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Validity, Construction, and Application of State Civil and Criminal Elder Abuse Laws

James L. Buchwalter, J.D.

Many states have recently enacted laws that hold persons civilly liable or criminally responsible for the specifically defined misconduct of neglecting or otherwise abusing the elderly. Thus, one state has a criminal law that imposes an enhanced sentence if the underlying crime, such as murder, was committed against an elderly person. Issues arise concerning the scope and interpretation of these laws. For example, in People v. Adams, 93 Cal. App. 4th 1192, 113 Cal. Rptr. 2d 722, 113 A.L.R.5th 729 (4th Dist. 2001), reh'g denied, (Dec. 14, 2001) and review denied, (Feb. 20, 2002), the court held that California's sentence enhancement statute did not apply to the defendants, who were convicted of second–degree murder and involuntary manslaughter, respectively, of a 69–year–old man, where neither murder nor manslaughter was a predicate offense under the elder abuse statute, Cal. Penal Code § 368, and the defendants were not charged with elder abuse as a separate crime. This annotation collects and analyzes cases in which the courts have dealt with issues arising under state civil and criminal elder abuse laws.

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I. PRELIMINARY MATTERS

§ 1[a] Introduction—Scope

This annotation discusses all cases that explicitly apply or interpret state elder abuse laws, whether criminal or civil in nature. Included are laws that create a separate offense or cause of action for elder abuse, as well as criminal statutes that authorize an enhanced sentence for crimes that involve an elderly victim. Excluded are cases that happen to involve an elderly person that has suffered abuse, but which do not concern a law that specifically define elder abuse as a distinct form of misconduct. Outside the scope of the annotation, therefore, are cases that address, for example, the propriety of granting an order of protection for abuse against an elderly person, or that discuss a common law negligence claim that involves an elderly victim.

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing on this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cases and Statutes.

§ 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Summary and comment—Generally

Responding to a growing awareness that elderly persons may be particularly vulnerable to abuse, states have enacted civil[FN1] and criminal[FN2] laws that hold perpetrators accountable for mistreating elderly victims. The laws typically encompass physical abuse, often in a nursing home, as well as financial misconduct by person in a position of trust with the victim.[FN3] More egregious cases of misconduct, involving reckless or intentional acts, may entitle a plaintiff to enhanced remedies,[FN4] such as attorney's fees, under a civil elder abuse statute, or may provide a predicate for a criminal elder abuse offense.
In civil litigation, courts have addressed procedural or threshold issues in elder abuse actions, such as to whether a state court had subject matter jurisdiction over a claim for elder abuse that implicated certain Medicaid provisions (§ 3), whether certain federal banking and consumer laws preempted a state's financial elder abuse statute (§ 4), and the application of a statute of limitations in an elder abuse action (§ 5), including the issue whether the running of a statute of limitations should be tolled because of the victim's insanity (§ 6). Courts have also addressed such issues as whether a plaintiff had representative capacity or successor status to maintain a statutory elder abuse claim (§ 7), and whether a trial preference was warranted in an elder abuse suit on account of the plaintiff's advanced age (§ 8).
Addressing the merits of civil elder abuse claims, courts have ruled that the pain and suffering provision of an elder abuse statute could be applied retroactively. Courts have also addressed the relation between common law negligence and an elder abuse statute (§ 9), the requisite level of negligence (§ 10), and whether state and federal regulations governing health care facilities could be used as an additional source of law governing the standard of care imposed on the defendant (§ 11). Case law has considered whether there was a causal link established between the defendant's misconduct and the harm suffered by the victim (§ 12). Finally, courts in civil actions alleging statutory elder abuse claims have addressed the scope of financial elder abuse (§ 13).
The remedies or relief available under civil elder abuse statutes has a been a fertile source of case law, with courts addressing such questions as to whether an implied right of action existed under an elder abuse statute (§ 14), and the scope of relief under an elder abuse law that grants heightened remedies for recklessness (§ 15). Courts have addressed whether damages were recoverable under an elder abuse statute for the negligent infliction of emotional distress (§ 16), and for punitive damages (§ 19). Authority has considered whether pain and suffering is recoverable under an elder abuse statute (§ 17), and, more specifically, whether a pain and

suffering provision could be applied retroactively (§ 18). Courts have held that attorney's fees under an elder abuse statute were not warranted or must be reduced in amount (§ 20[a]), or were proper under the circumstances (§ 20[b]). Finally, courts have addressed whether an employee's reinstatement after being discharged for abusing an elderly patient was inconsistent with the public policy underlying the state's elder abuse statute (§ 21), whether an employee may have a cause of action for retaliatory discharge against his or her employer if terminated for reporting misconduct of coworker (§ 22), and whether an inheritance may be forfeited as a consequence of an adjudication of elder abuse (§ 23).

In criminal prosecutions for elder abuse, courts have addressed the scienter requirement under the governing statute (§ 24), and, specifically, whether circumstantial evidence suffices to demonstrate the defendant's knowledge of the victim's age in an elder abuse prosecution (§ 25). Courts have considered the definition of a caregiver under an elder abuse criminal provision (§ 26), and have addressed whether a defendant could be convicted of elder abuse under the circumstances for failing to protect the victim from the misconduct of others (§ 27). Case law has addressed whether the evidence adduced at trial in an elder abuse prosecution supported a jury instruction for a lesser included offense (§ 28), and has considered the application of a statute of limitations for an elder abuse offense (§ 29). The principle requiring each juror to agree on the same particular one of several acts or omissions adduced at trial to support an elder abuse charge has been addressed (§ 30). Courts have considered such issues as the validity of a hearsay exception for statements of elderly persons or disabled adults describing instances of abuse (§ 31). Also, courts in elder abuse prosecutions have considered a trial court's discretion to impose a statutory sentence enhancement for causing a more serious injury or death to the victim (§ 32[a]), and whether such a provision could be imposed for a nonelder abuse conviction (§ 32[b]). Finally, authority has addressed the validity of a condition on probation that required a defendant convicted of elder abuse to submit to searches without a showing of probable cause (§ 33).

§ 2[b] Summary and comment—Practice pointers

The importance of an appellate brief was highlighted in an elder abuse appeal,[FN5] affirming an elder abuse conviction that included, inter alia, a special finding of intentionally causing great bodily harm requiring medical treatment to a person over 60 years of age, the court found no arguable issue presented by the appeal. The court noted that the appointed defense counsel merely stated the facts of the case, but raised no specific appellate issues, and the defendant had been advised by the court of his right to submit written arguments on his own behalf within 30 days. No such submission, however, was received by the court.

Counsel should note that the abuse of elderly victims may preclude the civil compromise of a criminal offense. In a criminal case[FN6] arising from an automobile collision involving driving under the influence of intoxicants, the court concluded that the Legislature implicitly demonstrated an intent to allow the civil compromise of reckless endangering offenses in cases that do not involve elder abuse or domestic violence, since the law expressly disallowed compromises in those latter two types of cases. Applying the principle of "expressio unis," under which the inclusion of specific matters in a statute tends to imply a legislative intent to exclude related matters that were not mentioned, the court explained that under Or. Rev. Stat. § 135.703(1)(d)(D), a civil compromise is explicitly disallowed in cases of reckless endangering

committed by one family or household member on another family or household member or on an "elderly person."

Counsel should investigate any disqualifications or civil disabilities that may arise from a civil or criminal adjudication of elder abuse. For example, one statute[FN7] effectively bars certain abusers from recovering under an elderly victim's will, a trust, or through intestacy, if the abuser was found civilly liable, or criminally responsible, for elder abuse.

On the issue of immunity from civil liability for mandated reporters of abuse, in one case[FN8] where an elderly person had died shortly after she was taken to the hospital by emergency medical technicians who entered her residence without consent after receiving a report of suspected elder abuse or neglect, and a surviving son and daughter–in–law sued the physician and nurse who had reported the suspected abuse, as well as the EMT's and their employers, the court ruled that the report made by the nurse, who was a mandated reporter under the Elder Abuse and Civil Protection Act, Cal. Welf. & Inst. Code § 15634, was a report required or authorized by the Act, and thus was protected by absolute privilege under the Act in a suit alleging trespass, false imprisonment, and intentional/negligent infliction of emotional distress, arising from the removal of the elder person from their home following the report. This protection applied although the nurse had made the report through a physician rather than directly to local law enforcement as called for by the Act.

Indirectly suggesting that the prospect of an elder abuse lawsuit may not provide a complete deterrent to mistreating elderly victims, one court[FN9] has ruled that the statutory "reasonable licensee defense" to citations against long–term health care facility for statutory violations imposed under Cal. Health & Safety Code § 1424 does not repeal or negate the common law rule imposing a nondelegable duty on licensees; thus, unreasonable actions by employees are attributed to licensees although they assert that defense. The court rejected the contention that the health care association's proposed interpretation of the reasonable licensee defense would retain protection for nursing home residents from the misconduct of individual nursing home employees because the residents would have various private rights of action against the employees, including the action created by the Elder Abuse Act, Cal. Welf. & Inst. Code §§ 15600 et seq.

II. CIVIL SUITS FOR ELDER ABUSE

A. Procedural or Threshold Issues

§ 2.5. Purpose of statute

[Cumulative Supplement]

The following authority considered the purpose of an elder abuse act.

CUMULATIVE SUPPLEMENT

Cases:

The Elder Abuse Act's goal was to provide heightened remedies for acts of egregious abuse against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. West's Ann. Cal.Welf. & Inst.Code §§ 15600 et seq. Benun v. Superior Court, 20 Cal. Rptr. 3d 26 (Cal. App. 2d Dist. 2004).

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[END OF SUPPLEMENT]

§ 3. Subject matter jurisdiction

The following authority considered whether the state court had subject matter jurisdiction over a claim for elder abuse that implicated certain Medicaid provisions.
In Minka v. Pacificare of California, 2001 WL 1194958 (Cal. App. 4th Dist. 2001), unpublished opinion, in which the plaintiff sued his health maintenance organization and its physician provider group, asserting 12 causes of action, including elder abuse, arising from the defendants' alleged refusal to approve an experimental surgical procedure known as transmyocardial laser revascularization (TMR) to treat his coronary artery disease, the court reversed a trial court ruling that had granted the defendants' separate motions for summary judgment on the ground that the trial court lacked subject matter jurisdiction because all of the plaintiff's claims are subject to the exclusive review provisions of the Medicare Act, 42 U.S.C.A. §§ 1395 et seq. The appellate court explained that a Medicare provider may violate state common law or statutory duties owing to beneficiaries, unrelated to its Medicare coverage determinations. The court noted the later repudiation of case law that had held that a state law claim is subject to the administrative review process of the Medicare Act if it is "inextricably intertwined" with a claim for Medicare benefits. The phrase "inextricably intertwined" is more correctly read as sweeping within the administrative review process only those claims that ultimately seek reimbursement or payment for medical services, but not claims that incidentally refer to a denial of benefits under the Medicare Act, the court concluded. The latter type of state law claims by Medicare beneficiaries are not subject to the administrative review process and may be pursued in state court, the court stated.

§ 4. Federal preemption of state elder abuse laws

The following authority considered whether federal banking and consumer laws preempted a state's financial elder abuse statute.

In Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445 (1st Dist. 2001), review denied, (Jan. 23, 2002) and cert. denied, 122 S. Ct. 2662, 153 L. Ed. 2d 837 (U.S. 2002), the court held that the Alternative Mortgage Transaction Parity Act of 1982 did not expressly preempt a homeowner's state law claims for elder abuse, unlawful business practices, and fraudulent concealment and negligent misrepresentation brought against a nonfederally chartered lender who provided a reverse mortgage. The court explained that the preemption language in the Act did not clearly manifest a Congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions. Further, the court ruled that the Act and regulations adopted under it did not impliedly preempt the elder abuse claim, since the regulations that apply to nonfederally chartered housing creditors were too few in number to occupy the field. The court added that allowing the claims to proceed would not frustrate Congress' intent to allow nonfederally chartered housing creditors to engage in alternative mortgage financing; there was no comprehensive federal regulatory scheme governing such creditors; and the claims concerned matters not addressed by the federal regulations. The court went on to rule that the Truth in Lending Act (TILA) did not expressly preempt the homeowners' elder abuse claim, since the TILA acknowledged a continued role for state law in regulating credit transactions; TILA did not prohibit states from requiring additional disclosures from lenders; and regulations adopted under TILA providing for preemption did not deal with the aspects of lending at issue in the homeowners' claims. Further, the court ruled, the elder abuse claim was not impliedly preempted, as the TILA preempted only inconsistent state laws, thus implicitly repudiating a federal occupation of the field. Also, the TILA did not (through conflict preemption) preempt the homeowners' state law claims for elder abuse, unlawful business practices, and fraudulent concealment and negligent misrepresentation. The court reasoned that the TILA was intended to protect consumers from inaccurate and unfair credit practices, and the homeowners' claims actually furthered that purpose, rather than frustrating it. Finally, the court ruled that the Depository Institutions Deregulation and Monetary Control Act of 1980 did not preempt the homeowners' state law claims, since the homeowners were not challenging the loan origination fees, cash advance fee, or interest rates themselves.

