



# Weekly Law Resume

A Newsletter published by Low, Ball & Lynch  
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: LINDA MEYER and JAMES REGAN

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## Elder Abuse-Standards for Neglect

*Elaine Carter, et. al. v. Prime Healthcare Paradise Valley, LLC*

Court of Appeal, Fourth District (August 12, 2011)

This case considers the factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act. Claims under this act allow for enhanced remedies, such as recovery of attorney's fees. Further, a plaintiff who sues as the personal representative or successor in interest of a deceased elder is partially relieved of the limitation on damages imposed by Code of Civil Procedure section 377.34 - which means they may also recover damages for the decedent's pre-death pain and suffering.

Plaintiffs Elaine Carter, Newgene Grant and Roosevelt Grant, Jr., appealed a judgment entered after the trial court sustained a demurrer without leave to amend. Plaintiffs sued defendants Paradise Valley Hospital (the "Hospital") and Paradise Valley Health Care Center, Inc. (the "Center") for the death of their father, 87-year-old Roosevelt Grant ("Grant"), on theories of elder abuse (Welf. & Inst. Code Section 15600 et. seq.-the Elder Abuse Act), willful misconduct and wrongful death.

Roosevelt Grant was admitted to the Hospital on April 21, 2008. Two days later he was transferred to the Center for short-term rehabilitation. He was then hospitalized a second time for treatment of pneumonia and pressure ulcers, some of which developed at the Hospital. After eight days at the Hospital and a further stint at the Center, Grant was admitted to the Hospital for a third time, where he died on August 18, 2008. Plaintiffs allege during this hospitalization, the Hospital did not give him life-saving medications and that it failed to properly stock a "crash cart", such that he died when those treating him could not locate a common size endotracheal tube and intubate him. Plaintiffs claimed many of the Hospital's records were fraudulent.

Plaintiffs filed suit on October 27, 2009, alleging that the Hospital caused Grant's death by "recklessly," "willfully," and

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"with deliberate indifference and conscious disregard for the health, safety and well-being of [Grant]," failing to treat his pressure ulcers, administer his prescribed medications and properly stock a crash cart.

The Hospital demurred to the first amended complaint on the grounds that the elder abuse claim did not state facts sufficient to constitute a cause of action and the willful misconduct and wrongful death claims were time-barred. The trial court sustained the demurrers without leave to amend and ruled: (1) the allegations of the elder abuse claim did not constitute "neglect" within the meaning of the Elder Abuse Act; (2) there is no separate cause of action for willful misconduct; and (3) the willful misconduct and wrongful death claims arose from the Hospital's provision of professional services and were barred by the statute of limitations.

The Court noted that the Act defines neglect as "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." "Neglect includes, but is not limited to, all of the following: (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; (2) Failure to provide medical care for physical and mental health needs. . . .; (3) Failure to protect from health and safety hazards; (4) Failure to prevent malnutrition or dehydration." In short, it refers "to the failure of those responsible . . . to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34)

To recover the enhanced remedies available under the Elder Abuse Act from a health care provider, the plaintiff must prove "by clear and convincing evidence" that "the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of" the neglect.

The Court of Appeal ruled that for conduct to constitute neglect within the meaning of the Elder Abuse Act, the plaintiff must allege facts establishing that the defendant "(1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury." The plaintiff must also allege that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. Finally, the facts constituting the neglect and establishing the causal link between the neglect and the injury "must be pleaded with particularity," in accordance with the pleading rules governing statutory claims.

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The Court held there were not sufficient allegations to constitute neglect within the meaning of the Elder Abuse Act. As to all three hospitalizations, nothing was alleged about the Hospital's denial or withholding of any care or any injury Grant suffered. As to the second hospitalization, although it was alleged that he suffered additional pressure ulcers on his heels, there were no allegations as to how the Hospital or its allegedly false documentation caused the ulcers or other injury to Grant. As to the third hospitalization, the Court held that although the failure to properly medicate and locate the proper size endotracheal tube in time to save Grant's life might constitute professional negligence, absent specific factual allegations indicating at least recklessness, neither failure constituted abuse or neglect within the meaning of the Act. Although neglect that is fraudulent may be sufficient to trigger the enhanced remedies available under the Act, without detrimental reliance, there is no fraud.

Finally, the Court noted that as to the willful misconduct claim, all Plaintiffs had was a survivor claim for professional negligence against the Hospital.

The Court of Appeal affirmed the trial court ruling sustaining the demurrer to the Elder Abuse causes of action without leave to amend.

## COMMENT

Elder Abuse is a rapidly changing area of the law. The Elder Abuse Act allows for enhanced remedies that are otherwise unavailable in most cases. This case tries to add objectivity to the standards for these types of claims. It distills several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D057852.DOC](http://www.courtinfo.ca.gov/opinions/documents/D057852.doc)

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