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OF THE STATE OF CALIFORNIA

SUPREME COURT
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KATHLEEN A. WINN, *et al.*,
Plaintiffs and Appellants,

v.

PIONEER MEDICAL GROUP, INC., *et al.*,
Defendants and Respondents.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Eight
Case No. B237712

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

INTRODUCTION TO REPLY BRIEF ON THE MERITS 1

DISCUSSION 2

I. PLAINTIFFS MISSTATE DEFENDANTS' CONTENTIONS 2

A. Defendants Do Not Contend That Health Practitioners Should Be Immunized From Responsibility Under The Elder Abuse Act 2

B. Defendants Do Not Contend That Only "Care Custodians" Can Be Responsible For "Neglect" Under The Elder Abuse Act 4

C. Defendants Do Not Contend That "Reckless Neglect Should Be Treated Differently Under The Act, Depending On Where It Occurs" 5

II. PLAINTIFFS' CONTENTIONS ARE CONTRARY TO ESTABLISHED DOCTRINE THAT PROFESSIONAL NEGLIGENCE AND NEGLECT ARE MUTUALLY EXCLUSIVE AND THAT THE TWO CLAIMS ARE DIVIDED BASED ON THEIR GRAVAMEN 7

A. Plaintiffs Do Not Deny That Professional Negligence And Elder Abuse Neglect Are "Mutually Exclusive" 7

B. Plaintiffs Do Not Deny That The "Gravamen" Of Their Claim Is "Professional Negligence" 8

C. Plaintiffs Argue That The Concepts Of Professional Negligence And Elder Abuse Differ In "Degree," Which Is Inconsistent With Their Mutual Exclusivity 10

D. Plaintiffs Admit That They Seek To Avoid MICRA And Thereby Achieve Greater Recovery Of Damages 12

E. Plaintiffs Do Not Deny Pursuing Their Original Lawsuit For Compensatory Damages Based On "Professional Negligence," To Which They Added "Medical Facts To Color" Their Original Allegations In Order To Pursue A Second Lawsuit To Obtain "Heightened Civil Remedies" Under The Elder Abuse Act 13

F. Plaintiffs Also Propose That The Jury Determine The "Difference In Degree" Between "Professional Negligence" And Elder Abuse "Neglect," Even Though Such A Determination Should Be A Judicial Function 15

G. Plaintiffs' Reliance Upon Federal Cases Is Unpersuasive 16

III. PLAINTIFFS' DENIAL OF THE "CUSTODIAL RELATIONSHIP" PREREQUISITE TO A CLAIM UNDER THE ELDER ABUSE ACT IS BASED ON A FLAWED STATUTORY ANALYSIS 18

A. The Statute's Plain Language Precludes Holding A Health Practitioner Liable For Neglectful Elder Abuse In An Outpatient Setting For Failure To Refer The Patient To A Specialist 19

1. Plaintiffs focus exclusively on the word "*care*" 20

2. Plaintiffs ignore the words "*having the,*" which precludes application of the Elder Abuse Act to a defendant who merely provides, or is in the position to provide, care for a patient 20

3. Plaintiffs erroneously challenge the point that the words "*care or custody*" should be read as synonymous within the statutory context 23

4. Plaintiffs improperly add a word into the statute 26

5. Plaintiffs' response to defendants' argument regarding the legislative history reflecting statutory intent is not persuasive 27

B. Plaintiffs Do Not Respond To Defendants' Point That A Health Practitioner Does Not Have The Care Or Custody Of A Patient Merely By Acting In The Capacity As A Health Practitioner 28

C. Plaintiffs Unpersuasively Attempt To Disregard The Language In *Covenant Care* And *Delaney* 29

D. Plaintiffs' Reliance On *Mack v. Soung* Is Misplaced 31

CONCLUSION 32

CERTIFICATION 34

TABLE OF AUTHORITIES

Page(s)

CASES

Benun v. Superior Court (2004)
123 Cal.App.4th 113 7

Berkley v. Dowds (2007)
152 Cal.App.4th 518 7

Carter v. Prime Healthcare Paradise Valley LLC (2011)
198 Cal.App.4th 396 ..... 7, 8

CD Investment Co. v. California Insurance Guaranty Assn.
(2000) 84 Cal.App.4th 1410 ..... 21, 22

Country Villa Claremont Healthcare Center, Inc. v. Superior Court (2004) 120 Cal.App.4th 426 ..... 8, 9

Covenant Care, Inc. v. Superior Court (2004)
32 Cal.4th 771 ..... 8, 10, 18, 22, 29, 30, 31, 32

Delaney v. Baker (1999)
20 Cal.4th 23 ..... 7, 29, 30

Estelle v. Gamble (1976)
429 U.S. 97 ..... 17, 18

Farmer v. Brennan (1994)
511 U.S. 825 17

Grafton Partners L.P. v. Superior Court (2005)
36 Cal.4th 944 23

Helling v. McKinney (1993)
509 U.S. 25 17

Lungren v. Deukmejian (1988)
45 Cal.3d 727 26

Mack v. Soung (2000)
80 Cal.App.4th 966 ..... 31, 32

People v. King (1993)
5 Cal.4th 59 28

People v. Singh (2001)
92 Cal.App.4th Supp. 13 21

People v. Uribe (2011)
199 Cal.App.4th 836 17

Pineda v. Bank of America, N.A. (2010)
50 Cal.4th 1389 22

Ramos v. Lamm (10th Cir. 1980)
639 F.2d 559 18

Sababin v. Superior Court (2006)
144 Cal.App.4th 81 ..... 30, 31

Sierra Club v. San Joaquin Local Agency Formation Com. (1999)
21 Cal.4th 489 28

Smith v. Ben Bennett, Inc. (2005)
133 Cal.App.4th 1507 ..... 8, 98

STATUTES

United States Code
42 U.S.C. § 1983 16

Welfare & Institutuions Code
§ 15600 22
§ 15610.17 4
§ 15610.57 ..... *passim*
§ 15630 ..... 29, 32
§ 15657 ..... 4, 7, 12, 19, 27, 31
§ 15657.2 8

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Assem. Republican Caucus,
Analysis of Assem. Bill No. 2611 (2003-2004 Reg. Sess.)
as amended Aug. 9, 2004 (Aug. 24, 2004) 28

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Analysis of Sen. Bill No. 2199 (1997-1998 Reg. Sess.)
as amended Apr. 28, 1998 (June 26, 1998) 27, 28

