenge the
28 Judge’s ruling. Therefore, Plaintiffs necessarily reiterate their argument previously presented in
reference to the First Amended Complaint.

8

Under §368(c), a person is guilty of a misdemeanor, rather than a felony, for treating an elder as described, except under circumstances not likely to cause great bodily harm or death, or as specified in §368(b)(2) above, except that the elder’s person or health “may be” endangered, rather than is endangered.

1 Defendants entire argument against Plaintiffs’ Elder Abuse Cause of Action is that such a claim
2 is prohibited in actions based on Medical Malpractice. However, Plaintiffs have shown herein
3 sufficient facts exist to plead not only Professional Negligence, but ordinary Negligence, as well as
4 recklessness, and, as such, this case properly includes the Elder Abuse Action. **An Elder Abuse claim**
5 **is brought against an elder’s custodian or caregiver who *may or may not* be a health care**
6 **provider. The Defendants’ status as a health care provider is merely incidental to the**
7 **custodian/caregiver role. Moreover, the *Elder Abuse and Dependent Adult Civil Protection Act***
8 **(*EADACPA*) legislative history indicates that “professional negligence” for *Code of Civil***
9 ***Procedure* §425.13 purposes is distinct from the abuse and neglect actionable under the *Act*.⁹**

10 Furthermore, Defense, once again, blatantly misrepresents the pleadings when they state that
11 “the criteria of [*Welfare & Institutions Code*] §15610.23 of a physical or mental limitation which
12 restricts the ability of a person to carry out normal activities and/or protect their rights, prior to
13 admission[,]” has not been pled. [Demurrer, p. 14, lines 27-28.] To the contrary, and as argued above
14 with respect to the Willful Misconduct Cause of Action, **Plaintiffs have alleged facts in their Second**
15 **Amended Complaint going beyond professional negligence and, in fact, rising to the level of**
16 **recklessness by virtue of Defendants’ pattern of conscious disregard of ADELE FRANZ’ rights**
17 **and safety; specifically, by acknowledging that she was a fall hazard; documenting her falls and**
18 **fall risks on numerous occasions; then repeatedly failing to do anything to prevent her inevitable**
19 **future injuries, despite having knowledge of her condition and health and safety risks.** [Plaintiff’s
20 Second Amended Complaint §§15, 19-22, 32.] Hence, Plaintiff’s Second Amended Complaint has
21 pled Defendants’ reckless acts and omissions invoking the *Elder Abuse Act*.

22 Notably, the California Supreme Court has held that a health care provider engaging in reckless
23 abuse or neglect of an elder within the meaning of *Welfare & Institutions Code* §15657 is subject to
24 the heightened remedies of the *EADACPA*, and is not subject to the limitations of Section §15657.2,
25 which apply only to Professional Negligence actions. [*Delaney v. Baker*, 20 Cal.4th 23 (1999).] The
26 abuse and neglect specified in §15657, in other words, is something other than, and mutually exclusive
27 of, “professional negligence,” as that term is used in §15657.2. The *Delaney* Court defined
28 recklessness as “deliberate disregard of the high degree of probability that an injury will occur.”

9

Covenant Care, Inc. v. Super. Ct. (Inclan), 32 Cal.4th 771, 782-790, 11 Cal.Rptr.3d 222, 229-236 (2004); *Country Villa Claremont Healthcare Ctr., Inc. v. Super. Ct. (Rodriguez)*, 120 Cal.4th 426, 431, 15 Cal.Rptr.3d 315, 319 (2004) – Section 425.13 likewise is not applicable to common law counts (Fraud, Willful Misconduct) joined with *Elder Abuse Act* claim in action against custodian that is also health care provider.

1 [Delaney v. Baker, 20 Cal.4th at 31.] The Court also considered it significant that the focus of
2 EADACPA is to protect elders and dependent adults from gross mistreatment in the form of abuse and
3 custodial neglect, while the impetus for enacting MICRA was the rapidly rising cost of medical
4 malpractice insurance in the 1970s. Hence, in citing Delaney, the Defense is, once again,
5 misrepresenting the procedural backdrop of the case. The California Supreme Court was affirming
6 the judgment of the lower Court after a full jury trial, wherein the health care provider was found to
7 be reckless vis-a-vis the deceased elder therein. Plaintiff is not herein presenting evidence, and has
8 more than adequately pled facts demonstrating reckless behavior on the part of these Defendants based
9 upon known facts; hence, the Demurrer should fail, so as to avail Plaintiffs the heightened remedies
10 under the Elder Abuse Act.