§ 5. Statute of limitations—Generally

[Cumulative Supplement]

The following authority has considered the application of a statute of limitations in an elder abuse action.
In Guardian North Bay, Inc. v. Superior Court, 94 Cal. App. 4th 963, 114 Cal. Rptr. 2d 748 (6th Dist. 2001), review denied, (Mar. 27, 2002), in which children of patients at a skilled–nursing facility brought tort claims including willful misconduct and intentional infliction of emotional distress against the facility's owner, which had been convicted of felony elder abuse in connection with those patients, the court ruled that where a civil action for damages is based on a health care provider's conviction of felony elder abuse, the applicable statute of limitations is Cal. Civ. Proc. Code § 340.3, which sets a minimum one–year limitations period from the judgment of conviction for a civil action based on the felony conviction, rather than the

maximum three–year period for a medical malpractice action provided in Cal. Civ. Proc. Code § 340.5 under the MICRA medical injury compensation scheme. The court noted that Cal. Penal Code § 368 was enacted to protect a vulnerable class of people from abusive situations that are likely to cause serious injury or death. Criminal responsibility under that law, thus, reflects a more egregious form of misconduct involving a more culpable level of mens rea, and is not premised on professional negligence within the meaning of Cal. Civ. Proc. Code § 340.5, which contemplates a negligent act or omission by a health care provider when rendering professional services. Under § 368, the court explained, a custodian or caretaker must have willfully caused or permitted injury to, or endangered, an elderly person. As support for its conclusion, the court cited the ruling in Delaney v. Baker, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999), discussed in § 14, that health care providers who recklessly neglect elders are not exempt from the enhanced civil remedies provision imposed under Cal. Welf. & Inst. Code § 15657 of the state's Elder Abuse Act.

CUMULATIVE SUPPLEMENT

Cases:

The court in Wilson v. Berkeley Long-Term Care, 2004 WL 625792 (Cal. App. 1st Dist. 2004), unpublished/noncitable, held that for the purpose of the statute of limitations, a cause of action for elder abuse brought on behalf of a decedent does not relate back to the filing of an earlier complaint by the same person in his individual capacity for wrongful death, and thus affirmed the trial court's judgment dismissing the late filed claims.
Three-year statute of limitations for actions against health care providers based on professional negligence did not apply in action for elder abuse under Elder Abuse Act; cause of action for custodial elder abuse against health care provider was separate and distinct cause of action from one for professional negligence against a health care provider, and, therefore, the statute of limitations applicable to claims for injury or death caused by wrongful act or neglect of another better served the purpose of the Elder Abuse Act. West's Ann.Cal.C.C.P. §§ 335.1, 340.5; West's Ann.Cal.Welf. & Inst.Code § 15600 et seq. Benun v. Superior Court, 20 Cal. Rptr. 3d 26 (Cal. App. 2d Dist. 2004).

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[END OF SUPPLEMENT]

§ 6. Tolling for victim's insanity

The following authority has considered whether the running of a statute of limitations in an elder abuse action should be tolled because of the victim's insanity.
In Alcott Rehabilitation Hospital v. Superior Court, 93 Cal. App. 4th 94, 112 Cal. Rptr. 2d 807 (2d Dist. 2001), a suit by a guardian ad litem contending that a skilled nursing facility committed

elder abuse and medical malpractice by mistreating a 70–year–old stroke victim, the court denied the facility's petition for a writ of mandate to compel a partial summary adjudication, ruling that the patient's insanity tolled the one year statute of limitations provided under Cal. Civ. Proc. Code § 340.5 for the claims against the nursing home, on the assumption that the one year statute indeed applied to health–care providers. The court explained that this result was required even though a guardian ad litem was directing the patient's medical care and exercising a power of attorney. The court explained that for purposes of the general provision, Cal. Civ. Proc. Code § 352, governing the tolling of statutes of limitations, a plaintiff is "insane" if incapable of caring for her property or transacting business, or understanding the nature or effects of her acts. The nursing home did not deny that the plaintiff was insane, but instead contended that the tolling provisions for insanity did not apply to the one–year limitations period provided under Cal. Civ. Proc. Code § 340.5. The court found inapposite the judicially created rule that no tolling provision outside of the Medical Injury Compensation Reform Act (MICRA) permits exceptions beyond those expressly listed in the statute of limitations governing MICRA claims. That rule applies only to the maximum three–year limitations period for such claims, the court reasoned. The court explained that the plaintiff's opposition to the nursing home's summary adjudication motion did not contend that a longer limitations period than one year applied here. Thus, the court was considering only the issue whether the one year period was tolled, and not whether that limitation period applied to the elder abuse claim. The latter issue was expressly left to be decided "another day."

§ 7. Representative or successor capacity to maintain suit

The courts in the following cases considered whether a plaintiff had representative capacity or successor status to maintain a statutory elder abuse claim.

Rejecting the contention that court approval is not a prerequisite to the commencement of an action for elder abuse following the death of the victim, in Kennedy v. Closson, 2001 WL 1338476 (Cal. App. 2d Dist. 2001), nonpublished/nonciteable, (Oct. 31, 2001) and review denied, (Jan. 29, 2002), the court noted that Cal. Welf. & Inst. Code § 15657.3(d), provides that "[u]pon petition, after the death of the elder or dependent adult, the right to maintain an action [for elder abuse] shall be transferred to the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent's estate." The plaintiff argued that the provision applies only to the right to "maintain" an action, not to the right to "commence" an action, but the court reasoned that even if such a distinction exists, he was now indeed attempting to maintain an action. The plaintiff did not suggest that he could amend his complaint to allege compliance with § 15657.3(d), the court stated. The court explained that if, as the plaintiff suggested, § 15657.3(d) does not apply to an action commenced after the death of the person subjected to elder abuse, the plaintiff did not satisfy Cal. Civ. Proc. Code §§ 377.30, 377.32, which bar an action by him as the decedent's successor in interest. Thus, the court reasoned, the plaintiff could not, as a matter of law, state a cause of action for elder abuse. Therefore, the defendants' demurrers to this claim were properly sustained without leave to amend.

In Rim v. Olympia Convalescent Hosp., 2002 WL 524511 (Cal. App. 2d Dist. 2002), nonpublished/noncitable, involving a claim under the Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 et seq., in which a plaintiff insisted that because of an excusable mistake of law, he had assigned his causes of action to another plaintiff

and voluntarily dismissed his case, the court concluded that neither the mandatory "attorney fault" provision of Cal. Civ. Proc. Code § 473(b), nor the discretionary "mistake of law" provision of that statute authorized relief from a voluntary dismissal. The court further concluded that even if it were to review the merits of the plaintiff's motion for relief from the dismissal order, it would find that no excusable mistake of law had occurred and that the trial court thus did not abuse its discretion in denying the motion.

§ 7.5. Procedural protections afforded

[Cumulative Supplement]

The following authority considered the procedural protections afforded under elder abuse acts.

CUMULATIVE SUPPLEMENT

Cases:

Fact that Legislature intended the Elder Abuse Act to sanction only egregious acts of misconduct distinct from professional negligence contravenes any suggestion that, in defining elder abuse to include failure to provide medical care, the Legislature intended that health care providers, alone among elder custodians, would enjoy under the Act the procedural protections they enjoy when sued for negligence in their professional health care practice. West's Ann. Cal.Welf. & Inst.Code §§ 15600 et seq. Covenant Care, Inc. v. Superior Court, 11 Cal. Rptr. 3d 222, 86 P.3d 290 (Cal. 2004).

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[END OF SUPPLEMENT]

§ 8. Trial preference

The following authority considered whether a trial preference should be granted under the circumstances in an elder abuse action.
Granting a writ of mandamus in Kraig v. Superior Court, 2002 WL 1303405 (Cal. App. 2d Dist. 2002) unpublished opinion, the court ruled that an 84–year–old plaintiff in an elder abuse action was entitled to a trial date preference under Cal. Civ. Proc. Code § 36(a), which mandates a preference on the petition of a party to a civil action who is over age 70, has a substantial interest in the litigated matter, and because of ill health will necessarily be prejudiced if the preference is not granted. A preference order requires the trial to be set within 120 days. The trial court had

declined to issue the preference because the Commonwealth had ordered a 90–day stay of all actions involving the defendant's insurance carrier. However, in granting the writ of mandate directing the trial court to issue the preference, the court here pointed out that the trial court could have satisfied the § 36 requirement without violating the Pennsylvania stay order, simply by scheduling the trial for a date later than the expiration of the 90–day stay period but still within the 120–day preference period.

B. Substantive Elements of Claim

§ 8.5. General principles

[Cumulative Supplement]

The following authority considered general principles concerning the substantive elements of a civil cause of action under state elder abuse laws.

CUMULATIVE SUPPLEMENT

Cases:

To obtain the remedies provided by the Elder Abuse and Dependent Adult Civil Protection Act, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. West's Ann.Cal.Welf. & Inst.Code § 15657. Sababin v. Superior Court, 50 Cal. Rptr. 3d 266 (Cal. App. 2d Dist. 2006).
The elements of a cause of action under the Elder Abuse and Dependent Adults Act are statutory, and reflect the Legislature's intent to encourage private, civil enforcement of laws against elder abuse and neglect by providing enhanced remedies, including reasonable attorney fees and costs, and, in a wrongful death action involving abuse or neglect of an elderly or dependent adult, damages for pain and suffering. West's Ann. Cal.Welf. & Inst.Code § 15600 et seq. Intrieri v. Superior Court, 117 Cal. App. 4th 72, 12 Cal. Rptr. 3d 97 (6th Dist. 2004).

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[END OF SUPPLEMENT]

§ 9. Relation to common-law negligence theory

The following authority considered the relation between common law negligence and an elder abuse statute in a civil action.
In Conservatorship of Person and Estate of Marion Adams v. Butler, 2002 WL 111356 (Cal. App. 2d Dist. 2002), nonpublished/nonciteable, in which the conservators for an elderly woman brought an action for physical abuse, neglect, and fiduciary abuse under the Elder Abuse and Dependent Adults Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 et seq., and also for general common law negligence, against the elderly woman's travel companion after she returned from a trip with the companion unable to function and with a subdural hematoma, the court, while not addressing the jury's $10,000 elder abuse verdict that was not contested by the defendant, ruled that substantial evidence supported the $290,000 general negligence verdict. Recounting the facts of the case, the court noted that the defendant had presented himself as the elderly woman's attorney and possibly as her conservator. He removed her from an assisted–living facility where her health was improving; she was enjoying activities, was able to move around, and could feed herself. The defendant took the woman on a trip to Mexico, purportedly to her former home, without a female aide as recommended by the facility. He had no plans for taking care of her medical needs during the trip or once they arrived in Mexico, the court noted. The defendant either "overshot" their intended destination or purposely took her on a much longer journey than was either necessary or anticipated. When the woman was found, she was dehydrated, malnourished, and sitting in her own excrement. She had black eyes consistent with being struck with a blunt object, and not consistent with the defendant's claimed car accident and other facts.
Comment The trial court had determined that the jury's $10,000 elder abuse verdict "overlapped" the $290,000 general negligence verdict, and accordingly did not include the elder abuse award in the final judgment.

§ 10. Requisite level of negligence

[Cumulative Supplement]

The courts in the following cases considered the level of negligence required to recover in an action for elder abuse.
The court in Grant v. Oh, 2003 WL 1194106 (Cal. App. 2d Dist. 2003), nonpublished/nonciteable, reversed the judgment entered following the granting of summary adjudication as to the plaintiff's elder abuse cause of action. The plaintiff, the surviving son and heir at law of the decedent, filed a complaint for, inter alia, elder abuse and neglect (Cal. Welf. & Inst. Code §§ 15600 to 15671) against, inter alia, the defendant doctor. The court noted that the California Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment, and in addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died. The court noted that in order to be entitled to these

heightened remedies, Cal. Welf. & Inst. Code § 15657 provides that the plaintiff must establish recklessness, oppression, fraud, or malice in the commission of this abuse by clear and convincing evidence. The court noted that "recklessness" refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the "high degree of probability" that an injury will occur, and recklessness, unlike negligence involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions" but rather rises to the level of a "conscious choice of a course of action … with knowledge of the serious danger to others involved in it." The court noted that Cal. Welf. & Inst. Code § 15610.07 states that "abuse of an elder" includes neglect, and "neglect" is defined in section Cal. Welf. & Inst. Code § 15610.57, as the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise and neglect includes, but is not limited to, all of the following: failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; failure to provide medical care for physical and mental health needs; failure to protect from health and safety hazards, and failure to prevent malnutrition or dehydration. The court held that the trial court erroneously granted the motion for summary adjudication of the elder abuse cause of action, as there were triable issues of material fact. The court noted that there was conflicting evidence of whether the defendant doctor subjected the decedent to prolonged periods of deprivation of food she could ingest, whether he failed to properly monitor her food intake and weight to prevent starvation, whether he failed to prevent bedsores and the worsening of existing bedsores, which resulted in the amputation of her leg, and whether he abandoned his patient when she was transferred to another hospital, failing to give the new hospital necessary information for her treatment. The court noted that the plaintiff's expert opined that this was one of the worst cases of elder abuse she had encountered and that to a reasonable degree of medical certainty, had the decedent received proper care she would still be alive, and the defendant's expert opined that the defendant's treatment complied with the standard of care applicable to physicians rendering care and treatment to patients at skilled nursing facilities in this locality and that his treatment was not a substantial factor in causing any pain, suffering, or the death of the decedent. The court noted that was a classic example of conflicting factual allegations that must be assessed by a trier of fact at a trial.

The court in Marron v. Superior Court, 108 Cal. App. 4th 1049, 134 Cal. Rptr. 2d 358 (4th Dist. 2003), held that excerpts from the deposition testimonies of the percipient witnesses sufficiently described, for purposes of successfully opposing the state university medical center's summary adjudication motion, specific acts and omissions constituting the alleged reckless neglect and, to the extent the patient's parents and successors in interest were required to show that the medical center or its employees acted with a conscious choice of a course of action with knowledge of the serious danger to others involved, their opposing papers therefore included sufficient admissible evidence to support an inference that there was reckless neglect in caring for the patient, in violation of the California Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 et seq.