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(2d ed. 2002) 22

Restatement Third Torts: Liability for Physical and Emotional
Harm 11

Restatement Second Torts 11

The Original Roget's Thesaurus of English Words and
Phrases (1962) 24

Webster's Encyclopedic Unabridged Dictionary of the English
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INTRODUCTION
TO REPLY BRIEF ON THE MERITS

The arguments in the Answer Brief on the Merits ("ABM") reveal that plaintiffs are determined to expand the scope of the Elder Abuse and Dependent Adult Civil Protection Act (the "Elder Abuse Act" or the "Act") beyond its statutory language and eliminate the recognized division between professional negligence and elder abuse. Plaintiffs argue that the Elder Abuse Act applies to anyone who has a duty of care to an elder or dependent adult, instead of, as the statute requires, to only those persons "having the care or custody" of an elder or dependent adult. They further argue that a plaintiff may simultaneously pursue recovery for elder abuse "neglect" and professional negligence, even when both claims are based on the identical facts. Additionally, plaintiffs deny that "neglect" and professional negligence are "mutually exclusive," contrary to this Court's established doctrine. None of plaintiffs' points is meritorious.

To hold a health practitioner liable for neglectful elder abuse, the law requires a plaintiff to plead and prove that the practitioner had custodial obligations with respect to a patient, which entails more than merely acting as the patient's health practitioner. Additionally, it is established doctrine that professional negligence and neglectful elder abuse are mutually exclusive, and that the nature of a claim is established by the gravamen of the complaint, something which should be determined on the pleadings.

This brief responds to the points made in plaintiffs' Answer Brief on the Merits. It does not otherwise recapitulate the analysis in

the Opening Brief on the Merits ("OBM"). First, this brief corrects plaintiffs' misstatement of defendants' arguments. Second, it addresses the mutually exclusive nature of professional negligence and elder abuse and why plaintiffs' arguments are inconsistent with that mutual exclusivity. Finally, it responds to plaintiffs' attempts to refute the statutory construction of the Elder Abuse Act, which imposes custodial obligations as prerequisite to liability for neglectful elder abuse.

DISCUSSION

I. PLAINTIFFS MISSTATE DEFENDANTS' CONTENTIONS

A. Defendants Do Not Contend That Health Practitioners Should Be Immunized From Responsibility Under The Elder Abuse Act

Plaintiffs claim that defendants contend that all physicians and other health practitioners should be *immunized* from responsibility under the Elder Abuse Act. (ABM, p. 2.) Plaintiffs' claim is not true; to the contrary, defendants acknowledge that they and all other health practitioners have potential responsibility under the Elder Abuse Act for "neglect" – but *only* so long as they were in a custodial relationship with the elder adult when the alleged abuse occurred. To be clear, **what defendants contend is that the phrase "any person having the care or custody" (Welf. & Inst. Code, § 15610.57, subd. (a)(1)) operates as a *limitation* on liability for "neglect," by**

requiring that the defendant have custodial obligations to the vulnerable adult.

The distinction between what plaintiffs claim that defendants contend and what defendants actually contend is crucial because the Court of Appeal majority held that the term "neglect" in Section 15610.57, subdivision (a)(1), is not limited to "health care providers with custodial obligations." (Slip Opn., pp. 3, 9-16.) The effect, as defendants explained in their Opening Brief on the Merits, is that the majority opinion "impermissibly expands the reach of neglect claims to the health practitioners who provide outpatient care in their own offices – a context where a health practitioner and a patient are certainly not in a custodial relationship." (OBM, p. 7.) Now, in light of plaintiffs' arguments in their Answer Brief on the Merits, defendants' concern is even greater. If this Court agrees with plaintiffs, the Elder Abuse Act will be further expanded, from any person "having the care or custody" to any person "providing medical care."

Specifically, plaintiffs urge this Court to rewrite the statutory definition of elder abuse "neglect" as applying to "any person who *provides care*" – meaning any kind of care. (ABM, p. 22 ["*any* person who provides them care"], p. 29 ["'Any person' who provides care for an elder or dependent adult"], p. 44 ["those providing care to the elder"].) Thus, plaintiffs propose that the single statutory definition of persons who can be responsible for "neglect" (*i.e.,* those "having the care or custody") be expanded into three broader classes:

1. "Any person" who *provides care* for an elder or dependent adult; or

2. "Any person" who *has custody* of either an elder or dependent adult; or

3. *Both 1 and 2* above.

(ABM, p. 29, emphasis added.) In that way, plaintiffs reveal their true goal in this case, which is to *expand* the statutory scope of neglectful elder abuse. Plaintiffs also reveal why they mischaracterize defendants' argument – to shift the Court's focus away from that goal.

The Elder Abuse Act does not broadly apply to *any* person who "provides" *any* kind of "care" – particularly *medical* care – to elderly or dependent adults. Rather, it is limited to those "having the care or custody" of the elder or dependent adult, which is to say those that have custodial obligations. Plaintiffs' arguments to the contrary should be rejected.

B. Defendants Do Not Contend That Only "Care Custodians" Can Be Responsible For "Neglect" Under The Elder Abuse Act

Plaintiffs claim that defendants rely on the statutory definition of a "care custodian" in Welfare and Institutions Code section 15610.17 to support defendants' argument that only those having custodial obligations may be liable for "neglect" under the Elder Abuse Act. (ABM, p. 27 ["Respondents' attempt to erroneously link the definition of 'care custodian' to the reach of civil remedies addressed in § 15657"].) Plaintiffs again mischaracterize defendants' argument. Defendants do not rely upon the definition of a "care custodian" in the Elder Abuse Act (Welf. & Inst. Code, § 15610.17) to

understand this Court's phrase "custodial obligations." Defendants did not even cite the statutory definition of "care custodian" in their Opening Brief on the Merits. To be clear, **defendants assume that the basis of the phrase "custodial obligations" is the phrase "any person having the care or custody" in the statutory definition of "neglect."** (Welf. & Inst. Code, § 15610.57, subd. (a)(1).)

