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# Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers

Robert A. Mead

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**UNPUBLISHED OPINIONS AND CITATION  
PROHIBITIONS: JUDICIAL MUDDLING OF  
CALIFORNIA’S DEVELOPING LAW OF ELDER AND  
DEPENDENT ADULT ABUSE COMMITTED BY HEALTH  
CARE PROVIDERS**

Robert A. Mead<sup>†</sup>

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† State Law Librarian and Director, New Mexico Supreme Court Law Library, and Adjunct Professor, University of New Mexico School of Law and Santa Fe Community College Paralegal Studies Program. J.D., University of New Mexico, 1995, and M.L.S., Emporia State University, 2000. I would like to thank my paralegal interns, Amy Meilander and Margaret Friedenauer, for their invaluable assistance with this article. The views and opinions in this article are solely my own and do not reflect the policies or positions of the New Mexico Supreme Court or Court of Appeals. New Mexico has much to learn from California’s experience, having only recently begun to digitally release the unpublished Memorandum Opinions of the New Mexico Court of Appeals at [www.nmcompcomm.us](http://www.nmcompcomm.us). New Mexico’s judicial rule regarding opinions only prohibits the citation of unpublished memorandum opinions *as precedent*. N.M. R. App. P. 12-405 (West 2010). Further, the New Mexico Court of Appeals allows parties to cite its unpublished opinions as persuasive authority without precedential value. *Gormley v. Coca-Cola Enters.*, 85 P.3d 252, 255 (N.M. Ct. App. 2003). Now that New Mexico’s unpublished memorandum opinions are available on the internet, New Mexico may face the same policy pressures regarding publication and precedent that have divided the California bench and bar.

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I. INTRODUCTION

Arlene Renteria was a thirty-eight-year-old who died in 2003 from an infected bed sore.<sup>1</sup> Ms. Renteria suffered from Huntington’s Chorea, a genetic disorder with symptoms including uncontrolled movement, progressive dementia, psychoses, and an increased risk for skin infection and weight loss due to the degeneration of nerve cells in the brain.<sup>2</sup> She lived at Covina Rehabilitation Center from June 2000 to March 2003, when she was admitted to the East Valley Hospital emergency room.<sup>3</sup> Her care plan at Covina Rehabilitation Center required the nursing staff to monitor her skin for signs of infection each day and seek physician treatment orders if any signs were found.<sup>4</sup> Despite this plan, when she was admitted to the hospital, she had lacerations on her toes and feet, dark red squishy patches on her buttocks, a staphylococcus infection on her left hand, and redness on the skin of her lower back.<sup>5</sup> Additionally, she was dehydrated from infective diarrhea, malnourished, and had vaginal bleeding and a small abrasion on her left minor labia.<sup>6</sup> The infected bed sore on the sacral area of her lower back caused her death several months later.<sup>7</sup>

Ms. Renteria’s heirs sued the nursing home and its parent corporations, for dependent adult abuse, among other causes of action.<sup>8</sup> California’s Medical Injury Compensation Reform Act of 1975 (MICRA) places a cap of \$250,000 on non-economic damages such as pain and suffering in professional negligence cases.<sup>9</sup> Prior

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1. Sababin v. Superior Court, 50 Cal. Rptr. 3d 266, 269 (Ct. App. 2006).  
 2. *Id.*  
 3. *Id.*  
 4. *Id.*  
 5. *Id.*  
 6. *Id.*  
 7. *Id.*  
 8. *Id.* at 268.  
 9. CAL. CIV. CODE § 3333.2(a)–(b) (West 1997); *see also* Bernadette Stafford,

to 1991, California trial lawyers argued that MICRA “markedly depresses the number of claims” against nursing homes and made “most nursing home cases ‘zero damages’ cases because the cost of litigation exceeds the potential value of the award.”<sup>10</sup> Consequently, personal injury attorneys were hesitant to take professional negligence cases that involved elder and dependent adult abuse.<sup>11</sup>

In 1991, in response to this hesitation, the California Legislature amended its original elder abuse act, creating the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), which gives attorneys more incentive to represent clients such as Ms. Renteria’s heirs by increasing the remedies available for substantiated cases of abuse and neglect.<sup>12</sup> Under EADACPA, plaintiffs must prove by clear and convincing evidence that a defendant is liable for neglect or physical abuse, and that the defendant acted with recklessness, oppression, fraud, or malice.<sup>13</sup> If successful, the plaintiff can recover attorney fees and costs, as well as damages for the decedent’s pain and suffering, in addition to compensatory damages.<sup>14</sup> EADACPA excludes liability for simple, or even gross,<sup>15</sup> professional negligence, which is compensated instead under the MICRA tort caps.<sup>16</sup> Thus, the gravamen for an elder or dependent abuse lawsuit against a health care professional in California is whether the defendant’s actions are egregious enough to constitute elder or dependent adult abuse, rather than simple professional negligence.<sup>17</sup>

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*Expedient Efforts for the Elderly: Covenant Care, Inc. v. Superior Court*, 39 U.C. DAVIS L. REV. 699, 708 (2006) (explaining several ways in which MICRA provisions restrict possible awards to plaintiffs).

10. Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 371 (2006).

11. See Marc Hankin, *The Elder Abuse and Dependent Adult Civil Protection Act (CHAP. 774, STATS. 1991)*, 26 BEVERLY HILLS B. ASS’N J. 18, 19 (Winter 1992) (noting that, after 1991, “it will no longer be cheaper to kill an old person than injure one.”).

12. Stafford, *supra* note 9, at 704.

13. CAL. WELF. & INST. CODE § 15657 (West Supp. 2010).

14. *Id.*

15. CAL. WELF. & INST. CODE § 15657.2 (West 2001); see also Stafford, *supra* note 9, at 713 (explaining that under the Elder Abuse Act, petitioners must show proof of a “reckless, malicious, oppressive, or fraudulent act” to obtain enhanced remedies).

16. CAL. CIV. CODE. § 3333.2(a) (West 1997).

17. The most insightful examination of the distinction between elder abuse and medical malpractice is Bryan Carney, *Crossing the Line: Litigation of Elder Abuse Claims Hinges on the Distinction Between Professional Negligence and Actual Abuse*, 30

In *Sababin v. Superior Court*,<sup>18</sup> Ms. Renteria's heirs appealed the trial court's grant of summary judgment on the issue of dependent abuse after it found that there was no evidence that the defendants were guilty of more than professional negligence.<sup>19</sup> In its unpublished opinion, the California Court of Appeal, Second District, Division 2, relied on the holding of *Delaney v. Baker*,<sup>20</sup> a 1999 opinion from the California Supreme Court.<sup>21</sup> The appellate court reversed the trial court and held that there were triable issues as to whether Covina Rehabilitation Center's employees were guilty of reckless, oppressive, or malicious neglect when they failed to follow Ms. Renteria's care plan for maintaining the health of her skin.<sup>22</sup> Because California's Appellate Rule 8.1115(a) prohibits the citation of or reliance upon an unpublished decision, *Sababin* is unavailable to use as precedent as it had not been selected for publication.<sup>23</sup> The court acceded to attorney requests to reissue its opinion as a published opinion, noting:

This opinion was originally filed as a nonpublished opinion on September 13, 2006. We received numerous requests for publication that were well taken because attorneys and trial courts in elder and dependent abuse cases have struggled with the distinction between neglect and professional negligence. The requests revealed that attorneys and trial courts would benefit if we elaborated on certain points in our prior, nonpublished opinion. Rather than issue a piecemeal modification, we opted to grant rehearing on our own motion under California Rules of Court, rule 25(a), vacate the September 13, 2006 opinion, and issue a new and revised opinion.<sup>24</sup>

The *Sababin* court's acknowledgment of the difficulty of parsing the delineation between professional negligence and elder abuse highlights the key policy issue in holding health care

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L.A. LAW. 42 (Oct. 2007). This article is, in part, an extension of Mr. Carney's search for the line, albeit from a plaintiff's, rather than a nursing home defense, perspective. While both plaintiffs and defendants may occasionally tactically benefit from an ambiguous line, the bar, the health care industry, and even the general public need to come to a general understanding of the difference between negligent and abusive medical care.

18. 50 Cal. Rptr. 3d 266 (Ct. App. 2006).

19. *Id.* at 268.

20. *Delaney v. Baker*, 971 P.2d 986 (Cal. 1999).

21. *Sababin*, 50 Cal. Rptr. 3d at 268.

22. *Id.*

23. CAL. RULES OF COURT, R. 8.1115(a).

24. *Sababin*, 50 Cal. Rptr. 3d at 268 n.5.

professionals liable for elder or dependent abuse in egregious cases: put simply, where is the line between negligent medical malpractice and reckless elder abuse?<sup>25</sup>

This article contends that California's appellate publication practices and the related prohibition on the citation of, or reliance upon, unpublished opinions interfere with the rational process of interpreting EADACPA to determine whether particular types of behaviors by health care professionals constitute elder or dependent adult abuse or neglect. Four areas of analysis are necessary for understanding the impact of unpublished decisions on California's elder abuse law: first, the enactment of EADACPA and the particulars of the Act;<sup>26</sup> second, the California Supreme Court's interpretation of EADACPA in *Delaney* as it applies to health care professionals;<sup>27</sup> third, *Delaney*'s appellate progeny, both published and unpublished, where the California appellate courts have tried to implement *Delaney*'s distinction between professional negligence and elder abuse;<sup>28</sup> and finally, California's appellate publication rules, including their historical development and the 2007 revisions.<sup>29</sup> The article concludes with the suggestion that the California Supreme Court abandon its citation prohibition for unpublished opinions.<sup>30</sup>

## II. ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT

In 1975, the California Legislature enacted MICRA in response to concern that medical malpractice awards were making it difficult for physicians to afford malpractice insurance.<sup>31</sup> The MICRA provisions include a hard cap for non-economic damages, specifically that "[i]n any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary damage" and that "[i]n no action shall the amount of damages for non-economic losses exceed two

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25. See Carney, *supra* note 17, at 42.