The court in Doepke v. Ponhold, 2003 WL 116454 (Cal. App. 2d Dist. 2003), nonpublished/nonciteable, in which the plaintiff's complaint alleged elder abuse in violation of Cal. Welf. & Inst. Code §§ 15610.23, 15610.57, and 15657, and the plaintiff alleged that the defendant doctor's conduct amounted to reckless neglect, the court noted that in order to obtain the remedies available in Cal. Welf. & Inst. Code § 15657, a plaintiff must demonstrate by clear and convincing evidence that the defendant is guilty of something more than negligence; he or

she must show reckless, oppressive, fraudulent, or malicious conduct. The court noted that the latter three categories involve "intentional," "willful," or "conscious" wrongdoing in a "despicable" or "injurious" nature. The court found that the plaintiff failed to raise a triable issue of material fact with respect to his negligence cause of action and, therefore, could not show "something more than negligence" as required under Cal. Welf. & Inst. Code § 15657, and the trial court correctly granted summary judgment.
The court in Norman v. Life Care Centers of America, Inc., 2003 WL 1558283 (Cal. App. 4th Dist. 2003), nonpublished/nonciteable, in which the plaintiff, individually and as successor-in-interest of the decedent, appealed a judgment following a jury verdict in favor of the defendants in her elder abuse action against the defendant, held that the trial court prejudicially erred by refusing to instruct on negligence per se. The court concluded that substantial evidence supported instructing with the plaintiff's instruction on her neglect theory of elder abuse and that the instruction was a correct statement of the law. The trial court therefore erred by refusing her request for that instruction. The court noted that one of the plaintiff's theories of elder abuse was that the defendant neglected the decedent, as that term is used in the Act, Cal. Welf. & Inst. Code § 15610.07. "Neglect" under the Act includes: "The negligent failure of any person having the care or custody of an elder … to exercise that degree of care that a reasonable person in a like position would exercise." (§ 15610.57, subd. (a)(1)) In support of her neglect theory of elder abuse, the plaintiff presented evidence that the defendant violated certain DHS regulations that apply to licensed skilled nursing facilities.

CUMULATIVE SUPPLEMENT

Cases:

As used in the Elder Abuse and Dependent Adult Civil Protection 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; the statutory definition of neglect speaks not of the undertaking of medical services, but of the failure to provide medical care. West's Ann. Cal.Welf. & Inst.Code §§ 15600 et seq. Covenant Care, Inc. v. Superior Court, 32 Cal. 4th 771, 11 Cal. Rptr. 3d 222, 86 P.3d 290 (2004).
Triable issues precluded summary adjudication as to whether rehabilitation center's employees were guilty of reckless, oppressive, or malicious neglect under the Elder Abuse and Dependent Adult Civil Protection Act, with regard to the care of patient with Huntington's Chorea disease; it was reasonably deducible from the evidence that rehabilitation center's employees neglected to follow patient's care plan by failing to check patient's skin condition on a daily basis and failing to notify a physician of the need for a treatment order. West's Ann.Cal.Welf. & Inst.Code § 15610.57. Sababin v. Superior Court, 50 Cal. Rptr. 3d 266 (Cal. App. 2d Dist. 2006).
Triable questions of fact existed regarding the reckless neglect element of a cause of action for elder abuse under the Elder Abuse and Dependent Adults Act, thereby precluding summary adjudication in action against nursing home, after Alzheimer's patient was injured by non-Alzheimer's patient who had entered Alzheimer's unit without authorization; there were reasonable inferences of a conscious disregard for the safety of Alzheimer's patients based on the fact that nursing home left the code to Alzheimer's unit keypad access system posted over the

keypad, and that non-Alzheimer's patient, known to have a confused and hostile mental state, was allowed to enter Alzheimer's unit and engage in altercations with Alzheimer's patients without intervention by nursing home's personnel. West's Ann. Cal. Health & Safety Code §§ 15600 et seq. Intrieri v. Superior Court, 117 Cal. App. 4th 72, 12 Cal. Rptr. 3d 97 (6th Dist. 2004).

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[END OF SUPPLEMENT]

§ 11. Regulations as defining standard of care

The following authority considered whether state and federal regulations could provide the governing standard of care in an elder abuse action.
In In re Conservatorship of Gregory, 80 Cal. App. 4th 514, 95 Cal. Rptr. 2d 336 (3d Dist. 2000), as modified on denial of reh'g, (May 30, 2000) and review denied, (Aug. 23, 2000), an action on behalf of a nursing home resident seeking relief under the Elder Abuse and Dependent Adults Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 et seq., and also on the theories of negligence and fraud, the court ruled that jury instructions based partially on state and federal regulations, rather than on the statute that the elder abuse claims were grounded, were appropriate as a means to assist the jury in determining whether the nursing home's conduct involved physical abuse or neglect, recklessness, oppression, fraud, or malice. The court explained that regulations in general are a permissible source for jury instructions, and the regulations at issue here were authorized by state and federal legislation and were designed to protect nursing home residents. Rejecting the defendants' contention that the regulations effectively created a new cause of action, the court explained that they merely set forth the care required under the existing statutory right of action for elder abuse. Further, the court stated that the regulation–based instructions were not too vague to adequately guide the jury, since it had heard testimony describing how nursing home professionals construed and applied the regulations, and the instructions set out numerous specific examples illustrating how the required standard should be applied. The jury instructions were based on state and federal regulations, as well as on the elder abuse statute itself, specifically Cal. Welf. & Inst. Code § 15610.07, which defines elder abuse as "physical abuse, neglect, or other treatment with resulting physical harm or pain or mental suffering, or the deprivation by a custodian of goods or services which are necessary to avoid physical harm or mental suffering." Setting forth how patients in skilled–nursing facilities should be treated, the court read to the jury portions of state statutes, and state and federal regulations, that govern patients' rights and patient care in these facilities. The cited federal regulations governed nursing facilities that participate in Medicaid, the court noted.

§ 12. Causal link between misconduct and harm

The following authority considered whether there was a causal link established between the defendant's misconduct and the harm suffered by the victim.
In Rodriguez v. Care with Dignity Health Care Inc., 2002 WL 59621 (Cal. App. 4th Dist. 2002), nonpublished/nonciteable, (Jan. 17, 2002) and review filed, (Apr. 17, 2002), in which the surviving family members of a nursing home resident sued the nursing home for elder abuse, wrongful death and negligence, and breach of contract, and the court affirmed the judgment to the extent that the jury found that although the nursing home was negligent, its actions did not cause injury or death, the court explained that the plaintiffs were not prejudiced by the trial court's failure to instruct the jury on the theory of negligence per se concerning certain federal and state nursing home regulations. Even though a registered nurse had testified as an expert witness that the nursing home breached the regulatory standard of care imposed under the regulations, the court reasoned that the absence of a causal link between the misconduct and the victim's injuries rendered the court's failure to instruct the jury harmless. Specifically, the court concluded that it was "not reasonably probable that a more favorable result would have been obtained had a negligence per se instruction been given." The court specifically rejected the plaintiffs' contention that the burden of proof should have shifted to the nursing home to show an absence of causation. Although upholding the judgment on the elder abuse and wrongful death claims, the court reversed the trial court order that had entered a judgment in favor of the nursing home notwithstanding the verdict for breach of contract. The appellate court thereby reinstated the jury's verdict for the plaintiffs on that particular claim.

§ 13. Financial abuse

[Cumulative Supplement]

The following cases considered the scope of liability under statutes prohibiting financial elder abuse.
In Darone v. Cary, 2002 WL 28158 (Cal. App. 1st Dist. 2002), nonpublished/nonciteable, in which an 80–year–old real estate vendor brought an action against real estate brokers and a mortgage broker alleging breach of fiduciary duty, undue influence, fraud, and financial abuse of an elderly person in violation of Cal. Welf. & Inst. Code §§ 15610 et seq., arising from an alleged conspiracy to defraud the plaintiff into selling her house for far less than it's market value, the court upheld a judgment on the pleadings on the elder abuse claim, explaining that the complaint alleged only that the mortgage broker arranged a loan for the buyer; no direct business or contractual relationship was alleged between the broker and the plaintiff vendor. Thus, the broker had no legal duty toward the plaintiff on which to base a cause of action for financial elder abuse, the court reasoned. The court explained that although a broker owes the lender and borrower, as principals, a fiduciary duty to disclose all material facts of the transaction that might affect their decisions, this duty does not extend to the vendor of the property.
The court in Blevins v. Rios, 2003 WL 463555 (Cal. App. 2d Dist. 2003), nonpublished/nonciteable, in which the defendant appealed an order granting the plaintiff's petition to recover property of the estate of the deceased, where the defendant wrote checks payable to herself on the deceased's account and caused him to name her as the beneficiary of his

Veteran's Affairs life insurance policy, the trial court found the defendant had a confidential relationship with the deceased and exerted undue influence on him and committed financial elder abuse in order to procure over $67,750 from his bank account and to cause him to change the beneficiary on his life insurance policy, and the defendant argued that substantial evidence did not support the trial court's conclusions, contending that the deceased authorized her to make the checks payable to herself and that most of the funds were used to pay the deceased's expenses, affirmed the finding of financial elder abuse. The court noted that under the California Elder Abuse and Dependent Adult Civil Protection Act (Cal. Welf. & Inst. Code §§ 15600 et seq, "Elder Abuse Act"), "elder abuse" is defined as "[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting harm or pain or mental suffering." (Cal. Welf. & Inst. Code § 15610.07 subd. (a).) The Act defines "financial abuse" as "tak[ing], secret[ing], appropriat[ing], or retain[ing] real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." (Cal. Welf. & Inst. Code § 15610.30 subd. (a)(1).) A "wrongful use" is a bad faith use. (Cal. Welf. & Inst. Code § 15610.30 subd. (b).) A person acts in bad faith if he or she "knew or should have known the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult …" (Cal. Welf. & Inst. Code § 15610.30, subd. (b)(1)). In the instant case, the defendant admitted her confidential relationship with the deceased. The record contained ample evidence that the defendant used this position of trust and confidence to coerce him into changing the beneficiary designation on his life insurance policy and to appropriate $67,750 from his bank accounts. The defendant actively participated in drafting instruments naming her as the payee of funds on deposit in the deceased's bank accounts and deposited the funds into her account. Furthermore, the trial court rejected her credibility in finding that she appropriated most of these funds to her own use, and the court noted that the record contains no evidence any of the money taken was spent on the deceased. The court held that her doing so when the deceased clearly needed the monies for his own care was a clear violation of the Elder Abuse Act. Yet, the defendant steadfastly maintained she was authorized to write the checks. She contended she was only following the deceased's instructions in writing checks to herself, which she claimed she used for his benefit; that the deceased's biological family had abandoned him; that she had established a "father–daughter" relationship with him; that it was the deceased's own choice to give large gifts to the defendant and her family; that all checks written in January 2000 were authorized by the deceased; that money withdrawn from the deceased's account "would sit in her account until further instructions from him on how much to withdraw and what to spend the money on." Instead, she argued that she should be "viewed as a Good Samaritan who stepped in to help an elderly man after his family abandoned him." She contended that if she "was so sophisticated to carry out this elaborate scheme why didn't she continue this siphoning act" while the deceased was in the hospital. The court held that these arguments, which flew in the face of the evidence at the hearing, were unavailing. The court held that the evidence before the trial court supported its determination that the defendant skillfully ingratiated herself with a lonely, elderly man in declining health who was having trouble living on his own and who had been abandoned by his family. His daughters testified that his apartment was in shabby condition and it clearly contained evidence that the defendant had not been properly caring for the deceased. The deceased was excessively and inappropriately generous with strangers and obviously unable to look after his own financial affairs. The court noted that but for the deceased's admission to the hospital, it is likely the defendant would have continued emptying his bank accounts until nothing was left for his care. Yet the defendant steadfastly maintained she was "authorized" to

behave as she did and that she was a "Good Samaritan." The court disagreed; it saw nothing laudatory about the defendant's conduct in "looking after" an elderly man who was clearly an incompetent adult. Instead, she basically looted the deceased's bank account and influenced him to change the beneficiary on his life insurance policy. The court noted that given that his family was not interested in his well–being and the deceased was incapable of caring for himself or his financial affairs, the appropriate thing to have done under the circumstances would have been to call Adult Protective Services so that he could have been looked after by qualified persons and his assets managed in a fashion to ensure sufficient funds would be available for his care.
See Matter of Estate of Goodwin, 1993 OK CIV APP 86, 854 P.2d 390 (Okla. Ct. App. Div. 4 1993), in which the court ruled that persons who are under the sanctuary of adult protective services are subject to the dictates of Okla. Stat. Ann. tit. 84, § 41(B), which requires that the last will and testament of a person who is overseen by a guardian or conservator must be subscribed and acknowledged before a judge of the district court. Here, the testator's grandson, who had been named as executor under a prior will, brought suit against the testator's son, who was named as executor in a later will that was executed after a guardian had been appointed by the district court. The later will changed significantly the terms of the decedent's earlier will. The court recognized that elder abuse has been recognized as a growing social problem, and in 1981 a Congressional committee recommended that the states enact laws to protect the elderly from physical, emotional, and financial abuse. Many states did in fact create such laws, the court noted, such as the one at issue here, Okla. Stat. Ann. tit. 43A, § 10–102. The Oklahoma law, the court noted, has a specific legislative purpose to protect persons from exploitation, abuse, or neglect, while still guaranteeing the individual "to the maximum degree of feasibility" the "same rights as other citizens." The court explained that the statute does not deprive elderly persons of any rights, but instead offers them protection from financial abuse, which is the intent of the adult protective services law, Okla. Stat. Ann. tit. 43A, §§ 10–101 et seq. Accordingly, the court determined that, as a matter of law, the will executed while the decedent was under a legal guardianship could not be admitted to probate, and thus the district court's summary judgment for the grandson was affirmed.
In White v. McCabe, 159 Or. App. 189, 979 P.2d 289 (1999), in which the vendor of a home brought rescission and constructive trust claims against the purchaser, alleging violations of the elder abuse statute, Or. Rev. Stat. § 124.110(1)(a) and the Unlawful Trade Practices Act (UTPA), the court ruled that because there was no evidence of a fiduciary relationship as required by the plain language of the statute, the trial court properly granted the defendant's motion for summary judgment on the elder abuse claim. The court noted that under Or. Rev. Stat. § 124.110(1)(a), an action may be brought under Or. Rev. Stat. § 124.100 for fiduciary abuse in the following circumstances: "(a) When a person, including but not limited to a person who has the care or custody of an elderly or incapacitated person or who stands in a position of trust to an elderly or incapacitated person, takes or appropriates money or property of the elderly or incapacitated person for any wrongful use or for any purpose not in the due and lawful execution of the trust or duty of the person." The court explained that although the plain language of the introductory clause of the statute provides that it applies in cases of fiduciary abuse, the plaintiff conceded that no classical fiduciary relationship ever existed between the defendant or his agent and the plaintiff.