C. Defendants Do Not Contend That "Reckless Neglect Should Be Treated Differently Under The Act, Depending On Where It Occurs"

Plaintiffs also claim that defendants contend that "reckless neglect should be treated differently under the Act, depending upon where it occurs." (ABM, p. 3.) Yet again, plaintiffs mischaracterize defendants' contention. Defendants acknowledge that "neglect" can occur in a hospital, in a nursing home, in a clinic, in a physician's office, in a private home, or in any other location, but only if the defendant meets the statutory prerequisite of neglect by having assumed the responsibility for the basic needs and comfort of the elder or dependent adult. To be clear, **defendants contend that the only thing that matters about the location of where the alleged "neglect" occurs is whether the defendant qualifies as a "person having the care and custody" of the elder.**

It is a matter of statutory definition. Only someone "having the care or custody" of an elderly or dependent adult can be condemned for "neglecting" that adult, just as only someone "having the care or custody" of a minor can be condemned for neglecting that child. The common feature of those two concepts is not where the alleged

"neglect" occurs, but whether the defendant has the assumed the responsibility for the basic needs and comfort of the adult or minor. That explains why, at least until the Court of Appeal's decision in this case, the Elder Abuse Act had been applied *only* in the context of nursing home facilities and other such places "having the care or custody" of elder and dependent adults. That also explains why, until the Court of Appeal's decision in this case, the Elder Abuse Act had never been applied to an *outpatient* setting. And, finally, that is why this Court should reject plaintiffs' argument that any adult who is 65 or more years old and not dependent on others for basic needs and comfort nevertheless can be the victim of elder abuse "neglect" as that term is defined in subdivision (a)(1) of Welfare and Institutions Code section 15610.57. (ABM, pp. 24-25 ["The Act applies to all persons over the age of 65 years regardless of their competence or living situation"].)

Defendants acknowledge that the Elder Abuse Act applies to *all* forms of elder abuse, including physical abuse and financial abuse, and that *any* adult who is 65 or more years old and completely independent of others can be the victim of physical or financial abuse. The same is not true with regard to the elderly who are the victims of "neglect," however. They are, by statutory definition, dependent on others "having the care or custody" of their basic needs and comfort. (Welf. & Inst. Code, § 15610.57, subd. (a)(1).)

II. PLAINTIFFS' CONTENTIONS ARE CONTRARY TO ESTABLISHED DOCTRINE THAT PROFESSIONAL NEGLIGENCE AND NEGLECT ARE MUTUALLY EXCLUSIVE AND THAT THE TWO CLAIMS ARE DIVIDED BASED ON THEIR GRAVAMEN

Plaintiffs' contentions are contrary to established doctrine that professional negligence is mutually exclusive from neglect under the Elder Abuse Act, and that the classification of a claim as for either professional negligence or elder abuse turns on the claim's gravamen.

A. Plaintiffs Do Not Deny That Professional Negligence And Elder Abuse Neglect Are "Mutually Exclusive"

Plaintiffs do not deny that professional negligence and neglectful elder abuse are "mutually exclusive." Plaintiffs quote this Court's observation that professional negligence and elder abuse neglect are "mutually exclusive." (ABM, p. 36, quoting *Delaney v. Baker* (1999) 20 Cal.4th 23, 34.) Plaintiffs, however, say nothing further in that regard.

Indeed, plaintiffs say nothing about those Courts of Appeal that have generally followed this Court's lead, recognizing that professional negligence and neglect are completely "different paradigms." (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 124, 126 ["'professional negligence' is mutually exclusive of the elder abuse and neglect specified in section 15657"]; *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 529 ["Acts of simple or even gross negligence will not justify the additional civil damage remedies"].) Two other decisions to the same effect are *Carter v. Prime Healthcare*

Paradise Valley LLC (2011) 198 Cal.App.4th 396, 405-407 and *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1521-1523. Although plaintiffs comment on those decisions, they do not do so with respect to the "different paradigms" or "gravamen" concepts. (ABM, pp. 17-18.)

The basic point, as the Court of Appeal articulated in *Smith v. Ben Bennett, Inc., supra,* is that "section 15657.2 works like a toggle switch. If a claim is a 'cause of action . . . based on . . . professional negligence,' then 'those laws which specifically apply to . . . professional negligence causes of action' apply, and the Elder Abuse Act does not." (*Smith v. Ben Bennett, Inc., supra,* 133 Cal.App.4th at 1522-1523.) Plaintiffs apparently do not disagree.

B. Plaintiffs Do Not Deny That The "Gravamen" Of Their Claim Is "Professional Negligence"

Plaintiffs do not deny that the "gravamen" of their claim against defendants is "professional negligence," as the dissent observed. (Slip Opn., dis. opn. of Bigelow, P.J., pp. 4-6, 9.) They also do not deny that "professional negligence" is "a fundamentally different paradigm" from "neglect," as the majority observed. (Slip Opn., p. 19.) Plaintiffs do not respond to defendants' argument in that regard. (See OBM, pp. 24-25, citing *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 ["the gravamen of an action is violation of the Elder Abuse Act"], *Country Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426, 434 ["the gravamen of real parties' claims, both statutory and

nonstatutory, is elder abuse"], *Smith v. Ben Bennett, Inc., supra,* 133 Cal.App.4th at 1525 ["the gravamen of what would otherwise have been professional negligence causes of action"].)

The dissent's conclusion that the "gravamen" of plaintiffs' claim is professional negligence was based on a number of factors. Decedent visited the defendant physicians only on an outpatient basis, and was not inhibited from seeking a second opinion. (Slip Opn., dis. opn. of Bigelow, P.J., p. 5.) There were no allegations that decedent was in a nursing home or had diminished cognitive abilities, that defendants acted intentionally or fraudulently, or that there was a complete failure to treat her condition. (*Ibid.*) While the absence of any one of these allegations is not determinative, the fact that none is alleged means that the "gravamen" of the claim is not elder abuse.

In this case, the gravamen of the complaint is professional negligence, not neglectful elder abuse. The failure of a treating physician in an outpatient context to refer a patient to a specialist, where the treating physician does not have custodial obligations to that patient, is not the withholding of care that would constitute neglect under the Elder Abuse Act. Here, the complaint is based on the allegation that defendants failed to make correct medical decisions, the gravamen of which sounds in professional negligence, not in neglect under the Elder Abuse Act.