11 Finally, Defense asserts that Plaintiffs failed to comply with California Civil Code §3294(b)¹⁰
12 within the context of California Welfare and Institutions Code §15657(c)¹¹ in pleading Elder Abuse
13 [Demurrer, p. 15, lines 1-4.] However, Plaintiffs precisely and sufficiently alleged pursuant to Section
14 3294(b), the following:

15 DEFENDANTS had advance knowledge of the unfitness of Defendants DOES 1-100
16 and/or other persons, who were acting as their employees and/or agents providing care
17 for Plaintiff ADELE FRANZ, yet DEFENDANTS employed or otherwise contacted
18 with said persons with a conscious disregard of the rights or safety of others; and/or
19 DEFENDANTS learned of the acts and omissions of Defendants DOES 1-100 and/or
20 other persons, yet approved, authorized and/or ratified that wrongful conduct; and/or
21 DEFENDANTS itself committed said acts of oppression, fraud or malice by way of
22 an officer, director or managing agent of the corporation, including, but not limited to,
23 Defendants HUMAYEN and CAREY. [Plaintiffs' Second Amended Complaint ¶113.]

24 Furthermore, Section 15657 pertains to awarding damages “[w]here it is **proven by clear and**
25 **convincing evidence.**” [Emphasis added.] [California Welfare and Institutions Code §15657.]
26 Clearly, the herein parties are not now at a point in this litigation where they must prove any facts.

27 _____
28 “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.” [California Civil Code §3294(b).]

11

“Where it is proven 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 that the defendant has been guilty of recklessness, oppression,
fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise
provided by law:

* * *

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive
damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees
permitted under this section may be imposed against an employer.” [California Welfare & Institutions Code §15657(c).]

1 Defendants cite *Archuleta v. Grand Lodge*, 262 Cal.App.2d 202, 208-209, 68 Cal.Rptr. 694
2 (1968) to support their argument that Plaintiffs have not sufficiently pled factual allegations supporting
3 Elder Abuse. Amazingly, the citation has nothing to do with Elder Abuse or proper pleading of same.
4 Rather, the cited *Archuleta* opinion discusses the elements necessary to constitute an action for Fraud!
5 [*Id.*] Notwithstanding, Plaintiffs thoroughly alleged facts supporting their claim for Elder Abuse in
6 many Paragraphs, including 100, 110 and 120. [*See also* Paragraphs 15 and 19-22.] While Defendants’
7 assert Plaintiff failed to plead reckless conduct, the following alleged facts show otherwise:

- 8 • Notice of Plaintiff’s compromised physical and mental condition [Plaintiffs’ Second Amended
9 Complaint ¶15.];
- 10 • Notice of Plaintiff’s past falls [*id.* at ¶¶19,20,21];
- 11 • Notice of Plaintiff’s falls at the FUND [*id.* at ¶¶19,20,21];
- 12 • Notice of Plaintiff’s fall risk, especially from bed [*id.* at ¶¶19,20,21];
- 13 • Failure to properly restrain Plaintiff while in bed by lowering the bed and/or raising the bed
14 rails [*id.* at ¶¶27,28];
- 15 • Failure to properly supervise Plaintiff while in bed [*id.* at ¶¶27,28];
- 16 • Causing Plaintiff to lie in her own excrement without assisting her despite the fact Plaintiff had
17 rung for assistance [*id.* at ¶23];
- 18 • Failure to request a physician examine Plaintiff after she suffered two (2) broken femurs [*id.*
19 at ¶24];
- 20 • Failure to provide pain medication for ten (10) hours after Plaintiff had suffered two (2) broken
21 femurs [*id.* at ¶25];
- 22 • Reckless insertion of catheter upon Plaintiff’s discharge from FUND causing her to experience
23 severe and life-threatening case of Septicemia [*id.* at ¶37].