CUMULATIVE SUPPLEMENT

Cases:

Mortgage broker's solicitation of refinance from seventy-nine year old mortgagor without disclosing actual terms of loans and by instructing mortgagor to sign loan documents without actually reading them constituted "financial abuse" of elder or dependent adult under California Elder Abuse Act; broker's fees were wrongfully obtained as result of false statements about terms of refinance, which it knew were less favorable to mortgagor than previous mortgage. Cal. Welf. & Inst.Code § 15610.30(a)(1). Zimmer v. Nawabi, 566 F. Supp. 2d 1025 (E.D. Cal. 2008) (applying California law).

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[END OF SUPPLEMENT]

C. Remedies or Relief

§ 14. Implied right of action

[Cumulative Supplement]

The following authority considered whether an implied right of action existed under an elder abuse statute.
Concluding that an implied private right of action exists under the South Carolina Omnibus Adult Protection Act, S.C. Code Ann. §§ 43–35–5 to 43–35–350, in Williams-Garrett v. Murphy, 106 F. Supp. 2d 834 (D.S.C. 2000), the court nonetheless ruled that material issues of fact existed regarding whether a 90–year–old coin collector qualified as a vulnerable adult under the statute and whether a coin dealer's actions in a disputed transaction involving the collector's gold coins constituted abuse, neglect, or exploitation under the Act. Thus, the court concluded that summary judgment for either party was precluded on the coin collector's claim for an alleged violation of the Act arising out of the coin transaction. Whether the alleged victim was a vulnerable adult at the time of the acts in question is clearly a question of fact incapable of being answered as a matter of law, the court reasoned, since both parties dispute her mental and physical state during the relevant period, and the medical evidence presented in support of summary judgment failed to establish the facts. Furthermore, in light of the contested facts surrounding the actual events of the purported coin transaction, whether the defendant's actions constituted abuse, neglect, or exploitation under the Act also remained an unresolved question of fact. The court noted that the Omnibus Adult Protection Act was enacted to prevent abuse and exploitation of vulnerable adults, however, it contains no provision that explicitly grants a

private cause of action, the court observed. The court found that the Omnibus Adult Protection Act does not require action by the defendant, but instead, it criminalizes certain conduct. The court applied the principle that the legislative intent to grant or withhold a private cause of action for violating a statute, or failing to perform a statutory duty, is grounded primarily in the form or language of the statute. The law contains only two references to civil enforcement: first, in the preamble where it states that one of the 10 purposes of the Act is "to provide civil and criminal penalties for abuse, neglect, and exploitation," S.C. Code Ann. § 43–35–5(9); and second, in a provision allowing action by the Attorney General against persons or facilities for failing to exercise reasonable care, S.C. Code Ann. § 43–45–80. The express purpose of the Act is, in part, "to address the continuing needs of vulnerable adults," and "to uniformly define abuse, neglect, and exploitation for vulnerable adults in all settings," as expressed in S.C. Code Ann. § 43–35–5(4), (5), the court noted. Therefore, the court held, that a private civil enforcement would be consistent with the underlying purposes of the Act.

CUMULATIVE SUPPLEMENT

Cases:

The Elder Abuse and Dependent Adult Civil Protection Act creates an independent cause of action. West's Ann.Cal.Welf. & Inst.Code § 15600 et seq. Perlin v. Fountain View Management, Inc., 163 Cal. App. 4th 657, 77 Cal. Rptr. 3d 743 (2d Dist. 2008).

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[END OF SUPPLEMENT]

§ 15. Enhanced remedies for recklessness

The courts in the following cases considered whether relief was justified under the circumstances, pursuant to a law granting heightened remedies for egregious forms of elder abuse.
In Delaney v. Baker, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999), the California Supreme Court held that the enhanced remedies available under the state's Elder Abuse Act, Cal. Welf. & Inst. Code §§ 15600 et seq., apply to health care providers who engage in reckless neglect of an elder adult. The court construed two provisions of the Act, § 15657, which grants enhanced remedies for reckless neglect, and § 15657.2, which limits recovery for actions grounded in professional negligence. The court ruled that reckless neglect is separate from professional negligence and thus the restrictions on remedies against health care providers for professional negligence do not apply. The plaintiff sued a skilled–nursing facility after her mother, an 88–year–old resident, had died. Apparently because of insufficient staffing, rapid employee turnover, and poor employee training, the mother had been left lying in her own urine and feces for long periods and had serious pressure sores on her lower extremities and buttocks

when she died. Many violations of medical monitoring and record–keeping standards occurred that prevented timely communication between the facility and the woman's doctor, and the neglect occurred despite the daughter's continual complaints, the court noted. The California Department of Health Services had cited the facility for patient neglect shortly before the woman's admission, and it had fined the facility for dangerously inadequate care after her death. Delaney sued the facility and two of its administrators. The jury found in favor of the plaintiff on her negligence and abuse of an elder claims, and awarded $150,000 for pain, suffering, inconvenience, and physical impairment or disfigurement and $15,000 in damages for medical expenses. The court also granted her over $200,000 in attorney fees and costs. The court of appeals affirmed the trial court's judgment, and the defendants appealed to the California Supreme Court. The supreme court reasoned that § 15657.2 requires only that causes of action based on professional negligence be governed by laws that specifically apply to professional negligence actions, thus, § 15657.2 does not limit recovery under § 15657. The Supreme Court concluded that professional negligence in § 15657.2 was mutually exclusive of the abuse and neglect specified in § 15657. The defendants argued that the phrase "based on professional negligence" covers all conduct "directly related to the rendition of professional services," which therefore exempts from the heightened remedies of § 15657 those health care providers who recklessly neglect elderly, dependent adults. Rejecting the defendants' position, the argument adopted the view that the phrase "based on professional negligence" should be read narrowly to mean that "reckless neglect" under § 15657 is distinct from causes of action "based on professional negligence" within the meaning of § 15657.2. According to this interpretation, health care providers who engage in such neglect would be subject to the remedies under § 15657. By adopting this position, the court noted that "recklessness" is distinct from "negligence," with the former referring to a subjective state of culpability that is greater than negligence. Under the professional negligence provision, the acts proscribed by § 15657 do not include simple professional negligence, but instead refer to abuse or negligence performed with a culpability greater than mere negligence. Therefore, causes of action within the scope of § 15657 are not "causes of action based on professional negligence" within the meaning of § 15657.2. The court noted that the purpose of the Act is to "protect a particularly vulnerable population from gross mistreatment in the form of abuse and custodial neglect," and especially to provide heightened remedies for acts of egregious abuse against elders. Applying the law to the facts, the court stated that the victim was subjected to neglect and reckless treatment by the defendants, as demonstrated by their knowledge of the victim's deteriorating condition and repeated efforts to help her. The court affirmed the award of attorney's fees and damages for pain and suffering to the victim's estate. The court noted that although its decision would impose increased litigation costs on health care providers in skilled–nursing facilities, the threat of heightened remedies imposed under California law might prompt improvement in the quality of care given to elders. In Mack v. Soung, 80 Cal. App. 4th 966, 95 Cal. Rptr. 2d 830 (3d Dist. 2000), review denied, (Aug. 23, 2000), in which a patient's surviving children brought an action against the patient's former physician alleging violations of the Elder Abuse and Dependent Adults Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 et seq., and claiming intentional infliction of emotional distress, the court ruled that allegations that the physician concealed the patient's untreatable bedsore, opposed her medically necessary hospitalization, and then abandoned her at her hour of need, sufficed to state a cause of action for reckless neglect that warranted the heightened remedies provided under the elder abuse statute, Cal. Welf. & Inst. Code § 15657. Noting that under the Act's heightened remedies provision, "recklessness" requires more than inadvertence,

incompetence, unskillfulness, or a failure to take precautions, but rather rises to the level of consciously choosing a course of action while knowing that it presents a serious danger to others, the court determined that the conduct alleged here rose to the level of recklessness. The court noted that the heightened remedies available on a showing of reckless abuse included plaintiff's attorney fees and costs, and the recovery by the decedent's estate of damages for pain and suffering. Taking the required liberal construction of the complaint's allegations "with a view to substantial justice between the parties," the court found that the patient developed a serious, untreatable bedsore while she was in a nursing home and the defendant was her attending physician. The nursing home, assisted by the physician, concealed the bedsores' existence until a county ombudsman finally compelled them to reveal the injury to the plaintiffs. The court noted that when the physician later realized that the patient could not communicate, he consulted the plaintiffs on her treatment. When the patient's condition worsened, the plaintiffs expressed their desire to have her hospitalized (which was consistent with her wishes). The physician criticized the power of attorney granted to the plaintiffs by the patient and he opposed hospitalization. When the patient's condition reached a critical stage, the court noted, the physician gave a notice of withdrawal, refused to respond to the nursing home staff's request to hospitalize the patient, and abruptly abandoned her care. These facts constituted reckless abuse under the elder abuse statute, the court concluded.

In Trujillo v. Superior Court of Los Angeles County, 2002 WL 1558830 (Cal. App. 2d Dist. 2002), nonpublished/nonciteable, the court granted an extraordinary writ of mandate directing the trial court to reinstate an elder abuse suit, brought under Cal. Welf. & Inst. Code § 15657, explaining that a demurrer should not have been ordered dismissing the action, that alleged that the defendant home health–care agency displayed the requisite reckless neglect to authorize enhanced remedies under the statute. The suit alleged that the defendant knowingly skipped an appointment to care for the plaintiff's mother, thereby allowing her decubitus ulcers to develop deadly infections.

§ 16. Emotional injuries

The following authority considered whether damages for emotional injury are recoverable under an elder abuse statute.

In Moon v. Guardian Postacute Services, Inc., 95 Cal. App. 4th 1005, 116 Cal. Rptr. 2d 218, 98 A.L.R.5th 767 (1st Dist. 2002), in which a son–in–law brought suit against an assisted living facility after he allegedly observed the facility abusing his elderly mother–in–law, the court ruled that he was not "closely related" to his mother–in–law and thus could not establish a "bystander" claim for the negligent infliction of emotional distress. Furthermore, rejecting the son–in–law's contention that he should recover as a "direct victim" of the abuse, the court also rebuffed his argument that because this case involved elder abuse the court should invoke a public policy rationale to broaden the existing duty of care to encompass his claim. The plaintiff relied on Cal. Welf. & Inst. Code §§ 15600 et seq., citing its purpose to protect an especially vulnerable sector of the population from gross mistreatment. The court, however, responded that the elder abuse law already provides a remedy for the negligence of elder care facilities and it did not contemplate relief for a distinct class of people who have suffered emotional distress from an elderly relative being abused. Thus, the court explained, the act could not be used to expand claims for negligent infliction of emotional distress (NIED) to members of an extended family

that has a relative residing in an extended care facility. To do so, the court warned, would create a staggering number of potential plaintiffs. Addressing the "bystander" claim, the court explained that absent exceptional circumstances recovery under a NIED theory should be limited to relatives residing in the same household, or parents, siblings, children, or grandparents of the victim. The court pointed out that the mother–in–law was not a member of the son–in–law's household when her injury occurred, but instead was living in the facility. She never resided in the son–in–law's home for a substantial period of time, and the strong emotional bond between them did not qualify as an exceptional circumstance. The court noted that for purposes of a NIED claim, the distinction between bystander and direct victim theories derives from the source of the duty owed by the defendant to the plaintiff. Bystander claims, the court explained, are typically based on the breach of a duty owed to the public at large, while a direct victim claim arises from the breach of the duty that is assumed by, or imposed on, the defendant as a matter of law, or arises from the defendant's preexisting relationship with the plaintiff. Rejecting the defendant's contention that his complaint stated a claim for relief under a direct victim theory, the court found insufficient to create a legal duty of care under the alleged facts that he insisted on admitting the victim to the facility by signing the admission forms; advised personnel at the facility that he should be contacted if any problems arose; and had been assured many times that proper care would be provided. Explaining that if the plaintiff is not the defendant's patient, courts have not extended direct victim causes of action to emotional damages that are caused solely by the exposure to another person's injury, the court noted a case in which a doctor was held to a noted duty of care directly to a husband when his wife, the patient of the doctor, was incorrectly told that she had syphilis and was instructed to notify her husband of the condition of the condition so that he could be tested and obtain any necessary treatment. The duty of care arose there, the court explained, not simply because the diagnosis necessarily affected the husband, but because the doctor had directed the wife to tell the husband that she was infected. Discussing the application of this principle, which requires a sufficient preexisting relationship between the plaintiff and the victim, the court cited a case in which a court rejected a father's claim of direct–victim status in a suit against a psychotherapist who treated his son. The father there had not only hired the psychotherapist but had participated in therapy sessions, but the court in that case explained that an agreement with the patient to provide care for the child does not establish a duty of care toward the parent. The court here explained that relief was not warranted under these facts because the preexisting relationship in that case was stronger than is present here, and, yet even that, plaintiff was unable to recover.