C. Plaintiffs Argue That The Concepts Of Professional Negligence And Elder Abuse Differ In "Degree," Which Is Inconsistent With Their Mutual Exclusivity

Plaintiffs continue to argue, as they did in the Court of Appeal, that professional negligence and elder abuse "*differ only in degree.*" (Appellants' Opening Brief, B237712, filed June 8, 2012, ("AOB"), at 26.) As plaintiffs explained that "distinction" to the Court of Appeal, "[t]he only question is whether [defendants'] failure to provide [plaintiffs' decedent] with a referral to a vascular specialist was simply negligence, or did it constitute 'reckless' 'neglect.'" (Appellants' Reply Brief ("ARB"), B237712, filed Nov. 6, 2012, p. 4.) Plaintiffs now propose, in their Answer Brief on the Merits, that the distinction "between reckless neglect and mere negligence" (ABM, p. 39) is nothing more than "recklessness." (*Id.* at pp. 35-39.) Plaintiffs say nothing about the other statutory terms "malice," "oppression," and "fraud," however, and ignore the discussion of "recklessness" in *Covenant Care, supra,* 32 Cal.4th at 789 ["plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages"].

Specifically, plaintiffs propose that:

- "professional negligence" and elder abuse "neglect" should be simply analyzed as two points on a continuum of "misconduct";
- the analysis of "misconduct" should turn entirely on the degree of "culpability" or "egregiousness" of the specific act of defendant, whether the act is characterized as "professional negligence" or elder abuse "neglect"; and

- the "culpability" or "egregiousness" of the act should be measured by the "*difference in the degree of the risk.*"

(ABM, p. 38.) In support of that ultimate test of the difference between "professional negligence" and elder abuse "neglect" – the "difference in the degree of the risk" – plaintiffs cite the Restatement Second of Torts, section 500, which defined "Reckless Disregard of Safety." Plaintiffs ignore the more relevant, and certainly more current, discussions in the Restatement Third of Torts: Liability for Physical and Emotional Harm, sections 2 and 5, relating to "Recklessness" and "Intentional Physical Harm," respectively.[1] (Rest.3d Torts-PH, §§ 2, 5.)

Plaintiffs are wrong. Not even the Court of Appeal majority agreed with plaintiffs in regard to this proposed continuum of medical care in which "professional negligence" and elder abuse "neglect" differ only in "degree." (Slip Opn., p. 19 ["We do not find that professional negligence differs from elder abuse and neglect only in degree, or that there is a continuum of medical care, with professional negligence at one point on the continuum and reckless neglect at another"].)

Finally, plaintiffs contend that failure to provide some certain medical care leaves a health practitioner exposed to liability under the Elder Abuse Act even though that practitioner is otherwise providing

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[1] For example, Section 2, states that a person is reckless, only if, inter alia, "the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk." (Rest.3d Torts-PH, § 2.)

care and treatment to the patient. (ABM, p. 48-49.) Plaintiffs are wrong. Decisions about the suitability of alternative methods of diagnosis or treatment, including whether a specialist referral is indicated, is a question of medical judgment. A decision to recommend or to not recommend a particular treatment or referral, when made in the context of the provision of general care for a patient, does not constitute a "failure to provide medical care." In other words, liability does not arise under the Elder Abuse Act where a health practitioner provides some care, but merely does not provide the method of care or treatment that a patient later claims was medically reasonable. Such failure would constitute, at most, medical negligence.

D. Plaintiffs Admit That They Seek To Avoid MICRA And Thereby Achieve Greater Recovery Of Damages

On the last page of their brief (ABM, p. 64), plaintiffs reveal that their goal is to avoid the cap on noneconomic damages imposed by the Medical Injury Compensation Reform Act ("MICRA"). Notably, plaintiffs are pursuing *two* cases on the *same* facts, which suggests that they are determined to recover damages *both* for "professional negligence" *and* for neglectful elder abuse. Plaintiffs' ultimate argument is that "a finder of fact should conclude by clear and convincing evidence that an elderly patient was subjected to neglect committed with 'recklessness, oppression, fraud *or* malice,'" such that "the provisions of MICRA do not preclude recovery of the enhanced remedies in § 15657." (ABM, p. 64.)

In other words, plaintiffs argue that jurors – not judges – should decide which of the "mutually exclusive" theories of "professional negligence" and elder abuse "neglect" should apply in cases against health care providers. Unless the Court of Appeal's decision case is reversed, not only will plaintiffs succeed in reversing the order sustaining the demurrer, they will succeed in circumventing MICRA.

E. Plaintiffs Do Not Deny Pursuing Their Original Lawsuit For Compensatory Damages Based On "Professional Negligence," To Which They Added "Medical Facts To Color" Their Original Allegations In Order To Pursue A Second Lawsuit To Obtain "Heightened Civil Remedies" Under The Elder Abuse Act

Plaintiffs say nothing about their first lawsuit against defendants, in which they alleged professional negligence. That is, plaintiffs do not deny that they previously alleged that defendants engaged in "negligence and carelessness" (see, *e.g.*, Appellants' Appendix ("AA") 112:23-24, 113:1-2), specifically, that defendants "failed to diagnose, care for and treat the Decedent for right leg ischemia [restricted blood supply] secondary to right femoral and popliteal occlusions [blockages of the popliteal artery] which subsequently led to a below the knee amputation of Decedent's right leg on April 18, 2009." (AA 112:20-22.) As noted by the trial court, the only difference between plaintiffs' first lawsuit and their second lawsuit was the additional detail in the factual allegations of elder abuse (AA 162), but otherwise the two lawsuits turn on the same set of facts.

In the first case, plaintiffs alleged that defendants "*failed to diagnose, care for and treat* the Decedent for right leg ischemia [restricted blood supply] secondary to right femoral and popliteal occlusions [blockages of the popliteal artery] which subsequently led to a below the knee amputation of Decedent's right leg on April 18, 2009." (AA 112:20-22, emphasis added.) Plaintiffs easily could have added words and more detail by alleging that defendants "*failed to diagnose*" decedent's vascular insufficiency and should have referred her to a vascular specialist to "*care for*" and "*treat*" her vascular insufficiency.

In the second case, which underlies the instant appeal, plaintiffs did precisely that, by alleging that, "[n]otwithstanding the deterioration of the vascular flow in the legs of the Plaintiffs' Decedent, Defendants decided not to make a referral to a vascular specialist. In February 2008, Dr. Lowe noted that Ms. Cox's vascular examination was 'unremarkable,' while also noting that she 'had an abscess of the lateral aspect of the right hallux nail plate and cellulitic [acute spreading bacterial infection below the surface of the skin] changes of the left hallux nail plate.' These findings are well known in the health care profession to be consistent with tissue damage due to vascular insufficiency." (AA 72:22-28.) Plaintiffs alleged that decedent "passed away on January 8, 2010 as a result of the acts, errors and omissions referred to herein." (AA 3:11-12, 70:14-15.)