26. See *infra* Part II.

27. See *infra* Part III.

28. See *infra* Part IV.

29. See *infra* Part V.

30. See *infra* Part VI.

31. *Delaney v. Baker*, 971 P.2d 986, 992 (Cal. 1999).

hundred fifty thousand dollars (\$250,000).<sup>32</sup> As an example of the application of the MICRA cap, in 2002, a diabetic nursing home resident was awarded \$3 million by a jury for pain and suffering after he underwent a bilateral amputation due to substandard care.<sup>33</sup> Despite the jury verdict, the court applied the MICRA cap and reduced the judgment to \$250,000.<sup>34</sup>

In addition to the cap on non-economic damages, MICRA has other provisions that curtail recovery against health providers. MICRA restricts attorney fees<sup>35</sup> and prohibits recovery for pain and suffering once a patient dies.<sup>36</sup> Another statute, Section 425.13 of the California Code of Civil Procedure, also impedes meritorious elder abuse actions by procedurally limiting punitive damage awards by requiring that plaintiffs obtain a court order prior to filing a claim for punitive damages.<sup>37</sup> Plaintiffs must prove that there is a substantial likelihood of prevailing prior to being allowed to plead for punitive damages.<sup>38</sup>

These remedy caps and procedural hurdles dampened the willingness of attorneys to sue on behalf of elder abuse victims.<sup>39</sup> In

32. CAL. CIV. CODE § 3333.2(a)–(b) (West 1997).

33. Rustad, *supra* note 10, at 372 (citing *Ollison v. Eskaton Homestead of Fair Oaks*, No. 00AS05801 (Cal. Super. Ct. 2002)).

34. *Id.*

35. CAL. BUS. & PROF. CODE § 6146 (West 2008).

36. CAL. CIV. PROC. CODE § 377.34 (West 2004); *see also* BRIAN BURWELL & EILEEN TELL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE NURSING HOME LIABILITY INSURANCE MARKET: A CASE STUDY OF CALIFORNIA*, 8 (June 2006), <http://aspe.hhs.gov/daltcp/reports/2006/NHliab-CA.pdf>.

37. CAL. CIV. PROC. CODE § 425.13(a) (West 2004); *see, e.g.*, *Aquino v. Superior Court*, 26 Cal. Rptr. 2d 477, 481 (Ct. App. 1993) (discussing the “procedure for the trial court to determine whether punitive damages may be alleged against health care providers in any action for damages arising out of alleged professional negligence”).

38. CAL. CIV. PROC. CODE § 425.13(a); *see, e.g.*, *Aquino*, 26 Cal. Rptr. 2d at 481 (noting section 425.13’s requirement that the plaintiff establish such a “substantial likelihood”).

39. Hankin, *supra* note 11, at 19. Hankin states:

Talk about attorneys’ fees may seem meaningless since frail abused elders and dependent adults often die before trial. Many a case failed when the victim died before damages were awarded. Fearing an expensive loss of time and money, attorneys usually declined to handle contingency cases of obvious and severe abuse merely because the victim was rendered so frail by the abuse that death might come before the damage award, ending the hope of a truly significant recovery. Defendants have, therefore, had every incentive to delay. No longer. Damages for pain and suffering will be recoverable even after the victim’s death, up to \$250,000, if the plaintiff satisfies the tests for the recovery of attorneys’ fees. Contingency cases proving, by clear and convincing evidence, a

1991, EADACPA was passed by the California Legislature in response to lobbying by the Beverly Hills Bar Association and other advocates regarding the poor treatment of elders in nursing homes.<sup>40</sup> The legislature made a number of critical findings as part of the legislative process, findings that later proved instrumental in interpreting the legislature's intent in passing EADACPA.<sup>41</sup> Recognizing that elders may be "subjected to abuse, neglect, or abandonment,"<sup>42</sup> the legislature desired to direct the state's attention to this significant portion of the population.<sup>43</sup> In addition, the legislature found that elders were vulnerable and dependent upon families or caretakers, putting them at a greater risk of abuse.<sup>44</sup> Because of a hesitancy to take elder abuse cases caused, in part, by statutory limitations on damages, the legislature also saw a need "to enable interested persons to engage attorneys to take up the cause,"<sup>45</sup> providing an incentive to potential advocates. Thus, the recoverable damages once restricted by MICRA became possible through cases prosecuted under EADACPA.<sup>46</sup>

The legislature made EADACPA broad enough to cover situations where an individual over the age of eighteen is vulnerable to abuse and neglect.<sup>47</sup> The statute defines the term "elder" as "any person residing in this state, 65 years of age or older,"<sup>48</sup> but it also extends protection to dependent adults—those between the ages of eighteen and sixty-four with "physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights."<sup>49</sup> Within EADACPA, "abuse of an elder or a dependent adult" is defined to specifically cover physical and financial abuse, abandonment, isolation, and

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reckless or intentional abuse of the frail are now viable.

*Id.*

40. *Id.* at 18–19; *see also* BURWELL & TELL, *supra* note 36, at 8 (noting that EADACPA was enacted "following a series of studies on the quality of life for California's elderly.>").

41. *See* Delaney v. Baker, 971 P.2d 986, 991–92 (Cal. 1999).

42. CAL.WELF. & INST.CODE § 15600(a) (West 2001).

43. *See id.* § 15600(b).