§ 17. Pain and suffering—generally

The courts in the following cases considered whether damages for pain and suffering are recoverable under an elder abuse statute.

In Matter of Guardianship/Conservatorship of Denton, 190 Ariz. 152, 945 P.2d 1283 (1997), in which a husband, whose wife was injured during a stay at a licensed adult care home, filed a complaint against the owner of the home and others, alleging negligence, breach of contract, and statutory cause of action under elder abuse statute, Ariz. Rev. Stat. Ann. § 46–455, the court held that the husband could recover damages for the wife's pain and suffering under the statute, even though she had died while the complaint was pending. The defendants had moved for partial judgment on the pleadings on the claim for damages for pain and suffering. The superior court

granted the motion and the husband then filed a petition for special action in the court of appeals, which declined to accept jurisdiction. The husband filed petition for review with the California Supreme Court, which was granted. In granting relief, the court explained that the elder abuse statute expressly provides to victims and their representatives the right to recover damages for pain and suffering, even after the death of the victim, and that this right is not limited by the survival statute, Ariz. Rev. Stat. Ann. § 14–3110, which generally prevents recovery of pain and suffering damages after the victim's death. The court stated that the plain wording of Ariz. Rev. Stat. Ann. § 46–455(F)(4) allows the trial court to award damages for pain and suffering. If the trial court finds liability under the statute, it may order the tortfeasor to pay "actual and consequential damages, as well as punitive damages, costs of suit, and reasonable attorney's fees, to those persons injured by the conduct described in this section." The court reasoned that since actual damages are synonymous with compensatory damages, and compensatory damages include damages for pain and suffering, actual damages include damages for pain and suffering.
The court in Marron v. Superior Court, 108 Cal. App. 4th 1049, 134 Cal. Rptr. 2d 358 (4th Dist. 2003), held that the state Government Code section, Cal. Gov't Code § 818, providing public entities are not liable for damages primarily for the sake of example and by way of punishing the defendant did not bar recovery of enhanced damages for the patient's pain and suffering, under the Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welf. & Inst. Code § 15657, in an action against a state university medical center brought by the patient's parents and successors in interest; the enhanced remedy under the Act was not punitive, but was measured by the patient's actual loss or injury.

§ 18. Retroactive application

The following authority considered whether the pain and suffering provision of an elder abuse statute could be applied retroactively.
Construing Cal. Welf. & Inst. Code § 15657(b), an amendment to the state's elder abuse law that allows, among other enhanced remedies, damages for pain and suffering, in ARA Living Centers - Pacific, Inc. v. Superior Court, 18 Cal. App. 4th 1556, 23 Cal. Rptr. 2d 224 (1st Dist. 1993), the court ruled that the law could not be applied retroactively since there was an insufficient showing of a legislative intent to do so. The court noted that for purposes of determining the retroactivity of a statutory amendment, if the legislature has merely produced a change in the conduct of trials, then the new provision will apply to the current trial even though the event at issue occurred before the provision became law. In such cases, there is actually only prospective application, the court explained. By contrast, if the new provision has altered the legal consequences of past conduct by imposing new or different liabilities for that conduct—a new cause of action, in effect—then any application to past conduct would indeed be retroactive and must be justified by showing that the legislature intended such a result. The court concluded that the pain and suffering remedy must be applied prospectively only, but not because the law had created a new cause of action. It had not; the pain and suffering provision was merely an additional remedy for the existing cause of action for elder abuse. Rather, retroactivity was barred because, although the legislature had intended the pain and suffering remedy as an incentive to bringing civil actions for future cases of elder abuse, it had not displayed a clear intent to address past abuses.

§ 19. Punitive damages

[Cumulative Supplement]

In the following cases, the courts considered whether punitive damages were recoverable in an elder abuse action.
In Community Care and Rehabilitation Center v. Superior Court, 79 Cal. App. 4th 787, 94 Cal. Rptr. 2d 343 (4th Dist. 2000), Summarized in, 2 WCAB Rptr. 10,158, 2000 WL 33415210 (Cal. App. 4th Dist. 2000), in which a wrongful death action was brought against a convalescent center in connection with the care rendered to a resident who was recuperating from hip replacement surgery, the court held that the heightened procedural requirements imposed by Cal. Civ. Proc. Code § 425.13 for seeking punitive damages in a medical malpractice action apply in a suit brought under the Elder Abuse Act, Cal. Welf. & Inst. Code §§ 15600 et seq., that alleges malfeasance in the provision of health care services. The court noted that under Cal. Civ. Proc. Code § 425.13, a party seeking punitive damages in a medical malpractice action may not simply assert the claim in the complaint; instead, a motion must be brought establishing a substantial probability of prevailing on the punitive damages claim on the merits. The supporting evidence for these motions typically consists of affidavits and deposition transcripts, the court pointed out. The legislature intended this provision to prevent litigants from initiating meritless claims for punitive damages. Often these claims are pursued for strategic reasons or to generate publicity. In particular, the court explained that because punitive damages are not covered by malpractice or liability insurance, a demand for punitive damages in the complaint directly jeopardizes the defendant's personal assets. The court explained that plaintiffs may not circumvent these requirements by artfully pleading a claim as elder "abuse" or "neglect" rather than medical malpractice. The court noted that under Cal. Welf. & Inst. Code § 15657, the elder abuse act provides additional remedies of attorney's fees, and damages for pain and suffering, if the defendant is "guilty of recklessness, oppression, fraud, or malice." Thus, the court noted, there is a strong incentive to bring a personal injury or wrongful death action under the elder abuse act. Under § 15657.2, however, claims against health care providers for professional negligence do not benefit from the enhanced remedy provisions of the act, but remain subject to laws such as California's Medical Injury Compensation Reform Act (MICRA), which consists of several provisions favorable to defendants, such as a limitation on damages and an allowance for periodic payments of judgments. The issue here arose because the protection granted to health care providers speaks of "negligence," even though "the focus of" the elder abuse act is on conduct that displays a mens rea of at least recklessness. Thus, according to the court, the issue presented was, if an action is brought under the elder abuse act, based on medical services and allegedly reckless or intentional misconduct, does § 15657.2 apply, so as to invoke the procedural protections of MICRA and the generally applicable laws concerning damages. In finding that these procedural protections did indeed apply, the court emphasized that California Civil Procedure Code § 425.13 does not prohibit the recovery of punitive damages against a health care provider; it merely establishes procedures designed to ensure that such claims are not made without foundation. Thus, applying § 425.13 does not mean that a plaintiff alleging elder abuse will lose a valuable right, it simply ensures that punitive damages cannot be demanded in

bad faith or as a tactical ploy designed to coerce a hasty settlement, the court stated. The court held the procedural requirement applicable and, accordingly, it issued a peremptory writ of mandate ordering the superior court to grant the convalescent center's motion to strike the punitive damages claim for failure to comply with Cal. Civ. Proc. Code § 425.13.

In Covenant Care, Inc. v. Superior Court, 107 Cal. Rptr. 2d 291 (App. 2d Dist. 2001), reh'g denied, (June 8, 2001) and as modified, (June 20, 2001) and review granted and opinion superseded, 112 Cal. Rptr. 2d 257, 31 P.3d 1269 (Cal. 2001), in which the children of a deceased hospice resident, after suing the facility's owner for damages under a common–law negligence theory, sought more than two years later to file an amended pleading alleging elder abuse and intentional torts and seeking punitive damages, the court held that when the emphasis of an action is on elder abuse and the abuser is primarily a custodian, but only incidentally a health–care provider, the suit does not arise out of the professional negligence of a health–care provider, and is thus not subject to the statutory time limits for adding a punitive damages claim. The defendant had contended that the claim for punitive damages was time–barred under Cal. Civ. Proc. Code § 425.13, but the court disagreed, accepting the plaintiff's argument that § 425.13 does not apply to the Elder Abuse and Dependent Adults Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 et seq. Explaining that the law extends to intentional torts although § 425.13 on its face applies only to actions involving "negligence," the court remarked that to restrict the law's scope to negligence would render it superfluous since there are very few situations that mere negligence can support a claim for punitive damages. Nevertheless, the court agreed with the plaintiffs that the elder abuse claim was exempt from the procedural hurdles of § 425.13 although it was grounded on misconduct that exhibited a higher mental state than mere negligence. After noting that in California elder abuse is both a crime under Cal. Penal Code § 368, and a civil wrong under Cal. Welf. & Inst. Code §§ 15600 et seq., the court cited Delaney v. Baker, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999), discussed in § 14, as recognizing the application of heightened civil remedies, specifically attorney's fees and costs, and pain and suffering prior to death, in cases of elderly abuse that involve "reckless neglect" at the hands of caregivers, including nursing homes or other residential health–care facilities. The court stated that it was not persuaded to follow the contrary results reached by a Fourth District Court of Appeal in Community Care and Rehabilitation Center v. Superior Court, 79 Cal. App. 4th 787, 94 Cal. Rptr. 2d 343 (4th Dist. 2000), summarized in, 2 WCAB Rptr. 10,158, 2000 WL 33415210 (Cal. App. 4th Dist. 2000) and review denied, (June 28, 2000), discussed in § 18, and that the California Supreme Court had not yet decided the precise issue raised here. The court noted five reasons why it believed that the Community Care case was wrongly decided. First, that decision was premised on a "wholly unsupported assertion" that § 425.13 is clearly conceptually related to the statutes enacted as part of MICRA, which was adopted in 1975 to address a medical malpractice crisis by controlling the costs of malpractice insurance. Noting that § 425.13 was adopted in 1987 to ensure greater certainty that awards of punitive damages are appropriately granted, by requiring clear and convincing evidence of fraud, malice, or oppression, and to make it harder to assert frivolous claims for punitive damages against a health–care provider. The court reasoned that because malpractice insurance does not cover punitive damages, the only "common thread" between MICRA and § 425.13 is that both apply to health care providers. Secondly, the court noted, the plaintiffs in Community Care alleged no more than medical malpractice; their allegation of elder abuse arose from the fortuitous fact that the decedent happened to die at a nursing home that she was transferred to after surgery. The court here viewed those allegations, which included such claims as the failure to timely assess

the decedent's medical condition, as evincing artful pleading as a ruse to evade the procedural strictures of § 425.13. Thirdly, the court disagreed with the position in Community Care that § 425.13 does not prohibit the recovery of punitive damages, but merely establishes procedures to ensure that claims for them are not made without foundation. The court explained that where, as here, the motion for leave to add a claim for punitive damages is made more than two years after the complaint is filed, the motion must be denied. Fourth, the court disagreed with the view expressed in Community Care that § 425.13 should apply whenever the gravamen of the complaint is malfeasance in the provision of health care. The court reasoned that any danger of artful pleading could be vitiated by motions to strike or for summary judgment, regardless of how the claim is denominated. Finally, disagreeing with the suggestion that exempting elder abuse from the requirements of § 425.13 could unconstitutionally favor elder abuse claimants by treating them as less likely to bring unsubstantiated claims, the court referred to the legislative finding of § 15600 that elderly victims are in fact a disadvantaged class that require added remedies, including incentives to encourage attorneys to pursue abuse claims.

CUMULATIVE SUPPLEMENT

Cases:

The procedural prerequisites to seeking punitive damages in an action for damages arising out of the professional negligence of a health care provider did not apply to punitive damage claim in action alleging elder abuse subject to heightened civil remedies under the Elder Abuse and Dependent Adult Civil Protection Act. West's Ann. Cal. C.C.P. § 425.13; West's Ann.Cal.Welf. & Inst.Code §§ 15600 et seq. Covenant Care, Inc. v. Superior Court, 32 Cal. 4th 771, 11 Cal. Rptr. 3d 222, 86 P.3d 290 (2004).

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[END OF SUPPLEMENT]

§ 20[a] Attorney's fees—Fee award denied or reduced

In the following cases, the courts ruled that attorney's fees under an elder abuse statute were either not warranted or must be reduced in amount.
In Conservatorship of Levitt, 93 Cal. App. 4th 544, 113 Cal. Rptr. 2d 294 (2d Dist. 2001), review denied, (Jan. 29, 2002), in which an attorney had represented a professional conservator in the conservator's successful efforts to protect the estates of two conservatees from financial elder abuse, the court affirmed the trial court's ruling that an award of attorney's fees that was approximately 15% lower than the amount requested by the attorney was appropriate in light of the modest sizes of the estates involved. Finding no abuse of discretion in the lower court's decision, the court explained even though the attorney was a recognized leader in the field of elder law who had drafted the state's elder abuse statute, and had performed praiseworthy work

here, the modest estate sizes of $370,000 and $130,000 justified the court's refusal to award the full requested amount of attorney's fees, $72,537 and $82,515, respectively. The court explained generally that a decision on the appropriate amount of attorney's fees to be awarded is vested in the sound discretion of the trial court, and more specifically, that in cases of elder abuse under Cal. Welf. & Inst. Code § 15675.1, an award of attorney's fees is to be based on "all factors relevant to the value of the services rendered." Further, one factor that must specifically be considered under Cal. Welf. & Inst. Code § 15675.1(a) is the "value of the abuse–related litigation in terms of the quality of life of the elder or dependent adult, and results obtained." Explaining that the value of the estate is also an "appropriate factor" to be considered in a fee award, the court noted that § 15657.1 incorporates by reference the factors set forth in Rule 4–200 of the Rules of Professional Conduct of the State Bar of California, which is the "amount involved and the results obtained." Citing case law that emphasized the expertise of trial courts in assessing the value of legal services, the court rejected the attorney's argument that to base a fee reduction on the size of the estate was a bad policy that would dissuade attorneys from representing middle–income elders who are being subjected to physical or financial abuse. The court acknowledged the need to protect the vulnerable elderly and conceded the social value of the attorney's efforts in this case. However, despite taking judicial notice of a Los Angeles County Board of Supervisors' Order recognizing that elderly persons with modest estates do not have ready access to legal advice and assistance that would enable them to redress the exploitation of their assets or to obtain proper estate planning, the court explained that under the abuse of discretion standard the trial court's ruling was unobjectionable.