These allegations were quoted by defendants in their Opening Brief on the Merits (OBM, p. 18, quoting AA 72:22-28) in support of their argument that "[t]he same set of facts does not give rise to both professional negligence and neglect claims, especially when the

theory at issue is a failure to refer the patient to a specialist – a theory of professional negligence." (OBM, p. 20.) Plaintiffs do not deny the basic point – that these are allegations of "professional negligence" to which, as the trial court put it, plaintiffs merely "added additional medical facts to color these allegations." (AA 162.)

F. Plaintiffs Also Propose That The Jury Determine The "Difference In Degree" Between "Professional Negligence" And Elder Abuse "Neglect," Even Though Such A Determination Should Be A Judicial Function

Plaintiffs propose that the jury – not the judge – determine the "degree" of difference between the "professional negligence" that plaintiffs claim and the "neglect" that plaintiffs claim, based on the same set of facts. (ABM, p. 39 ["A properly instructed jury is certainly capable of distinguishing between reckless neglect and mere negligence"].) Or, as plaintiffs explained their proposal to the Court of Appeal, "[t]his characterization of the distinction highlights the importance of *affording a jury the opportunity to decide for themselves*" (ARB, p. 6, emphasis added), as if the jury could understand how to compare legal concepts that are "mutually exclusive."

Even though the Court of Appeal majority rejected plaintiffs' proposed "continuum of medical care," the majority agreed with plaintiffs that "the same facts may prove professional negligence and also elder abuse or neglect. This is no different from, say, a criminal act for which the law provides radically different consequences

depending on the mens rea of the actor." (Slip Opn., p. 19.) In other words, in the decision's construct, professional negligence is a lesser included offense.

That is wrong for many reasons, the most obvious of which is that this Court and the Courts of Appeal have repeatedly held that the two concepts are "mutually exclusive." It is like asking the jury to compare legal apples and oranges. Second, even though it might be argued that there is a type of "mens rea of the actor" that can be evaluated in a case of alleged elder "abuse" or "neglect" (*i.e.,* "recklessness," "malice," "oppression," "fraud"), there definitely is no type of "mens rea of the actor" to be evaluated in a case of alleged "professional negligence." In other words, "professional negligence" is not a lesser included offense of elder "abuse" or "neglect." Third, even assuming, as plaintiffs propose, that the degree of culpability turns on "the degree of the risk," it follows that juries are not capable of comparing the "the degree of the risk" of nonspecialist physician versus specialist physicians or other health practitioners. In reality, such a comparison is a *risk/benefit* analysis that has nothing to do with culpability. It has far more to with the legal concept of duty, which is a determination properly reserved for the judge.

G. Plaintiffs' Reliance Upon Federal Cases Is Unpersuasive

Plaintiffs' reliance on federal authorities "interpreting 'deliberate indifference' in the context of a prisoner's right to be

protected from 'cruel and unusual punishment' at the hands of a health care provider" is misplaced. (ABM, pp. 50-54.)

First, the cases do not address the Elder Abuse Act or any similar statutory scheme. Rather, those cases concern a prison inmate's right under 42 U.S.C. section 1983 to bring an Eighth Amendment claim against the government or other public entity for a prison official's deliberate indifference to serious medical needs. Some of the cases do not even involve the rendition of medical care. (*Farmer v. Brennan* (1994) 511 U.S. 825 [prison officials held liable under the Eighth Amendment for acting with "deliberate indifference" to an inmate's safety from other inmates]; *Helling v. McKinney* (1993) 509 U.S. 25 [prison inmate stated Eighth Amendment claim based on allegation that prison officials acted with "deliberate indifference" in exposing him to cigarette smoke].) Furthermore, the cases do not address a physician's duty to his or her patient, but rather the duty of the government to provide medical care for those whom it is punishing by incarceration. (See *Estelle v. Gamble* (1976) 429 U.S. 97, 103.)

Here, defendants are not prison officials, and decedent was not an inmate. Plaintiffs do not allege that defendants violated the Eighth Amendment in their treatment of decedent's foot problems. Simply stated, federal decisions construing a prisoner's right to medical care during his or her confinement have no application in this case.

Second, this Court is not bound by the decisions of federal courts of appeals. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875.)

Third, a prison official's "deliberate indifference" to a prison inmate's health is not analogous to "neglect" under the Elder Abuse Act. Plaintiffs in this case were required to allege conduct that was reckless, oppressive, fraudulent, or malicious (*Covenant Care*, *supra*, 32 Cal.4th at 781), whereas prisoners need only show "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result" to establish a violation of their Eighth Amendment right. (*Farmer v. Brennan*, *supra*, 511 U.S. at 826.)

In any event, these federal authorities do not help plaintiffs because the United States Supreme Court was careful to distinguish a "deliberate indifference" to an inmate's health and "an inadvertent failure to provide adequate medical care." (*Estelle v. Gamble*, *supra*, 429 U.S. at 105-106; see *Ramos v. Lamm* (10th Cir. 1980) 639 F.2d 559, 575.) Where, as here, a plaintiff maintains an action for "simple negligence," he or she "does not state a valid claim of medical mistreatment under the Eighth Amendment." (*Estelle v. Gamble*, *supra*, 429 U.S. at 106.)

III. PLAINTIFFS' DENIAL OF THE "CUSTODIAL RELATIONSHIP" PREREQUISITE TO A CLAIM UNDER THE ELDER ABUSE ACT IS BASED ON A FLAWED STATUTORY ANALYSIS

Plaintiffs' denial of the "custodial relationship" prerequisite to establishing a claim under the Elder Abuse Act is based on a flawed statutory analysis. Plaintiffs accuse defendants of relying on a "guise

of statutory construction." (ABM, p. 22 [heading III A].) There is no guise. Review of this case requires interpretation of the statute.

Plaintiffs recognize that this case requires interpretation of the statute, and they offer their own analysis. Their interpretation, however, is based entirely on the word "care." For example, plaintiffs explain, "[h]ealthcare providers are some of the entities and individuals *that care for* the elderly on a recurring and continuing basis." (ABM, p. 61, emphasis added.) Plaintiffs argue that physicians who provide "care," or have a duty arising from a physician-patient relationship to provide "care," are liable under the Elder Abuse Act if they "cause harm to their elderly patients." (ABM, p. 58 [heading F].) Providing medical "care" to the elderly, however, is not the same as "having the care or custody of" the elderly.