44. *Id.* § 15600(d).

45. *Id.* § 15600(j).

46. *See generally* Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599 (2002) (calling for the reform of EADAPCA damage caps).

47. CAL.WELF. & INST.CODE § 15600(c).

48. *Id.* § 15610.27.

49. *Id.* § 15610.23(a) (West Supp. 2010).

abduction.<sup>50</sup> In more detail, physical abuse is defined with references to the Penal Code's definitions of assault, battery, sexual assault, sexual battery, rape, incest, sodomy, and lewd or lascivious acts.<sup>51</sup> In addition to the listed crimes, physical abuse includes the "[u]se of a physical or chemical restraint or psychotropic medication" as a form of punishment, for a period beyond what the physician or surgeon ordered, or using the medication without a physician's order.<sup>52</sup>

EADACPA broadly defines neglect as a caregiver's failure to "exercise that degree of care that a reasonable person in a like position would exercise."<sup>53</sup> Neglect specifically includes: the "failure to assist in personal hygiene, or in the provision of food, clothing, or shelter";<sup>54</sup> the failure to provide medical or mental health care;<sup>55</sup> the "failure to protect elders from health and safety hazards";<sup>56</sup> and the "[f]ailure to prevent malnutrition or dehydration."<sup>57</sup> The definition also addresses the need to protect elders and dependent adults from self-neglect.<sup>58</sup>

Section 15657 of the California Welfare and Institutions Code is the key implementing section which expands the available remedies in order to fulfill the legislature's goal of enticing attorneys to represent elders and dependent adults:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63 [or] neglect as defined in Section 15610.57 . . . and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

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50. *Id.* § 15610.07 (West 2001). This article intentionally excludes from analysis all forms of elder abuse except physical abuse and neglect. While financial abuse is a significant problem in both California and the rest of the United States, it is different in both kind and form from abuse and neglect perpetrated by health care practitioners, with the possible exception of Medicaid and Medicare fraud.

51. *Id.* § 15610.63 (West Supp. 2010).

52. *Id.* § 15610.63(f).

53. *Id.* § 15610.57 (West 2001).

54. *Id.* § 15610.57(b)(1).

55. *Id.* § 15610.57(b)(2).

56. *Id.* § 15610.57(b)(3).

57. *Id.* § 15610.57(b)(4).

58. *Id.* § 15610.57(b)(5) (West Supp. 2010).

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.<sup>59</sup>

Section 15657 requires that plaintiffs prove, by clear and convincing evidence, that the defendant committed abuse or neglect while acting in a reckless, oppressive, fraudulent, or malicious manner.<sup>60</sup> This heightened burden of proof was added during the legislative process in response to opposition to EADACPA from the California Association of Health Facilities.<sup>61</sup> If this burden is met, additional remedies are available, including attorney fees<sup>62</sup> and non-economic damages with a \$250,000 cap.<sup>63</sup> Punitive damages are permitted if the plaintiff can show that the defendant acted with oppression, fraud, or malice, or that a

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59. *Id.* § 15657 (West 2001).

60. *Id.*

61. *Delaney v. Baker*, 971 P.2d 986, 994 (Cal. 1999).

62. CAL. WELF. & INST. CODE § 15657.1. This section states:

The award of attorney's fees pursuant to subdivision (a) of Section 15657 shall be based on all factors relevant to the value of the services rendered, including, but not limited to, the factors set forth in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California, and all of the following: (a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained. (b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability. (c) The reasonableness and timeliness of any written offer in compromise made by a party to the action.

*Id.*

63. *Id.* § 15657(b) (West Supp. 2010); CAL. CIV. CODE § 3333.2(b) (West 1997).

defendant employer employed an individual with “advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded.”<sup>64</sup> On its face, section 15657.2 exempts health care providers from liability for elder abuse and neglect for actions defined as professional negligence:

Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider’s alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action.<sup>65</sup>

Unfortunately, the legislature did not define “professional negligence” within EADACPA, forcing courts to look back to MICRA’s definition for guidance:

“Professional negligence” means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.<sup>66</sup>

The legislature also failed to define “health care practitioner” within EADACPA. This has made it somewhat unclear as to whom the professional negligence exemption applies to under section 15657.2.

MICRA defines a “health care provider” as any person licensed or certified pursuant to Division 2 of the Business and Professions Code: licensed osteopaths or chiropractors, clinics, health dispensaries and facilities, and “the legal representatives of a health care provider.”<sup>67</sup> In contrast, EADACPA defines two different groups having “care and custody” of elders and dependent adults:

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64. CAL. CIV. CODE § 3294.

65. CAL. WELF. & INST. CODE § 15657.2.

66. CAL. CIV. CODE § 3333.2 (West 1997). Not surprisingly, the same definition for “professional negligence” is used in California Civil Procedure Code section 364 and California Civil Procedure Code section 340.5. CAL. CIV. PROC. CODE §§ 340.5, 364 (West 2004).