In Listman v. Listman, 2002 WL 194248 (Cal. App. 6th Dist. 2002), nonpublished/nonciteable, in which a son filed a petition to cancel his deceased mother's revocable trust, quiet title, and obtain an accounting and damages, and his brother sought to probate the mother's will and gain authority to administer her estate, the court held that the trial court's findings that the decedent did not have the requisite testamentary capacity to execute her will and trust were sufficiently supported by the evidence, and the son was not entitled to attorney's fees under Cal. Welf. & Inst. Code § 15657, a provision of the Elder Abuse and Dependent Adult Civil Protection Act, since the court in adjudicating the petitions did not find, by clear and convincing evidence, that the brother was liable for physical abuse, neglect, or fiduciary abuse and that he was guilty of recklessness, oppression, fraud, or malice in committing the misconduct. The court explained that the intent of the elder abuse law was to protect abused elders, and that the enhanced remedies provision, including attorney's fees, were intended to achieve that result by encouraging interested parties to hire attorneys. The court explained that although the right to maintain an action for relief for abuse of an elder or dependent adult may, with the court's permission, be transferred after the death of the elder to the decedent's personal representative or to a successor in interest, the law was designed to protect abused elders while they are still living. The court added that in an appropriate case, attorney's fees under § 15657 might be recoverable in a will or trust contest. Here, however, the petitions did not contain any allegations of elder abuse or neglect to invoke the application of § 15657, and the trial court did not reach the issue of elder abuse or neglect in resolving them. Finally, the court of appeals declined to reach the issue whether attorney's fees could be awarded under § 15657 in a will or trust contest case where a person is deemed to have predeceased the decedent pursuant to Cal. Prob. Code § 259(a), because the appellate record in this case did not show that that court resolved any claim under that section.

§ 20[b] Attorney's fees—Fee award upheld

The following authority has upheld the award of attorney's fees under an elder abuse statute. Explaining that Cal. Welf. & Inst. Code § 15657 authorizes an award of attorney's fees and costs if a defendant is shown by clear and convincing evidence to have committed financial elder abuse, in In re Estate of Atwood, 2002 WL 22366 (Cal. App. 3d Dist. 2002), nonpublished/nonciteable, (Jan. 9, 2002) and review denied, (Mar. 20, 2002), in which a conservator brought an action against the roommate of an incompetent person to recover funds or property belonging to the estate, the court affirmed the judgment, finding that the defendant had failed to set forth on appeal all the material evidence bearing on whether he committed abuse, and therefore he had waived any contention that the evidence was insufficient. Merely adducing the evidence favorable to his own position was insufficient, the court explained. The court quoted from the defendant's perfunctory brief that merely asserted he was not a fiduciary or representative under former Cal. Welf. & Inst. Code § 15610.3, and that he could not have acted in bad faith because, according to the brief, "there was no showing that the property was not transferred or made readily available to the elder." Reciting the facts of the case, the court noted that in September 1999, the conservator was appointed over the person and estate of the victim, a 78–year–old woman suffering from senile dementia. In January 2000, she filed a petition for an order authorizing a turnover and accounting against the defendant, alleging that the defendant had lived with the victim for approximately 18 months before the establishment of the conservatorship and during that time had written several checks for personal property items that were not in the victim's possession, including a backhoe, a tractor, a trailer, and a pickup truck. The conservator also alleged that the defendant was either in possession of the items, knew their whereabouts, or had sold them and kept the proceeds. The conservator further alleged that the defendant had acted in bad faith by wrongfully concealing or disposing of the items, and therefore should be liable for twice the value of the items could be recovered under Cal. Prob. Code § 2619.5. In addition, the conservator requested an award of attorney fees and costs under Cal. Welf. & Inst. Code § 15657. The conservator adduced evidence of five different transactions in 1998 and 1999—when the defendant was living with the victim—where the victim had written checks for various items: (1) $28,000 for a backhoe from an auction company; (2) $15,000 for a trailer from one William Dunton; (3) $3,400 for a pickup truck and trailer from a distributing company; (4) $4,453.56 for two tractors and some other equipment from another auction company; and (5) $3,224.75 for a pickup truck from a Redding Auto Center. The conservator's counsel read into the record excerpts from the defendant's deposition where he essentially denied knowledge of each of the transactions and of the equipment purchased. The counsel then offered testimony from various witnesses and documentary evidence to show that the defendant had indeed been involved in each of the transactions. For example, the court noted, the bill of sale for the backhoe was in the defendant's name, and the owner of the company testified that the defendant had brought the victim in as his "financial backer" to purchase the backhoe. In another example cited by the court, the invoice and title documents for the pickup truck were in the defendant's name. At the close of the conservator's case, the defendant's attorney renewed his request for a continuance, which the trial court again denied. After the defendant's attorney then rested without putting on any evidence, the trial court found by clear and convincing evidence that the defendant had committed financial abuse of an elder with respect to four of the five transactions, concluding that the transactions reflected "theft by Mr. Simonis of the property of

the conservatee whereby use of her funds he received the assets and then disposed of them in a fashion that did not go to her benefit." The trial court concluded that there was no property to be returned and therefore the defendant should be charged with the value of the assets, which the trial court found was $49,644.75. The trial court further found that the defendant's actions were wrongful and made in bad faith, and therefore concluded that the defendant would be liable for twice the value of the assets. Finally, the court awarded the conservator attorney's fees and costs under Cal. Welf. & Inst. Code § 15657. The court ultimately entered judgment against the defendant for $99,249.50, not including attorney's fees and costs.

§ 21. Employee disciplinary matters

The following authority has considered whether an employee's reinstatement to his position after being discharged for abusing an elderly patient was inconsistent with the public policy underlying the state's elder abuse statute.

In County of De Witt v. American Federation of State, County, Mun. Employees, Council 31, 298 Ill. App. 3d 634, 232 Ill. Dec. 716, 699 N.E.2d 163, 159 L.R.R.M. (BNA) 2123 (4th Dist. 1998), the court ruled that an arbitration award ordering the reinstatement, along with lost pay and seniority, of a nursing home employee who had been discharged for striking an elderly resident, violated the public policy of protecting the elderly from abuse and therefore was properly vacated by the circuit court. The court explained that even if the arbitrator's decision was based on his interpretation of a collective bargaining agreement, an appellate court will vacate an award if it is repugnant to "established norms of public policy." The court pointed out that the Nursing Home Care Act, 210 Ill. Comp. Stat. Ann. 45/1–101 et seq. (1996), and the Elder Abuse and Neglect Act, 320 Ill. Comp. Stat. Ann. 20/1 et seq. (1996), are clear examples of the Legislature's intent to protect the elderly from "neglect, abuse, and degrading treatment in nursing homes and domestic situations." Additional evidence of this intent is found in criminal statutes that increase the grade or punishment for crimes committed against victims over the age of 60, the court noted, citing 720 Ill. Comp. Stat. Ann. 5/2–4.6q, which elevates battery to aggravated battery if the defendant knowingly causes bodily harm to a person age 60 or older. According to the court, the arbitrator interpreted the agreement to hold that one instance of striking a victim that causes no injury does not constitute "resident abuse" and thus the employee could not be discharged for that one offense. The employee worked for the county and under her union contract could only be discharged for "just cause." The agreement also provided that employees "shall be immediately subject to discharge for resident abuse." The court, however, concluded that such a "one free hit" rule violates the public policy against elder abuse. The court noted that when a nursing home employee lashes out in frustration or anger and strikes a resident, it is "small comfort" that the act was an isolated incident or did not cause injury. Such misconduct is abusive and degrading, and the state's public policy does not tolerate any elder abuse, no matter how infrequent or mild. Therefore, the court explained that it could not recognize or enforce the contract interpretation that prevented an employer from responding to such behavior. The court rejected the defendant union's argument that the award of reinstatement did not violate public policy because the arbitrator determined that the employee was unlikely to repeat the misconduct in the future. The union had contended that as long as the arbitrator rationally found that the employee could be trusted to refrain from future abuse, the court must uphold the award. The court, however, found two flaws in this argument. First, the arbitrator's

determination that the employee posed no future threat of harm had no rational basis, in light of her stubborn and implausible denial that she had touched the victim, and considering the possibility that other employees might have been "covering up for her." The arbitrator also reinstated the employee without even a reprimand for her misbehavior, and thus failed to take any steps to deter future abuse. In fact, the court observed, the arbitrator's action encourages misconduct by preventing nursing homes from terminating abusive employees absent physical injury or repeated abuse. Second, the court explained that the arbitrator's decision that public policy was satisfied by withholding termination for isolated cases of abuse causing no physical injury was not binding on the court, since such determinations are for the court to make, not the arbitrator, who is limited in such circumstances to ruling on the interpretation of the collective bargaining agreement. Even if the arbitrator rationally concluded that the employee was unlikely to commit further offenses, that even isolated instances of abuse are against public policy and will require dismissal of the employee under the union contract at issue here, the court concluded.

§ 22. Retaliatory discharge of employee for reporting misconduct of coworker

The courts in the following cases considered whether an employee who had been discharged after reporting the misconduct of a coworker or participating in an investigation in connection with the abuse of an elderly client has a cause of action against the employer for retaliatory discharge.
The court in McAdoo v. Diaz, 884 P.2d 1385 (Alaska 1994), held that the elder abuse and neglect statute, Alaska Stat. §§ 47.24.010 et seq., did not protect against the retaliatory discharge of a church volunteer after reporting a violation by the church, since the statute protects against retaliatory action in the context of certain important relationships between the reporting and retaliating party, such as employment relationships and situations where the retaliating party provides substantial tangible benefits to the reporting party. It does not protect the intangible benefits of volunteering, however, and the dismissal of the plaintiff's claim was affirmed.
The court in Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455, 243 Ill. Dec. 46, 722 N.E.2d 1115, 15 I.E.R. Cas. (BNA) 1489 (1999) (distinguished on other grounds by, Rekosh v. Parks, 316 Ill. App. 3d 58, 249 Ill. Dec. 161, 735 N.E.2d 765 (2d Dist. 2000)) and (distinguished on other grounds by, Fiumetto v. Garrett Enterprises, Inc., 321 Ill. App. 3d 946, 255 Ill. Dec. 510, 749 N.E.2d 992, 17 I.E.R. Cas. (BNA) 1368, 144 Lab. Cas. (CCH) ¶59331 (2d Dist. 2001)) and (distinguished on other grounds by, Harris v. Bethesda Lutheran Homes, Inc., 2001 WL 877321 (N.D. Ill. 2001)) and (distinguished on other grounds by, Bea v. Bethany Home, Inc., 333 Ill. App. 3d 410, 266 Ill. Dec. 781, 775 N.E.2d 621 (3d Dist. 2002)) and (distinguished by, King v. Senior Services Associates, Inc., 275 Ill. Dec. 181, 792 N.E.2d 412 (App. Ct. 2d Dist. 2003)), discussed this section), held that the section of the Nursing Home Care Act (the Act), 210 Ill. Comp. Stat. Ann. 45/3-608, prohibiting retaliation against nursing home residents, employees, or agents who report mistreatment of residents did not imply a private right of action for nursing home employees who were retaliated against by their employer, since nursing home employees were not within the class of persons the Act was enacted to protect, the employees did not suffer the type of injuries that the Act was intended to prevent, and it was not necessary to imply a private right of action for employees in order to achieve the purpose of the Act.