A. The Statute's Plain Language Precludes Holding A Health Practitioner Liable For Neglectful Elder Abuse In An Outpatient Setting For Failure To Refer The Patient To A Specialist

The statute's plain language precludes holding a health practitioner liable for neglectful elder abuse in an outpatient setting for failure to refer the patient to a specialist. Put more generally, there is no potential liability under the Elder Abuse Act for neglectful abuse where the defendant is not someone "having the care or custody" of the patient. (Welf. & Inst. Code, § 15657, subd. (a).) And, this statutory language does not include within its ambit health practitioners who merely provide "care" to the patient but do not have custodial obligations.

1. Plaintiffs focus exclusively on the word "*care*"

In the hope of distracting the Court from the implication that "any person having the care or custody of an elder or a dependent adult" means a person who has "custodial obligations," plaintiffs focus on one word in Section 15610.57, subdivision (a)(1) – "*care.*" (ABM, pp. 27-32.) They do so in order to expand physician and other health practitioner liability under the Elder Abuse Act – so that the Act will extend to defendants' alleged failure to refer the patient to a specialist. In effect, plaintiffs omit from their reading of the statute the other words – "*having the*" and "*or custody.*" Words in a statute, however, must be construed in conjunction with the other words and phrases used in the text.

2. Plaintiffs ignore the words "*having the,*" which precludes application of the Elder Abuse Act to a defendant who merely provides, or is in the position to provide, care for a patient

Plaintiffs acknowledge that each word in a statute must be given meaning. (ABM, p. 23 ["every word of a statute must be presumed to have been used for a purpose"]), but they fail to follow this axiom of statutory interpretation. Indeed, there are several occasions in their brief when plaintiffs read the word "*the*" out of the statute. For example, they argue that the statute "applies generally to anyone having 'care or custody' of an elder" (ABM, p. 43), "to 'any person' who has *either* 'care *or* custody' of an elder" (*id.* at p. 27), and to any person "who provides care" (*id.* at p. 29).

Because the word "*the*" is missing from plaintiffs' quotations of, and references to, the statute, plaintiffs make it appear that the statute provides two alternative concepts – "care" or "custody" – rather than a single concept – "*the* care or custody." Even if "care or custody" were not read collectively, plaintiffs' omission of the definite article preceding the word "care" is significant, because the word "*the*," the definite article, restricts the meaning of "care or custody," or, as plaintiff might prefer, the meaning of only "care."

This is to say, plaintiffs ignore the point stated in the Opening Brief on the Merits that the Legislature's use of the definite article "the" preceding the term "care or custody" indicates the need of a relationship more significant than merely between someone who provides, or is in the position to, provide care, on the one hand, and the recipient of that care, on the other. (OBM, pp. 27-29.) Plaintiffs' interpretation would require the Court to read the statute as if contained an all-inclusive, indefinite modifier, such as "*any*" or "*some*" care. "Notably, the Legislature chose the definite article "*the*." (See *People v. Singh* (2001) 92 Cal.App.4th Supp. 13, 17 [explaining that Legislature chose the definite article "*the*," not the indefinite article "*a*" in speed trap statute pertaining to "enforcement of *the* speed limit].)

The definite article "*the*" refers to something particular, specific, or unique. Plaintiffs contend that the "*the*" should be given no weight. They claim that it "in no way limits the meaning" and they deny the significance of the discussion of the indefinite article in *CD Investment Co. v. California Insurance Guaranty Assn.* (2000) 84 Cal.App.4th 1410, 1421. (ABM, pp. 28-29.) If plaintiffs were

correct, however, it would render the word "*the*" surplusage, violating an axiom of statutory interpretation. Indeed, this Court has noted the significance of the indefinite article "*the*." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1396-1397, citing Garner, The Redbook: A Manual on Legal Style (2d ed. 2002) § 10.38, p. 173 [attributing significance to "the Legislature's grammatical choices – specifically, its use of definite and indefinite articles"].)

Plaintiffs' observation that the Legislature employed the indefinite article to modify "person" supports defendants' interpretation of the statute. (ABM, p. 29.) Indeed, "the use of both indefinite and definite articles" in Section 15610.57 "underscores that the Legislature's choice to use one as opposed to the other was deliberate and should be accorded significance." (*Pineda, supra,* 50 Cal.4th at 1397, fn. 5.)

In context, the phrase "*the care*," especially when coupled with the word "*having*," refers to an overall obligation for care, not particular instances in which care might be provided. In other words, having a person in one's charge, or in the words of this Court, having "custodial obligations." (*Covenant Care, supra,* 32 Cal.4th at 775.) It precludes application of the provision to a health practitioner who provides care to an individual but who does not "have the care or custody of that individual."

Finally, defendants' interpretation is consistent with the Legislature's express statements of its intent in Section 15600, subdivisions (d) and (e). (Welf. & Inst. Code, § 15600, subd. (d) and (e).)

3. Plaintiffs erroneously challenge the point that the words "*care or custody*" should be read as synonymous within the statutory context

Plaintiffs erroneously challenge the point that the words "*care*" and "*custody*" in the term "*care or custody*" are correctly read as synonyms within their context. Not only is this required by the general statutory context, but it is required because the two words are collectively preceded by the definite article "*the*." Plaintiffs' argument contravenes the canon of interpretation *noscitur a sociis*. (See, *e.g.*, *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960 ["a word takes meaning from the company it keeps"].). Furthermore, plaintiffs' argument is also based on a rejection of Bryan Garner's grammatical analysis (ABM, pp. 29-31), upon which defendants rely. (OBM, pp. 28-29.) Plaintiffs are wrong, however, to reject Garner for at least two reasons.

First, in addition to A Dictionary of Modern Legal Usage (Bryan A. Garner, A Dictionary of Modern Legal Usage (2d ed. 1995)), Garner is the editor of the highly respected and frequently cited Black's Law Dictionary (Black's Law Dict. (8th ed. 2004)).

Second, plaintiffs cite the Chicago Manual of Style to contradict Garner (ABM, p. 31-32), but they provide no explanation of which edition or page the quotation is from. That is important because the editors of that book recruited Garner to write its new chapter on contemporary grammar, syntax, and phrasing – how a sentence ought to be put together. (The Chicago Manual of Style (15th ed. 2003), pp. xi, 145, *et seq.*) That is even more important because the current edition advises that "with a series of coordinate

nouns, an article should appear before each noun. . . . If the things named make up a single idea, the article need not be repeated." (*Id.*, at § 574, at pp. 166-167.)