67. CAL. CIV. CODE §§ 3333.1–3333.2.

“health practitioner” and “care custodian.”<sup>68</sup> “Health practitioner” includes specific professions: “physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, licensed clinical social worker or associate clinical social worker, marriage, family, and child counselor,” and also includes the same broadly inclusive clause as MICRA: “or any other person who is currently licensed under Division 2 (commencing with section 500) of the Business and Professions Code.”<sup>69</sup> Additionally, the definition includes medical emergency technicians, paramedics, psychologist assistants, marriage, family, and child counselor trainees, unlicensed marriage, family, and child counselor interns, coroners, and state or county public health or social service employees “who treat[] an elder or a dependent adult for any condition.”<sup>70</sup> These practitioners provide medical and related services to elders and dependent adults.

In addition to medical care, elders and dependent adults often receive varying degrees of care in day-to-day living tasks; EADACPA defines those responsible for providing such care as “care custodians.”<sup>71</sup> The definition encompasses “an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff.”<sup>72</sup> Twenty-four types of public and private agencies are listed, including twenty-four-hour health facilities, clinics, home-health agencies, day care resources, state social services and county welfare departments, with an all-encompassing final listing of “[a]ny other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.”<sup>73</sup>

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68. CAL. WELF. & INST. CODE § 15610.37 (West Supp. 2010).

69. *Id.*

70. *Id.*

71. *See id.*

72. *Id.* § 15610.17.

73. *Id.*

The legislature left the relationship between sections 15657 and 15657.2 unclear, perhaps intentionally.<sup>74</sup> Specifically, it failed to address the issue of whether professional negligence was defined broadly enough to encompass all actions by a health care provider—as suggested by the MICRA definition of professional negligence—or whether there are certain behaviors that are egregious enough that they go beyond professional negligence and constitute abuse and neglect. Further, EADACPA is unclear on whether all activities of a health care provider are considered medical in nature or whether a health care provider can also be independently responsible as a care custodian. Judicial interpretation, starting in *Delaney v. Baker*, has begun to answer these questions.<sup>75</sup>

### III. *DELANEY v. BAKER*: HOLDING HEALTH CARE PRACTITIONERS ACCOUNTABLE FOR ELDER AND DEPENDENT ADULT ABUSE

In *Delaney v. Baker*, the California Court of Appeal, First District, affirmed a jury verdict in favor of Kay Delaney, a plaintiff who sued the Meadowood Nursing Center and its administrators, Calvin Baker, Sr. and Calvin Baker, Jr., for the wrongful death of her mother.<sup>76</sup> Kay Delaney's mother, Rose Wallien, was a resident of Meadowood for about four months.<sup>77</sup> Ms. Wallien, an eighty-eight-year-old, entered the Meadowood facility in April, 1993, in order to receive skilled nursing care due to a broken ankle.<sup>78</sup> On August 9, 1993, she died from infection caused by Stage III and IV pressure ulcers on her ankles, feet, and buttocks that she developed while at Meadowood.<sup>79</sup> Her Stage IV pressure sores were deep enough to expose bone.<sup>80</sup> Based on the reckless neglect of Ms. Wallien, the jury awarded the plaintiff damages for medical

74. See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 302 n.235 (2000) (“When members of Congress focus on a particular issue but fail to reach a collective decision about how to resolve it, they sometimes compromise by enacting intentionally ambiguous language that transfers the issue to the courts.”).

75. See *Delaney v. Baker*, 69 Cal. Rptr. 2d 645, 645–46, 652 (Ct. App. 1997).

76. *Id.* at 646.

77. *Id.*

78. *Id.*

79. *Delaney v. Baker*, 971 P.2d 986, 988 (Cal. 1999).

80. See W. Andrew Arnold & Brian E. Arnold, *Helping Society's Most Vulnerable: Nursing Home Litigation*, 14 S.C. LAW. 29, 32 (Mar. 2003) (“Stage IV is a full skin loss with extensive damage to the skin and underlying tissue, involving necrosis (rotting of skin) and may cause damage to the muscle and bone.”). Stage III and IV pressure ulcers are evidence of significant neglect. *Delaney*, 971 P.2d at 988.

expenses, pain and suffering, and attorney's fees and costs.<sup>81</sup> The defendants appealed to the California Court of Appeal, First District, and then to the California Supreme Court.

The key issue in both appellate court opinions was whether section 15657 of EADACPA was applicable to recklessly negligent health care professionals despite the language of section 15657.2.<sup>82</sup> The First District Court of Appeal held that health professionals could be held accountable under section 15657 despite the language of section 15657.2.<sup>83</sup> It based its decision on the definition of "specifically apply" in order to determine which professional negligence laws MICRA limits apply to:

The question, however, is whether section 15657.2 states that MICRA statutes shall *solely* govern or shall *also* govern. Appellants answer that the Legislature intended that MICRA alone should apply when the cause of action is based on the health care provider's alleged professional negligence. Appellants' argument implicitly assumes that the application of MICRA or EADACPA is an either-or proposition, but that both cannot apply in the same case. We disagree with this assumption. Section 15657 solely displaces statutes of *general* applicability, such as Code of Civil Procedure section 377.34, which limits the damages recoverable for a decedent's injuries or death, and Code of Civil Procedure section 1021, which limits the recovery of attorney fees. EADACPA's enhanced-remedy provisions do not conflict with any specific provision of MICRA.<sup>84</sup>

More importantly, the First District noted that EADACPA was a remedial statute which should be interpreted liberally to preserve the legislature's intention to remedy some of the evils of elder abuse and neglect.<sup>85</sup> Thus, it concluded that its "interpretation of section 15657.2 respects the legislature's intent by leaving intact the incentives created by EADACPA even where the cause of action is 'based on the health care provider's alleged professional negligence.'"<sup>86</sup>

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81. *Delaney*, 971 P.2d at 989.