In King v. Senior Services Associates, Inc., 275 Ill. Dec. 181, 792 N.E.2d 412 (App. Ct. 2d Dist. 2003), the court held that an employee of a not-for-profit corporation engaged in investigating allegations of elder abuse had a private right of action against her employer for retaliatory discharge under the Elder Abuse and Neglect Act,320 Ill. Comp. Stat. Ann. 20/1 et seq. (2000), after the employee was terminated for "blowing the whistle" on a co-employee who was eventually convicted of criminal offenses. An implied right of action, the court concluded, is the only method by which an employee involved in providing services to victims of elder abuse and neglect can seek a remedy for discrimination by his or her employer.
Caution In reaching its decision, the court in King v. Senior Services Associates, Inc., 275 Ill. Dec. 181, 792 N.E.2d 412 (App. Ct. 2d Dist. 2003), distinguished the circumstances presented therein from those at issue in Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455, 243 Ill. Dec. 46, 722 N.E.2d 1115, 15 I.E.R. Cas. (BNA) 1489 (1999) (distinguished on other grounds by, Rekosh v. Parks, 316 Ill. App. 3d 58, 249 Ill. Dec. 161, 735 N.E.2d 765 (2d Dist. 2000)) and (distinguished on other grounds by, Fiumetto v. Garrett Enterprises, Inc., 321 Ill. App. 3d 946, 255 Ill. Dec. 510, 749 N.E.2d 992, 17 I.E.R. Cas. (BNA) 1368, 144 Lab. Cas. (CCH) ¶59331 (2d Dist. 2001)) and (distinguished on other grounds by, Harris v. Bethesda Lutheran Homes, Inc., 2001 WL 877321 (N.D. Ill. 2001)) and (distinguished on other grounds by, Bea v. Bethany Home, Inc., 333 Ill. App. 3d 410, 266 Ill. Dec. 781, 775 N.E.2d 621 (3d Dist. 2002)) and (distinguished by, King v. Senior Services Associates, Inc., 275 Ill. Dec. 181, 792 N.E.2d 412 (App. Ct. 2d Dist. 2003)), (discussed this section), on the grounds that Fisher did not involve the Elder Abuse and Neglect Act, 320 Ill. Comp. Stat. Ann. 20/1 et seq. (2000), nor did it involve the reporting of criminal conduct, but rather only the reporting of tortious conduct. Citing the state's strong public policy of enforcing the state's criminal code, the King court determined that Fisher was not controlling.

§ 23. Statutory denial of right to inherit

The following authority considered whether an inheritance may be forfeited as a consequence of an adjudication of elder abuse.
In In re Estate of Williams, 2001 WL 1575522 (Cal. App. 1st Dist. 2001), nonpublished/nonciteable, in which the respondent challenged the appellant's right to inherit under a will on two separate alternative grounds, undue influence and Cal. Prob. Code § 259, which denies inheritance by providing that any person shall be deemed to have predeceased a decedent if it has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult, the court held that since the trial court had defeated the appellant's claim to inherit by refusing to probate the will on the grounds of undue influence, there would be no substantial rights affected by an additional ruling under § 259. Accordingly, the court found that the issue was moot and expressed no opinion on it.

III. CRIMINAL PROSECUTIONS FOR ELDER ABUSE

§ 24. Scienter requirement—generally

Courts in the following cases have considered the degree of scienter required to support a conviction for elder abuse.

In People v. Green, 2001 WL 1273470 (Cal. App. 1st Dist. 2001), nonpublished/nonciteable, in which the defendant was convicted of embezzlement under Cal. Penal Code § 487(a), and financial elder abuse under Cal. Penal Code § 368(e), the court reversed the convictions, ruling that the trial court erred in failing to instruct the jury that it must acquit the defendant if she was shown to have believed in good faith that her use of allegedly embezzled property was authorized.

In Vallery v. State, 46 P.3d 66 (Nev. 2002), in which the defendant was convicted of one count of elder neglect causing substantial bodily harm and two counts of elder neglect causing death, arising from her failure to take action to prevent the neglect of elderly persons residing in group care facilities administered by her, the court ruled that regarding the substantial bodily harm offense, the trial court's failure to instruct the jury on the governing 1993 elder abuse statute's actual knowledge element, codified in Nev. Rev. Stat. Ann. § 200.5099, warranted a remand for a new trial on that charge. The court explained that the 1995 elder abuse statute, which made it a crime for an individual who assumed responsibility for the care of an older person to cause physical or mental suffering through neglect, or to permit them to be placed in a situation where such a consequence may ensue, did not require that the caretaker had actual knowledge of the danger. The court explained that the use of the words "permit" and "allow" only required proof that an accused had reason to know of the danger. In contrast, the 1993 statute, which criminalized willfully causing unjustifiable physical or mental suffering through neglect, required actual knowledge that the older person was likely to suffer. Although the court agreed with the state's position that a neglect charge does not require a showing of intentional misconduct, it emphasized that a certain form of knowledge is indeed required; knowledge not of the danger to the older person, but of that person's circumstances. Specifically, a person cannot willfully cause or permit unjustified suffering through failing to provide appropriate care if unaware of the older person's needs. The phrase "willfully causes or permits" contemplates actual knowledge of a situation that requires action (or a denial of permission) in order to prevent harm to an older person.

§ 25. Defendant's knowledge of victim's age

The following authority considered whether circumstantial evidence suffices to demonstrate the defendant's knowledge of the victim's age in an elder abuse prosecution.

In People v. Archuleta, 2002 WL 1803868 (Cal. App. 2d Dist. 2002), nonpublished/nonciteable, (Aug. 7, 2002) and review denied, (Oct. 16, 2002), the court concluded that although the state's criminal law barring elder abuse, Cal. Penal Code § 368, requires a showing that the defendant knew the victim was 65 years of age or older, that knowledge need not be demonstrated through direct evidence. Thus, the victim's failure to tell the perpetrator her age was of no significance to the verdict, the court concluded. The court adopted the reasoning of the trial judge, who declared that "[t]he problem with requiring evidence of knowledge, is that it's very difficult, absent an

admission or confession, to know what's in the mind of any perpetrator. So you are more or less stuck with circumstantial evidence on that."

§ 26. Care or custody of elder victim defined

[Cumulative Supplement]

In the following cases, courts considered the definition of a caregiver under an elder abuse statute.
See also, People v. Siravo, 17 Cal. App. 4th 555, 21 Cal. Rptr. 2d 350 (2d Dist. 1993), in which the defendant was convicted of sexually assaulting his wife's housemate, construing Cal. Evid. Code § 972(e), an exception to the marital privilege statute for criminal proceedings in which one spouse is charged with a crime against a cohabitant of the other spouse, the court concluded that the term "cohabitant" means two people who live or dwell together in the same household. Rejecting the defendant's contention that the term must mean only an elderly or dependent adult, the court declined to adopt the view that the 1986 legislative bill placing parents, relatives, or other cohabitants outside the scope of the marital privilege in criminal cases also changed the elder abuse requirements. The court explained that although both portions of the bill addressed the same general concern of domestic violence, nothing in Assembly Bill No. 3988 suggested that its elder abuse component should be used to limit or define the marital privilege provision. Absent any such indication, the plain–meaning principle of statutory construction was controlling here, the court concluded.
In Peterson v. State, 765 So. 2d 861 (Fla. Dist. Ct. App. 5th Dist. 2000), review denied, 786 So. 2d 1188 (Fla. 2001), the court held that the defendant had a legal duty, under both the common law and the statute addressing aggravated manslaughter of an elderly or disabled person, Fla. Stat. Ann. § 825.102(3), to care for his elderly and disabled mother himself, or to obtain care for her from others, and to make reasonable efforts to protect the mother from the abuse and neglect she suffered under the brother's care, since the mother lived with defendant and brother in a home owned by the mother and the defendant; the defendant and brother were entrusted with mother's property; and defendant and brother agreed that the brother would do the actual work of caring for the mother. The court noted that the statutory term "caregiver" logically encompasses more than just a person or persons who do actual physical work of caring for elderly or disabled adult; it also includes persons who in fact are entrusted with responsibility for seeing that care is being given in a proper and humane manner.

CUMULATIVE SUPPLEMENT

Cases:

Statute defining crimes against elder or dependent adult does not require that a defendant be in a caretaker relationship with the victim. West's Ann.Cal.Penal Code § 368. People v. Matye, 70 Cal. Rptr. 3d 342 (Cal. App. 3d Dist. 2008).

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[END OF SUPPLEMENT]

§ 27. Failure to act

The following authority considered whether a defendant could be convicted of elder abuse under the circumstances for failing to protect the victim from the misconduct of others.
Construing Cal. Penal Code § 368(a), which creates a felony offense for willfully allowing pain or suffering to be inflicted on an elderly or dependent adult, in People v. Heitzman, 9 Cal. 4th 189, 37 Cal. Rptr. 2d 236, 886 P.2d 1229 (1994), the court held that although the law indeed fails to provide fair notice to potential violators, and does not provide clear standards for those charged with enforcing the statute, the law is nonetheless saved from unconstitutional vagueness by interpreting its imposition of criminal liability for failing to act as applying only to a person who has a duty under existing tort principles to control the conduct of the individual who is directly causing or inflicting the abuse. The daughter of the victim did not violate the statute here, even though the father died from septic shock as a result of sores that were caused by malnutrition, dehydration, and neglect. There was no showing that she had a legal duty to control either of her brothers, with whom her father was residing at time of his death.

§ 28. Lesser included offense

[Cumulative Supplement]

The following authority considered whether the evidence adduced at trial in an elder abuse prosecution supported a jury instruction for a lesser included offense.
In the course of determining that there was sufficient evidence to support the defendant's conviction for elder abuse under Cal. Penal Code § 368(b)(1), in People v. Archuleta, 2002 WL 1803868 (Cal. App. 2d Dist. 2002), nonpublished/noncitable, (Aug. 7, 2002) and review denied, (Oct. 16, 2002), the court held that even assuming that misdemeanor elder abuse is a lesser included offense of felony elder abuse, the trial court did not err in failing to instruct on it. The court noted that despite the defendant's speculative assertions, there was no evidence that the offenses constituted a lesser crime than those charged. The defendant's conduct was perpetrated under circumstances likely to produce great bodily harm or death, the court explained, noting he pushed a frail elderly woman into counters, an ice chest, and onto the floor. He hit her, pulled her hair, and physically abused her. Such physical abuse could only occur under circumstances likely to cause great bodily harm or death, the court concluded. There was no contrary evidence adduced. The court rejected the defendant's attempt to "bootstrap" the jury's finding that the victim had not suffer great bodily injury into a claim that the defendant's intentional physical

violence towards her did not create a likelihood of such an injury. The court explained that the fact that the circumstances were likely to produce great bodily injury or death, does not necessarily mean that great bodily injury must result. The court essentially observed that not every likely result actually occurs.

CUMULATIVE SUPPLEMENT

Cases:

Trial court's failure to give instruction on lesser included offense of misdemeanor elder abuse was reversible error in prosecution for felony elder abuse under circumstances or conditions likely to produce great bodily harm or death, since there was reasonable chance that defendant would have obtained more favorable result; victim was not injured after being zapped with stun gun, he was six feet three inches tall and weighed 210 pounds, and after being zapped was able to retreat to bedroom after being zapped, and attempted to make 911 call and lie on bed in defensive position. West's Ann.Cal.Penal Code § 368(b)(1), (c). People v. Racy, 148 Cal. App. 4th 1327, 56 Cal. Rptr. 3d 455 (3d Dist. 2007).

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[END OF SUPPLEMENT]

§ 29. Statute of limitations

Authority has considered the application of a statute of limitations for an elder abuse offense. In People v. Steiner, 2001 WL 1646748 (Cal. App. 1st Dist. 2001), nonpublished/nonciteable, (Dec. 20, 2001) and reh'g denied, (Jan. 11, 2002) and review denied, (Mar. 20, 2002), in which the People appealed the pretrial dismissal of three counts of conspiracy to commit elder theft and five counts of elder theft, in violation of Cal. Penal Code § 368(e), contending that the conspiracy counts were not barred by the statute of limitations and that the elder theft charges were properly based on conduct completed after the victim's death, the court concluded that although the conspiracy counts were timely, the elder theft charges were properly dismissed. Addressing the conspiracy counts, the court noted that for purposes of the statute of limitations, an overt act in furtherance of a conspiracy cannot be committed after the completion of the object that made the conspiracy unlawful in the first instance. The record here contained evidence, however, from which the jury could conclude that the purpose of each conspiracy was to obtain money from the victims, and that the goal was not achieved until the defendants actually mortgaged the apartment building at issue, withdrew the cash from the bank account, or redeemed the stock. The court noted that there was evidence from which a jury could conclude that the objectives of the conspiracies were not achieved until the appellants had realized a profit from the victims' assets by converting them into cash. The court pointed to evidence, for example, that one of the appellants began making building improvements soon after becoming a

joint tenant in property belonging to one of the victims, and told a contractor that she was repairing the building in order to make it more attractive for refinancing. The People's theory was that the defendants began the thefts by acquiring joint tenancy or other interests in the property of their intended victims. Thus, the court reasoned, to the extent that the defendants may have acquired de facto possession or control over the property in question when the men died, they held the property in trust for the rightful heirs, and it was only when they took action for their own benefit, and contrary to the heirs' interests, that the thefts were deemed complete. The court approved the principle that it is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended. Thus, the court determined that the dismissal of the conspiracy counts on statute of limitations grounds was premature, and must be reversed.

§ 30. Juror unanimity on same act supporting guilty verdict

[Cumulative Supplement]

The following authority addressed the principle requiring each juror to agree on the same particular one of several acts or omissions adduced at trial to support an elder abuse charge.
In People v. Rae, 102 Cal. App. 4th 116, 125 Cal. Rptr. 2d 312 (1st Dist. 2002), as modified on denial of reh'g, (Oct. 9, 2002) and review denied, (Nov. 26, 2002), an opinion certified for partial publication, the court ruled that a standard jury instruction requiring unanimity on which one of several acts supported the finding of guilt was not warranted in a prosecution for elder abuse under Cal. Penal Code § 368, where the offense was capable of being committed by a continuous course of conduct and the defendant's wrongful acts were successive, compounding, and interrelated; the defendant failed or refused to provide the victim with appropriate nutrition, to help her move in order to prevent or relieve bedsores, to clean her when she was incontinent, to cooperate with health care workers and caregivers attempting to assist him, to use hospital bed provided for victim, or to adhere to the instructions of visiting health care workers. The court noted that in refusing the defendant's request to give the instruction, the trial court reasoned that "there may be multiple legal elements contained in the particular charges in question, but there could be a continuing course of conduct on the evidence. So I don't think 17.01 is appropriate." The court of appeal agreed, holding there was no error. The defendant had argued that because there was evidence of two separate events, one before and one after the victim's hospitalization, a unanimity instruction was required. Disagreeing, the court explained that a continuous course of conduct, by its nature, may stop and start, and the two–day period during which the defendant did not have charge over the victim's care did not interrupt his course of conduct. A close temporal connection is not required where the continuous course of conduct exception is implicated. The court reasoned that the victim's suffering did not end when she entered the hospital and then resumed when she came home to the defendant's care. Her suffering, magnified by her helplessness and enforced isolation from other people, continued unabated, the court stated.