Not only does the grammatical structure of the statute direct that the words should be read as synonyms, but the words "care" and "custody" are synonyms of the noun "restraint" under the common meaning of the noun "detention." (The Original Roget's Thesaurus of English Words and Phrases (1962) No. 747, pp. 464-465.) Obviously, patients in nursing homes and other long term care facilities are in a mild form of "detention," meaning that the nursing homes and other long term care facilities have "the care or custody" of those patients.

Certainly, prisoners who need health care are in "detention" – in prisons – where the prison staff members qualify as persons "having the care or custody" of the prisoners and can characterized as neglecting their "custodial obligations" if they deny the prisoners medical care. For that reason, plaintiffs' citation to federal appellate authority relating to medical care for prisoners (ABM, pp. 50-54), only reinforces defendants' statutory interpretation of the key statutory phrase "having the care or custody."

Black's Law Dictionary (8th ed. 2004) defines the noun "custody" as "1. *The care and control* of a thing or person for inspection, preservation, or security." (*Id.* at p. 412, emphasis added.) Consistent with Black's Law Dictionary, Webster's Encyclopedic Unabridged Dictionary of the English Language (1996) defines "custody" as "1. Keeping, guardianship, *care*." (*Id.* at p. 494, emphasis added.) Also consistent is Webster's New Collegiate Dictionary (1979), which defines "custody" as "immediate charge and

control, by a person or authority (as over a ward or a suspect)." (*Id.* at p. 278, emphasis added.)

Importantly, the words "care" and "custody" are used, along with the word "control," to define one another. As such, the definite article "*the*" in the statutory phrase "having *the* care or custody" is applied to both of the nouns in the phrase "care or custody" because the nouns are common plural items. The Legislature did not need the definite article "the" for each of the nouns (*i.e.,* "the care or the custody") because the nouns combine to form one single idea ("care or custody").

For these reasons, plaintiffs are wrong to argue that repeating the definite article "*the*" before items in a list is not necessary because, plaintiff's assert, the Legislature intended to refer to "a series of coordinate nouns." (ABM, pp. 30-31.) They are also wrong to argue that "all authoritative primary definitions of the word 'or' indicate that it is a conjunction that emphasizes two (or more) sentence elements between which there is an *alternative.*" (*Id.* at p. 31.) Indeed, even plaintiffs admit that there is "a secondary definition of the word 'or,' which states that 'or' can be used to connect 'two words denoting the same thing.'" (*Id.* at p. 32.)

In summary, the Legislature did not need to include the definite article "*the*" for each of the "coordinate nouns" because the "coordinate nouns" constitute a single idea. If the Legislature thought otherwise, it would have used the definite article "*the*" twice, to modify **separate** "coordinate nouns."

In any event, the lack of the article "*the*" immediately preceding the word "*custody*" in the statute is unavailing to plaintiffs. The word

"*the*" immediately precedes "*care*," which means that the "custodial relationship" requires more than merely being in the position to provide care, but that the defendant must be responsible for "*the care*," which describes an affiliation beyond that of merely a physician-patient relationship.

4. Plaintiffs improperly add a word into the statute

Plaintiffs read the word "*either*" into the statute in their argument that the statute "is directed to 'any person' who has *either* 'care *or* custody' of an elder." (ABM, p. 27.) Because plaintiffs add the word "*either*" to the phrase, they make it appear to offer two alternative concepts – "the care" or "the custody" – rather than a single concept – "the care or custody."

Plaintiffs are wrong to interpret the statute this way. As this Court explained, "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Additionally, it is apparent that the Legislature knew how to use the word "either." In fact, Section 15610.57 commences with a clause using the "either." (Welf. & Inst. Code, § 15610.57, subd. (a).)

Plaintiffs' interpretation of the statute would lead to absurd results. Plaintiffs' position, based on an isolated reading of the word "*care*" in Section 15610.57, is that any individual could be subject to

charges of neglectful abuse under the Elder Abuse Act merely because he or she provides some care to an elder or dependent adult. This would include a waiter who unreasonably serves an elder patron in a restaurant. This is because a waiter takes "care" of his customers (*i.e.,* "I'm your waiter, and I'll be taking care of you this evening"). Under plaintiffs' interpretation, the waiter is guilty of neglect under Section 15657 if he or she fails to bring the patron his or her food with the degree of care that a reasonable person would (Welf. & Inst. Code, § 15610.57, subd. (a)(1)), because unreasonable failure in "provision of food" is included within the definition of "neglect." (Welf. & Inst. Code, § 15610.57, subd. (b)(1).) This scenario falls within the ambit of plaintiffs' interpretation of the statute, but is undoubtedly outside of the Act's intended scope.

5. Plaintiffs' response to defendants' argument regarding the legislative history reflecting statutory intent is not persuasive

Plaintiffs reject the significance of the Assembly Republican Caucus's analysis of Senate Bill No. 2199. (Assem. Republican Caucus, Analysis of Sen. Bill No. 2199 (1997-1998 Reg. Sess.) as amended Apr. 28, 1998 (June 26, 1998).) That analysis reveals a legislative intent to limit the scope of the Elder Abuse Act to physicians who either have "direct supervision of the elder or doctors in charge of facilities or others with supervision over the elder." (OBM, pp. 12-13.) Plaintiffs argue that a physician who provides care is the "person 'with direct supervision' *for that care.*" (ABM, p. 40, emphasis added.) But, the analysis refers to something different –

supervision "*over the elder*," not supervision "*for that care*." Such supervision *over the elder* is tantamount to "custodial duties," supervision *for that care* is not.

With regard to Assembly Bill 2611 (Assem. Republican Caucus, analysis of Assem. Bill No. 2611 (2003-2004 Reg. Sess.) as amended Aug. 9, 2004 (Aug. 24, 2004), plaintiffs incorrectly suggest that the legislature accepted and approved of the "practice of concurrently filing both elder abuse and medical negligence claims in appropriate cases." (ABM, p. 63.) The Legislature's failure to act to address a condition of which it is aware does not constitute an acceptance or approval of that conduction. (See *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 506; see also *People v. King* (1993) 5 Cal.4th 59, 77.)

Most importantly, the Legislature distinguished between health practitioners and care custodians, a point that is maintained throughout the Act as a whole.