24 **VIII. THE 8TH, 9TH & 10TH CAUSES OF ACTION FOR FRAUD ARE PROPERLY PLED.**

25 **A. Constructive Fraud (no 8).** Defense erroneously asserts that “intent” is an element of
26 Constructive Fraud. [Demurrer, p. 16, lines 20-21.] It is not. [*See, e.g., Byrum v. Brand*, 219
27 Cal.App.3d 926, 937, 268 Cal.Rptr. 609 (1990), citing *Mary Pickford Co. v. Bayly Bros*, 12 Cal.2d
28 501, 525, 86 P.2d 102 (1939).] In *Byrum*, the Court explained that, **although in “actual fraud” cases
there must be intentional deception, under a constructive fraud theory, fraud is presumed from
the relation of the parties to a transaction or the circumstances under which it occurs.** [*See*
California Civil Code §1573 (breach of duty that gives advantage to person in fault does not require
“actually fraudulent intent”); *Barrett v. Bank of America*, 183 Cal.App.3d 1362, 1368 (1986).]

As the Court noted at the prior hearing on Plaintiffs’ First Amended Complaint [**Exhibit 1**],
Plaintiffs had failed to allege the actual withholding of information that should have been disclosed.
Plaintiff has attempted to cure that defect as follows:

The herein fraud consists of the breach of the fiduciary duty of disclosure of relevant
matters arising from the relationship between Plaintiff ADELE FRANZ and Defendant
FUND, including DOES 1-100; that is, said Defendants **withheld information that
should have been disclosed when Defendant FUND, including DOES 1-100, failed
to inform Plaintiff ADELE FRANZ that they did not have the staff necessary**

1 **and/or an appropriately trained staff to adequately monitor her safety and ensure**
2 **the bed rails were up at night; attend to her when she was utilizing the toilet; and**
3 **otherwise supervise and appropriately restrain ADELE FRANZ to prevent her**
4 **from falling**, despite the fact she was a known, documented fall risk, and Defendant
5 **FUND**, including DOES 1-100, accepted ADELE FRANZ into their facility
6 notwithstanding. [Plaintiffs' Second Amended Complaint §129.]

7 **B. Fraud-Negligent Misrepresentation (no. 9).** Contrary to Defense blatantly false assertion that
8 Plaintiffs failed to plead “who made the alleged misrepresentations, specifically when the alleged
9 misrepresentations were made, any intent on the part of defendant to misrepresent or the specific
10 content of the alleged statement” [emphasis added] [Demurrer, p. 17, lines 10-12], Plaintiffs refer to
11 their Second Amended Complaint wherein is alleged the following:

- 12 • Who: Defendant JOAN CAREY, R.N., Norine Jameson, LVN and Naomi Rada, among others
13 [Plaintiffs' Second Amended Complaint ¶¶133,134,135];
- 14 • When: July 8, 2003, November 29, 2003, January 15, 2004, July 23, 2004 and February 2,
15 2005, among other times [*id.* at ¶¶133,134];
- 16 • Intent: Representations and suggestions made and intended to induce reliance by Plaintiff
17 ADELE FRANZ so she would become, then remain, a resident/patient at the FUND, so that
18 Defendants could earn fees paid by or on behalf of Plaintiff ADELE FRANZ for her care that
19 purportedly complied with legal standards [*id.* at ¶136];
- 20 • Content: Defendants would 1) be alert to ADELE FRANZ' medical, physical, mental and
21 emotional requirements; 2) provide care that met legal standards; 3) provide care according to
22 representations made by Defendants in Exhibit 1 to Plaintiffs' Second Amended Complaint;
23 and 4) comply with Plaintiffs' request and the custodial necessity to ensure the bed rails were
24 up at night to prevent Plaintiff from falling [*id.* at ¶133].

25 **C. Fraud-Concealment (no. 10).** Plaintiff has pled all the requisite elements of Concealment, as
26 defined by Defendants [Demurrer, p. 17, lines 18-23], as follows:

- 27 • Concealed material fact(s): FUND 1) did not adequately staff and/or train staff so as to provide
28 type of care promised; 2) would not comply with Plaintiffs' request and custodial necessity to
ensure bed rails were up at night to prevent Plaintiff ADELE FRANZ from falling; and 3)
operation was designed to circumvent Defendants' legal duty to comply with regulations, so
as to maximize profitability, in part by diverting money paid by or on behalf of Plaintiff
ADELE FRANZ from her proper care and treatment [Plaintiffs' Second Amended Complaint
¶¶142,143,145];
- Duty: FUND in a fiduciary relationship to Plaintiff and had duty to disclose they could not and
would not provide legally adequate care to Plaintiff ADELE FRANZ and that she would thus
be subject to probability of suffering serious injury, pain and damage [*id.* at ¶¶ 141,146];
- Intentionally concealed/suppressed fact to defraud: Representations made intentionally to
induce Plaintiff ADELE FRANZ to enter FUND'S facilities; and mislead Plaintiffs to believe
Plaintiff ADELE FRANZ would be properly cared for, and thereby defraud her [*id.* at ¶¶
142,143,147];
- Plaintiff unaware of concealed fact: Plaintiffs had no such knowledge and no opportunity to
obtain true information, and reasonably relied upon the deception [*id.* at ¶¶ 145,150]; and
- Concealment caused damage: Plaintiff became a resident and continued to remain a resident
of FUND, which led to her damage and injury [*id.* at ¶¶ 127,147].

Further, as the Court noted at the prior hearing on Plaintiffs' First Amended Complaint
[**Exhibit 1**], Plaintiff had failed to allege a factual basis for Defendants' duty for disclosure of any
particular information. Plaintiff has attempted to cure that defect as follows:

1 A fiduciary relationship between Plaintiff ADELE FRANZ and DEFENDANTS,
2 including DOES 1-100, relating to the care, comfort, safety and health of Plaintiff
3 ADELE FRANZ and the disposition and use of money paid on behalf of Plaintiff
4 ADELE FRANZ for her proper care and treatment existed at the time the herein alleged
5 events occurred. Pursuant to this duty, Defendant FUND, including DOES 1-100,
6 owed the utmost good faith and fairness to Plaintiff ADELE FRANZ in all matters
7 pertaining to her health, care and comfort, and relating to the use of the money paid on
8 her behalf for her proper care and treatment, including the **duty to disclose the fact
9 that said Defendants did not have the necessary staff and/or an appropriately
10 trained staff capable of providing the level of care required by Plaintiff ADELE
11 FRANZ.** [Plaintiffs' Second Amended Complaint ¶141; *see also* ¶142 (line 7) and
12 ¶143 (line 23).]

13 **IX. THE 11TH CAUSE OF ACTION FOR NIED IS PROPERLY PLED.**

14 A Negligent Infliction of Emotional Distress (NIED) claim is proper on a bystander theory in
15 nursing home cases, and belongs to the resident's individual family members. In bystander cases, a
16 plaintiff must have a special relationship with the victim and must personally observe the bad care and
17 resulting injury.¹² Thus, **an argument can be made for family members who visit an elder in a
18 skilled nursing facility and see horrible conditions.** In *Bird v. Saenz*, 28 Cal.4th 910, 919, 123
19 Cal.Rptr.2d 465 (2002), the Court clarified the holding in *Ochoa v. Superior Court*, in which "the
20 injury-producing event was the failure of custodial authorities to respond significantly to symptoms
21 requiring immediate medical attention [which] is not necessarily hidden from the understanding
22 awareness of a layperson." Specifically herein, Plaintiffs MELISSA FRANZ and GINA
23 MARTENSON alleged they:

- 24 • Witnessed Defendants engage in acts and omissions stated herein notwithstanding they
25 routinely complained regarding lack of care [Second Amended Complaint ¶¶152,154];
- 26 • Found ADELE FRANZ on the floor, when Defendants failed to strap her into her wheelchair,
27 and alone on the toilet, both of which were contrary to her care plan/intervention requirements,
28 and routinely informed Defendants of same [*id.* at ¶153];
- Witnessed the rough and reckless manner in which Defendants catheterized ADELE FRANZ
upon discharge, causing her to experience severe/life-threatening Septicemia [*id.* at ¶56].

29 **X. CONCLUSION**

30 _____ Since the Court assumes all facts alleged in Plaintiffs' First Amended Complaint to be true,
31 and since Plaintiffs have properly pled all Causes of Action, Defendants' Demurrer should be
32 overruled. In the alternative, Plaintiffs respectfully request the Court grant leave to amend.

33 DATED: July 24, 2007

JAMES R. GILLEN

34 By _____
35 James R. Gillen, Attorney for Plaintiffs

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See *Thing v. La Chusa*, 48 Cal.3d 644, 667, 257 Cal.Rptr. 865 (1989), which adopted *Ochoa v. Superior Court*, 39 Cal.3d 159, 216 Cal.Rptr. 661 (1985), as the paradigm of bystander NIED.