CUMULATIVE SUPPLEMENT

Cases:

In a trial for elder abuse under circumstances or conditions likely to produce great bodily harm or death, a jury is not required to unanimously agree on one circumstance or condition that was likely to produce great bodily harm or death, but rather, may consider all the circumstances or conditions that were likely to produce great bodily harm or death. West's Ann.Cal.Penal Code § 368(b)(1). People v. Racy, 148 Cal. App. 4th 1327, 56 Cal. Rptr. 3d 455 (3d Dist. 2007).

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[END OF SUPPLEMENT]

§ 31. Hearsay evidence of abuse

The courts in the following cases considered the validity of a hearsay exception for statements of elderly persons or disabled adults describing abuse.
The court in People v. Tatum, 133 Cal. Rptr. 2d 267 (App. 2d Dist. 2003), held that the assault victim's out-of-court statement was admissible at trial, following the victim's death by natural causes, pursuant to the elder abuse and dependent adults hearsay exception, Cal. Evid. Code § 1380, where the state established that the victim was competent to be a witness and had personal knowledge of the events to which he testified; the videotape of the interview established that the victim was able to articulate facts so as to be understood, and had the capacity both to perceive and to recollect, the victim had no apparent reason to fabricate and several good reasons not to do so, and the victim's statement was corroborated by forensic evidence. Cal. Evid. Code §§ 403(a)(2), 701(a)(1), 702, 1380.
In Conner v. State, 748 So. 2d 950 (Fla. 1999), reh'g denied, (Jan. 27, 2000) and cert. denied, 530 U.S. 1262, 120 S. Ct. 2719, 147 L. Ed. 2d 984 (2000), the court held that a hearsay exception under Fla. Stat. Ann. § 90.803(24), for statements by elderly persons or disabled adults describing abuse, facially violates the defendant's federal and state constitutional right to confront witnesses, guaranteed by U.S.C.A. Const. Amend. VI and Fla. Const. art. I, § 16(a), since the law did not ensure the reliability of hearsay statements, and its broad form was not supported by the competing policy interests that apply to a child abuse hearsay exception. The court noted that the right to confrontation of witnesses serves a threefold purpose because it: (1) ensures that a witness will give statements under oath, thus impressing the witness with the seriousness of the matter and discouraging lying by introducing the prospect of perjury; (2) forces the witness to submit to cross–examination and therefore tends to reveal the truth; and (3) permits the jury to observe the demeanor of witness, thus aiding the jury in assessing the witness's credibility.

§ 32[a] Sentence enhancement for severe injury or death—Discretion of court to impose enhancement

The courts in the following cases considered the trial court's discretion to impose a sentence enhancement for causing a more serious injury or death to the victim.

In People v. Carmichael, 2002 WL 475219 (Cal. App. 2d Dist. 2002), nonpublished/nonciteable, in which the defendant was convicted of elder abuse under Cal. Penal Code § 368 and received an additional five–year sentence enhancement pursuant to Cal. Penal Code § 12022.7(c), for inflicting great bodily injury on a person over age 70, the court ordered the case remanded for resentencing so the trial court could determine whether to exercise the discretion to strike the enhancement. The court explained that when the trial court pronounced the seven–year sentence, it wrongly believed that it was required to impose the five–year enhancement even though the seven–year sentence was "far, far in excess of the punishment [the defendant] needs." The court noted that absent a clear legislative directive to the contrary, Cal. Penal Code § 1385 grants the trial court the authority to strike a sentence enhancement allegation (or the punishment associated with that enhancement), in furtherance of justice, and pointed out that the general mandatory language that a sentence "shall" be imposed does not suffice to divest the court of that discretion. The court added that neither § 12022.7(c) nor any other Penal Code provisions contained any clear restriction on the trial court's authority to strike a great bodily injury enhancement in the interest of justice in cases of elder abuse. Further, the court reasoned, former subdivision (h) of Cal. Penal Code § 1170.1 specifically provided that notwithstanding any other law, the court may strike an enhancement that was imposed under § 12022.7. Although § 1170.1(h) was later repealed, the discretion it provided to strike an enhancement remains in effect by virtue of an express directive in the repealing act. Explaining that criminal defendants are entitled to sentencing decisions that are the products of informed discretion, the court cited with approval the principle that a court that is unaware of the scope of its discretionary authority can no more exercise that informed discretion than one that is imposing a sentence based on misinformation about a material aspect of a defendant's record. Finally, the court rejected the People's argument that the defendant waived the issue by failing to request relief, explaining that § 1385 grants the authority to strike an enhancement sua sponte. The court reasoned that a sentencing court that believes it cannot strike an enhancement will not do so on its own motion, and, hence, when a court affirmatively expresses that it lacks authority to strike an enhancement allegation, no motion is required by the defendant to preserve the issue. Recounting the facts that gave rise to the criminal charges, the court explained that the defendant had been staying in the house of her 78–year–old mother, who was recovering from a broken hip and ordinarily used a walker. After an argument one night over whether the defendant should come in from the porch so the mother could lock the house for the night, the defendant pushed her mother hard and told her something to the effect of "Don't tell me to come in." The mother fell and was unable to get back up. The mother began to go back to the bedroom and the daughter dragged her part of the way, the court stated, noting that the mother then called her other daughter, who drove the mother to the hospital, where she was treated for a fractured hip and later underwent surgery. The court noted that this incident was not the first confrontation between the mother and daughter. Although the daughter contended at trial that the fall was an accident, the court disagreed after considering the facts in the light most favorable to the judgment of conviction. A few years earlier, the defendant had been arrested after a physical altercation with her mother. Further, only a few months before the present incident, the defendant engaged in another physical confrontation that left the mother bruised; the daughter had broken into the house after

the mother had locked her out, fearing for her own safety. In that incident the daughter, after breaking in, took the mother's walker and disconnected the phone to prevent her from calling the police.

The court in People v. DeHart, 2003 WL 21241263 (Cal. App. 3d Dist. 2003), nonpublished/noncitable, upheld a sentence of nine years in prison for a 78-year-old defendant who entered a negotiated plea of guilty to elder abuse, and admitted an enhancement for great bodily injury, on charges of physical assault against his 81-year-old girlfriend, from which she suffered a skull fracture. The defendant argued that the sentence constituted cruel and unusual punishment as it was disproportionate to his individual culpability and that sending a nonrecidivist offender of his age to prison for the remaining years of his life was an absurd exercise of sentencing discretion. While concluding that the defendant had not agreed to the sentence as part of the plea bargain, the court determined that the defendant had waived his constitutional argument by failing to raise it in the trial court. Nevertheless, the court went on to explain why the argument of cruel and unusual punishment failed on the merits, noting that the defendant's probation report reflected a criminal history dating back to when the defendant was 26-years-old, including multiple convictions for petty theft, battery, drunk driving, obstructing and resisting an officer and giving false identification. The defendant had served probation at various times, which had been revoked and reinstated on more than one occasion. The lower court ultimately denied probation based on the seriousness of the offense and the defendant's prior poor performance on probation, and imposed the midterm of three years for the offense and five years for the enhancement since the victim was over 70 years of age. The court concluded that the sentence of the lower court did not "shock the conscience" in violation of the state constitutional standard, in light of the fact that the defendant slammed the victim's head into the wall causing serious injury and the defendant's criminal history reflected a person who cannot abide by the laws or comply with probation; nor was the sentence "grossly disproportionate" in violation of the federal constitutional standard.

§ 32[b] Sentence enhancement for severe injury or death—Application of enhancement to other crimes

The following authority considered whether a sentence enhancement for causing serious injury or death to an elder could be imposed for a nonelder abuse conviction.

In People v. Adams, 93 Cal. App. 4th 1192, 113 Cal. Rptr. 2d 722, 113 A.L.R.5th 729 (4th Dist. 2001), reh'g denied, (Dec. 14, 2001) and review denied, (Feb. 20, 2002), the court ruled that an elder abuse sentence enhancement did not apply to the defendants, who were convicted of second–degree murder and involuntary manslaughter, respectively, of a 69–year–old man, where neither murder nor manslaughter was a predicate offense under the elder abuse statute, Cal. Penal Code § 368, and the defendants were not charged with elder abuse as a separate crime. The appellants were charged with murder, and as to that charge it was alleged that within the meaning of the enhancement provision, Cal. Penal Code § 368(b)(3)(A), the victim was elderly and the appellants caused his death. The defendant (Adams) was convicted of second degree murder and his codefendant (Peterson) was convicted of involuntary manslaughter. The enhancement allegation was found true for both appellants. Adams was sentenced to an indeterminate term of 15 years to life plus five years for the § 368(b)(3)(A) enhancement, and Peterson was sentenced to the mid–term of three years on the involuntary manslaughter

conviction plus five years for the enhancement. The appellants argued the evidence was insufficient to support a true finding on the enhancement issue, but the court asked the parties to brief the more fundamental question of whether a § 368(b)(3)(A) enhancement applies to a charge of murder or manslaughter, or is applicable only to the crime of elder abuse as defined in § 368(b)(1). The court went on to conclude that the enhancement applies only to the latter offense, reasoning that § 368(b)(3)(A) unambiguously states that the enhancement applies only to a conviction of the crime described in § 368(b)(1). That subsection's use of the phrase "[i]f in the commission of an offense described in paragraph (1)" refers directly to the crime created in that subdivision (b)(1), and evinces no intent to apply the enhancement to any other crime. The court also pointed out that the crime created by § 368(b)(1), and the enhancements created by subdivisions (b)(3)(A) and (B), are all subsumed within the same subdivision. The reasonable interpretation of such a construction is that the crime and the enhancements are meant to be interlocking, the court concluded; the enhancements are not freestanding and have no application except to the crime created in subdivision (b)(1). Furthermore, the court explained, even if the language of § 368(b)(3)(A) was ambiguous, the legislative history would still demonstrate that the enhancement was intended to apply only to the crime described in subdivision (b)(1).

§ 33. Consent to search as condition of probation

The following authority considered the validity of a condition on probation that required a defendant convicted of elder abuse to submit to searches without a showing of probable cause. In People v. Balestra, 76 Cal. App. 4th 57, 90 Cal. Rptr. 2d 77 (4th Dist. 1999), review denied, (Feb. 23, 2000), the court held that a "consent to search" condition imposed under Cal. Penal Code § 1203.1 on the defendant's probation for an elder abuse conviction under Cal. Penal Code § 368, requiring her to submit her person and property to a search without a showing of probable cause, was not an abuse of discretion. The defendant, smelling of alcohol, had physically attacked and otherwise terrorized her 69–year–old mother for two hours, until the mother was able to finally escape. The court noted that, while warrantless search conditions are perhaps more common in cases involving theft, narcotics, or firearms, these conditions are intended to ensure that the subject is complying with the fundamental requirement that a probationer obey all laws. The court explained that because a warrantless search is justified by its rehabilitative purpose, "it is of no moment" whether the underlying offense is reasonably related to theft, narcotics, or firearms. The court held that the probation requirement did not violate the defendant's right under U.S.C.A. Const. Amend. IV to be free of unreasonable searches and seizures, since the condition served a valid rehabilitative purpose.

§ 34. Sufficiency of evidence

[Cumulative Supplement]

The following authority considered the sufficiency of evidence to support a conviction for elder abuse.

CUMULATIVE SUPPLEMENT

Cases:

Evidence was sufficient to support conviction for elder abuse under circumstances or conditions likely to produce great bodily harm or death, even in absence of expert testimony that stun gun defendant used was likely to produce great bodily harm or death; in addition to zapping victim in leg with stun gun, defendant followed victim to victim's bedroom, moved to bed where victim was in defensive position, zapped gun repeatedly in air, and tipped victim over, tore his pocket, and grabbed his wallet, which could have caused 74-year-old victim to fall and break his bones. West's Ann.Cal.Penal Code § 368(b)(1). People v. Racy, 148 Cal. App. 4th 1327, 56 Cal. Rptr. 3d 455 (3d Dist. 2007)

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[END OF SUPPLEMENT]

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Section 2[a] Footnotes:
[FN1] See Cal. Welf. & Inst. Code § 15657.

[FN2] See Cal. Penal Code § 368.

[FN3] See Am. Jur. 2d, Hospitals and Asylums § 37.

[FN4] See Delaney v. Baker, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999).

Section 2[b] Footnotes:
[FN5] See People v. Katz, 2002 WL 660877 (Cal. App. 6th Dist. 2002).

[FN6] See State v. Sumerlin, 139 Or. App. 579, 913 P.2d 340 (1996).

[FN7] See Cal. Prob. Code § 259.

[FN8] See Easton v. Sutter Coast Hosp., 80 Cal. App. 4th 485, 95 Cal. Rptr. 2d 316 (1st Dist. 2000), reh'g denied, (May 23, 2000) and cert. denied, 531 U.S. 1084, 121 S. Ct. 790, 148 L. Ed. 2d 686 (2001).

[FN9] See California Assn. of Health Facilities v. Department of Health Services, 16 Cal. 4th 284, 65 Cal. Rptr. 2d 872, 940 P.2d 323 (1997).

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