B. Plaintiffs Do Not Respond To Defendants' Point That A Health Practitioner Does Not Have The Care Or Custody Of A Patient Merely By Acting In The Capacity As A Health Practitioner

Merely acting as a health practitioner in relation to an elder or dependent adult does not establish that the health practitioner has the care or custody of that individual. This is apparent from review of Section 15630, subdivision (a), as defendants explained in their Opening Brief on the Merits. (OBM, pp. 27-28, citing Welf. & Inst.

Code, § 15630, subd. (a).) This is a critical point. Plaintiffs do not respond to it.

C. Plaintiffs Unpersuasively Attempt To Disregard The Language In *Covenant Care* And *Delaney*

This Court has interpreted the Act as requiring "custodial obligations," which means responsibility for attending to the "basic needs" of the elder or dependent adult. (See, e.g., OBM, pp. 29-31.) Plaintiffs' sole response is unpersuasive. They argue that the custodial obligations language in *Delaney* and *Covenant Care* was resulted only because those cases involved custodial settings and therefore, plaintiffs say, is inapplicable to cases where the patient is not in a "long term care setting," a term they do not define. (ABM, p. 34.) This is an erroneous reading of these decisions.

First, these decisions interpret that "plain language" of the Act, in particular the definition of neglect in Section 15610.57 as incorporated in 15657, without limiting that interpretation to a long term care setting. (*Covenant Care, supra,* 32 Cal.4th at 783-785.)

In characterizing neglectful elder abuse as defined in Section 15610.57, this Court stated in *Covenant Care*:

> *As used in the Act*, neglect refers not to the substandard performance of medical services but, rather, to 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*."

(*Covenant Care, supra,* 32 Cal.4th at 783, emphasis added, quoting *Delaney, supra,* 20 Cal.4th at 34.) The decision emphasizes this point by repeating it two pages later, italicizing the word "*custodial*" in its quotation of *Delaney*. (*Covenant Care, supra,* 32 Cal.4th at 785.)

Second, plaintiffs' contention is otherwise defeated by *Covenant Care.* Plaintiffs claim that a physician qualifies as "having the care or custody" merely by providing care to an elder or dependent adult. But, this contention is belied by *Covenant Care's* statement that distinguishes a health care provider's provision of health care on the one hand, with custodial obligations on the other. "Without question, health care provider and elder custodian 'capacities' are conceptually distinct." (*Covenant Care, supra,* 32 Cal.4th at 785.)

Third, plaintiffs have effectively acknowledged that the language "having the care or custody" refers to "custodial obligations," as stated by *Covenant Care.* In the Court of Appeal, plaintiffs stated in their Appellants' Opening Brief that:

> As also noted in *Sababin,* "neglect" under the Act "refers <u>not</u> to the substandard performance of medical services, but, rather, to 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*.'

(AOB, p. 29, quoting *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 89, quoting *Covenant Care, supra,* 32 Cal. 4th at 783.)

D. Plaintiffs' Reliance On *Mack v. Soung* Is Misplaced

Plaintiff contends that *Mack v. Soung* (2000) 80 Cal.App.4th 966, is not at odds with the Elder Abuse Act. (ABM, p. 43.) *Mack's* interpretation, however, is faulty because it omits the definite article "*the*" from its statutory interpretation. What is more, plaintiffs do not refute the three reasons stated in the Opening Brief on the Merits as to why *Mack* is inapposite to the issue on review.

Mack's interpretation omits the critical definite article "*the*" from its analysis. It incorrectly explains that the Act imposes liability for neglectful abuse on "anyone having 'care or custody' of an elder." (*Mack, supra,* 80 Cal.App.4th at 974.) It repeats this mistaken interpretation in its statement that "health practitioners who assume care or custody of the elderly are subject to liability . . . ." (*Id.* at 975.) The Act does not impose liability for neglectful abuse under Section 15657 to any physician who merely provides care – *e.g.*, "having care," but only on physicians who have "the care or custody."

Additionally, as noted in the Opening Brief on the Merits, *Mack* is inapplicable because it addressed and rejected the defendant physician's extreme claim that application of the Act is limited to "institutional health care facilities." (*Mack, supra,* 80 Cal.App.4th at 974.) Here, defendants do not make that claim. Additionally, unlike the present case, the defendant in *Mack* actively concealed injuries to the patient and abandoned her while she resided in a nursing home. Again, such allegations do not exist here.

Mack misinterpreted Section 15630, which establishes that health practitioners do not assume "the care or custody" of patients,

merely by acting as health practitioners. Indeed, Section 15630, subdivision (a) establishes that they are distinct from those that have "the care or custody." *Mack* missed this point by omitting an "*or*" from its quotation of Section 15630, subdivision (a).

Finally, *Mack* was decided prior to *Covenant Care* and does not account for its decision limiting neglectful abuse to those who have custodial obligations.

CONCLUSION

Plaintiffs' argument asks this Court to disregard established doctrine that neglectful elder abuse and professional negligence are mutually exclusive and that the nature of the plaintiff's claim is determined by the gravamen of the complaint. Plaintiffs' also ask this Court to disregard its interpretation of the Elder Abuse Act that imposes liability thereunder only on defendants who have custodial obligations. To accomplish this goal, plaintiffs impliedly ask this Court to rewrite Section 15610.57's definition of "neglect" by omitting critical words and interpreting others out of context. In effect, they ask this Court to remove the "custodial obligations" prerequisite to liability under the statute. To do so would violate the cannons of statutory interpretation.

Furthermore, if plaintiffs' arguments are accepted by this Court, then in most, if not all, "professional negligence" cases filed by or on behalf of patients 65 or more years old, the complaints will include claims of both "neglect" and "professional negligence." This would

permit plaintiffs to improperly obtain recovery not available in professional negligence actions.

For these reasons, the Court of Appeal's decision should be reversed and the demurrer to plaintiffs' complaint sustained.

DATED: March 3, 2014

CARROLL, KELLY, TROTTER, FRANZEN, MCKENNA & PEABODY

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CERTIFICATION

As determined by the software used to prepare this brief, this brief consists of 7,951 words.

DATED: March 3, 2014

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PROOF OF SERVICE

I am employed by Cole Pedroza LLP, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 200 S. Los Robles Ave., Suite 300, Pasadena, California 91101.

On the date stated below, I served in the manner indicated below, the foregoing document described as: REPLY BRIEF ON THE MERITS on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of March 2014.

Kathleen Eastham

Kathleen Eastham

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