82. *Id.* at 988.

83. *Delaney v. Baker*, 69 Cal. Rptr. 2d 645, 649 (Ct. App. 1997).

84. *Id.*

85. *Id.* at 650.

86. *Id.* (quoting CAL. WELF. & INST. CODE § 15657.2 (West 2010)).

The First District's decision in *Delaney* directly conflicted with the Second District's opinion in *Mueller v. Saint Joseph Medical Center*,<sup>87</sup> which held that EADACPA's enhanced remedies in section 15657 were excluded by section 15657.2 when claims were based on the rendition of professional services by health care providers, even if the providers acted in a manner that was recklessly negligent.<sup>88</sup> The *Mueller* court based this holding on precedent defining the term "based on" when it is used by the California Legislature.<sup>89</sup> The First District rejected this holding, noting that "[o]ur colleagues reached this conclusion without analysis of section 15657.2 as a whole or consideration of the legislative purposes of the statutory scheme."<sup>90</sup> Presumably because of the split in the districts, the California Supreme Court granted the petition for review.<sup>91</sup>

The California Supreme Court affirmed the First District's decision, but with different reasoning. Associate Justice Stanley Mosk, the author of the supreme court opinion, noted that there are three distinct ways to view the relationship between sections 15657 and 15657.2: first, following the court of appeal's approach and interpreting away any conflict between the sections;<sup>92</sup> second, following the defendant's proposed approach, which would "broadly exempt from the heightened remedies of section 15657 health care providers who recklessly neglect elder and dependent adults";<sup>93</sup> and finally, the approach of "the amici curiae Consumer Attorneys of California (joined to some degree by California Advocates for Nursing Home Reform, Inc.)."<sup>94</sup> The court adopted the third approach, but Associate Justice Janice Rogers Brown concurred in the result because she preferred the argument of the court of appeal.<sup>95</sup>

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87. *Mueller v. Saint Joseph Med. Ctr.*, 68 Cal. Rptr. 2d 668 (Ct. App. 1997).

88. *Id.* at 670–71.

89. *Id.* at 670–72.

90. *Delaney*, 69 Cal. Rptr. 2d at 652.

91. *See Delaney v. Baker*, 951 P.2d 1183 (Cal. 1998).

92. According to Associate Justice Mosk:

[S]ection 15657 is not thereby limited because section 15657.2 requires only that causes of action based on professional negligence be governed by laws that *specifically* apply to professional negligence actions, in particular the package of legislation referred to as the MICRA, and the statutes that are limited by section 15657 do not "specifically apply" to professional negligence actions.

*Delaney v. Baker*, 971 P.2d 986, 989 (Cal. 1999).

93. *Id.* at 990.

94. *Id.*

95. *Id.* at 998.

Although the supreme court generally accepted the court of appeal's reliance on the remedial nature of EADACPA, it rejected the court of appeal's reliance on the definition of "specifically apply" and opted instead to define "based on professional negligence" much more narrowly than the defendants and the *Mueller* court.<sup>96</sup> It held that "reckless neglect" under section 15657 is distinct from causes of action "based on professional negligence" within the meaning of section 15657.2.<sup>97</sup> Consequently, health care providers who engage in reckless neglect are acting beyond professional negligence and are thus subject to section 15657's enhanced remedies.<sup>98</sup> The court explained:

The legislative history shows that the Court of Appeal's interpretation is not plausible; rather it indicates that those who enacted the statute thought that the term "professional negligence," at least within the meaning of section 15657.2, was mutually exclusive of the abuse and neglect specified in section 15657. This is seen most clearly in the Legislative Counsel's Digest to the 1991 amendments to the Elder Abuse Act, which included section 15657 and 15657.2. The digest describes section 15657.2 as follows: "This bill would also specify that actions against health care professionals for professional negligence shall be governed by laws specifically applicable to professional negligence actions, *rather than by these provisions.*"<sup>99</sup>

Thus, the court held that "[i]n order to obtain the remedies available in section 15657, 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."<sup>100</sup>

This conduct is expressly distinguished from professional negligence. The court explained that oppressive, fraudulent, or malicious conduct involves "'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature."<sup>101</sup> In contrast to negligence, the court noted that recklessness "involves more

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96. *See id.* at 997.

97. *Id.* at 998.

98. *Id.* at 997.

99. *Id.* at 990 (internal citations omitted) (quoting LEGIS. COUNSEL'S DIG., S.B. No. 679, Reg. Sess., at 1 (Cal. 1991-1992)).

100. *Id.* at 991.

101. *Id.* (quoting CAL. CIV. CODE § 3294).

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.’<sup>102</sup>

*Delaney*’s general proposition, that the enhanced remedies of section 15657 are only available in cases of “reckless, oppressive, fraudulent, or malicious conduct” committed against an elder or dependent adult, is clear enough on the surface, but difficult to parse against the facts in medical abuse cases. Bryan Carney, a California nursing home defense lawyer, explains:

*Delaney*’s articulation of recklessness is a helpful but not definitive yardstick for distinguishing between elder abuse and professional negligence. Its facts are deplorable, but not many cases lie at that end of the spectrum. Most cases fall somewhere in the middle, and *Delaney* does not indicate what facts are needed, either at the pleading or summary judgment stage, for a case to cross the line separating elder abuse from professional negligence. That middle ground is being defined by the courts of appeal. With increasing frequency, inquiries concerning “What did they know?” and “When did they know it?” are being used to draw the line between professional negligence and elder abuse.<sup>103</sup>

The need for ample guidance from the appellate courts fleshing out the contours of the difference between professional negligence and reckless elder abuse is evident. Unfortunately, as shown below in Parts IV and V, the decision whether to publish, partially publish, or even depublish relevant opinions pursuant to the California’s appellate publication rule interferes with this process and the evolution of the law. Even in *Delaney*, the court of appeal partially published their decision, attempting to explain:

In the published portion of our opinion, we reject appellants’ interpretation of EADACPA; in the unpublished portion of this decision, we agree with appellants’ contention that the special damages award was not supported by substantial evidence and we reject appellants’ argument that the Bakers should not be held liable personally. In sum, we affirm in part and reverse in part.<sup>104</sup>

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102. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965)).

103. Carney, *supra* note 17, at 44–45.

104. *Delaney v. Baker*, 69 Cal. Rptr. 2d 645, 646 (Ct. App. 1997).

Without access to the physical court file, it is impossible for researchers to gain access to parts II.A.4, II.B, and II.C of the opinion, thus rendering silent part of the foundation for one the most important national cases applying elder abuse standards to health practitioners.

#### IV. *DELANEY'S* PROGENY

The opinions—both published and unpublished—that cite *Delaney* as authority constitute the universe of potential precedent governing the question of whether a particular failure by a health care provider constitutes abuse and neglect or professional negligence.<sup>105</sup> As of June 2010 there are 117 published and unpublished case opinions and orders that cite *Delaney*. Because of the variation between the two primary citators, Shepard's on LexisNexis, and KeyCite on Westlaw,<sup>106</sup> this analysis constitutes a conglomeration of the data provided by both citators. Of the 117 citations on KeyCite and Shepard's, twenty-one are orders from the California Superior Courts included in Westlaw, but not LexisNexis.<sup>107</sup> These orders are excluded from this analysis as they clearly are not precedent, except for the parties involved in the litigation, leaving ninety-six opinions that cite *Delaney*, including seven federal district court opinions, two of which are published. These opinions are examined in detail below, organized by court.

##### A. *California Supreme Court*

The California Supreme Court has cited *Delaney* nine times, with two of the nine opinions addressing issues relating to professional negligence and elder abuse.<sup>108</sup> The earlier of these two

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105. A search of both annotated statutes as well as an independent search in Westlaw using 15657 and 15657.2, the relevant statutory section numbers, revealed no additional cases that cited *Delaney* that were not already in the list.

106. See William L. Taylor, *Comparing KeyCite and Shepard's for Completeness, Currency, and Accuracy*, 92 LAW LIBR. J. 127 (2002).

107. KeyCite's inclusion of trial court orders alongside published and unpublished opinions is confusing and misleading, as the trial court orders do not constitute precedent for future cases. Thomson Reuters should include orders as a separate category, such as law reviews, rather than including them as equivalents to appellate opinions.

108. The seven irrelevant opinions are: *Cacho v. Boudreau*, 149 P.3d 473 (Cal. 2007); *People v. Canty*, 90 P.3d 1168 (Cal. 2004); *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30 (Cal. 2003); *People v. Seneca Ins. Co.*, 62 P.3d 81 (Cal. 2003); *Preferred Risk Mut. Ins. Co. v. Reiswig*, 980 P.2d 895 (Cal. 1999); *People v. Birkett*,

opinions, *Mueller v. Saint Joseph Medical Center*,<sup>109</sup> was contemporaneous with *Delaney* in the courts of appeal, and came to the opposite conclusion.<sup>110</sup> As discussed in Part II, the California Supreme Court vacated the Court of Appeal, Second District's decision and remanded the case with instructions to reconsider the case in light of *Delaney*. The second decision, *Covenant Care, Inc. v. Superior Court*,<sup>111</sup> is tangential to *Delaney*'s holding but is instructive regarding the court's interpretation of EADACPA.<sup>112</sup>

In *Covenant Care, Inc.*, the plaintiffs, adult children of an elderly decedent named Juan Inclan, alleged that the defendant nursing home corporation "conspired and otherwise 'acted with malice and oppression' in moving and treating decedent in order to maximize revenue from the Medicare and Medicaid programs and to avoid regulatory penalties for noncompliance with certain federal and state regulations."<sup>113</sup> They further alleged:

While decedent was at defendants' nursing facility . . . defendants knew he was suffering from Parkinson's disease and was unable to care for his personal needs. Defendants nevertheless failed to provide decedent with proper care, nutrition, hydration, and medication. Defendants' conduct was in conscious disregard of decedent's rights and safety. Decedent was left in his bed, unattended and unassisted, for excessively long periods. Although decedent increasingly could not feed or hydrate himself, he was for long periods not provided assistance with these activities. As a result, decedent was inadequately stimulated, became malnourished, and lost much of his body weight. Decedent was left in his excrement for long periods; he developed ulcers on his body that exposed muscle and bone and became septic; and he also became severely dehydrated. As decedent deteriorated, he manifested signs and symptoms of starvation, dehydration, neglect, and abuse.<sup>114</sup>

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980 P.2d 912 (Cal. 1999); and *Barris v. County of Los Angeles*, 972 P.2d 966 (Cal. 1999).

109. 977 P.2d 66 (Cal. 1999).

110. See *Delaney v. Baker*, 69 Cal. Rptr.2d 645, 652 (Ct. App. 1997).

111. 86 P.3d 290 (Cal. 2004).

112. *Id.* at 295.

113. *Id.* at 292.

114. *Id.* at 292-93.

The supreme court granted review to resolve a conflict in the courts of appeal regarding the applicability of Section 425.13(a) of the California Code of Civil Procedure, which imposes procedural roadblocks on plaintiffs seeking punitive damages arising out of the professional negligence of a health care provider, to EADACPA. The court held that section 425.13(a) procedures do not apply in cases where health professionals commit elder abuse or neglect, noting that nothing in the text, legislative history, or purposes of either section 425.13(a) or EADACPA suggest that the “Legislature intended to afford health care providers that act as elder custodians, and that egregiously abuse the elders in their custody, the special protections against exemplary damages they enjoy when accused of negligence in providing health care.”<sup>115</sup> The court noted that elder abuse committed by a health care provider is not an action that is “directly related” to the provider’s professional services and that “a failure to fulfill custodial duties owed by a custodian who happens also to be a health care provider, such abuse is at most incidentally related to the provider’s professional health care services.”<sup>116</sup>

Practically, *Covenant Care, Inc.* notes that some health care institutions perform both custodial functions and professional medical care and the fact that health care professionals do both interrelated functions does not convert all activities into professional medical care subject to various tort reform statutes.<sup>117</sup> Thus, the court applied *Delaney*’s reasoning to again distinguish professional negligence both from egregious abuse committed by health care professionals, and from custodial functions conducted by health care institutions and their professional employees.

*B. Court of Appeal, First District*

The Court of Appeal, First District, has seventeen opinions that cite *Delaney* as authority for various propositions of law, but only four of the opinions, all unpublished, examine the differences between professional negligence and elder abuse.<sup>118</sup> One of the

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115. *Id.* at 292.

116. *Id.* at 298–99.

117. *Id.* at 299.

118. Two of the otherwise irrelevant thirteen decisions are published opinions that examine other aspects of EADACPA in detail. They are: *Fitzhugh v. Granada Healthcare & Rehab. Ctr., LLC*, 58 Cal. Rptr. 3d 585, 589 (Ct. App. 2007) (holding that in wrongful death and Patient Bill of Rights suit, applying arbitration clause to

two more substantive of these opinions is *Leong v. Woods*,<sup>119</sup> where the court of appeal reversed the trial court's order of summary judgment against the plaintiff in an action for elder abuse and the wrongful death of his mother, Susan Leong.<sup>120</sup> Ms. Leong was a seventy-eight year-old diabetic with extensive cardiovascular disease who had fallen and broken a hip.<sup>121</sup> While recovering in the hospital from surgery, she developed Stage II heel ulcers and was transferred to the Ygnacio Valley Care Center where the defendant, Dr. James Woods, was the attending physician.<sup>122</sup> The defendant admitted that he had probably not removed her bandages to check her heels upon her admission on January 10, 2002.<sup>123</sup> Then, he then went on vacation until February 1, 2002.<sup>124</sup> He again did not check her ulcers on February 4, 2002, when a nurse told him that they had not healed.<sup>125</sup> Plaintiff's expert witness, Dr. Kathryn Locatell, testified:

Woods's care of Leong while her attending physician "fell below the standard of care, was gross neglect, and was reckless. A patient in a skilled nursing facility simply should not have Stage II heel blisters advance to open,

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survivors of elder would "minimize the Legislature's expression of public policy that under no circumstances may a patient or resident waive his or her right to sue for violations of rights under the Patients Bill of Rights, or other federal and state laws and regulations, which would include the existing Elder Abuse and Dependent Adult Civil Protection Act."); and *Easton v. Sutter Coast Hosp.*, 95 Cal. Rptr. 2d 316 (Ct. App. 2000) (suit against doctor and nurse by children of deceased elder for reporting suspected elder abuse and neglect dismissed because mandatory reporting statute provides absolute, rather than qualified, immunity from suit). The remaining irrelevant opinions are: *In re Estate of Kloor*, Nos. A117181, A117207, 2009 WL 2952224 (Cal. Ct. App. Sep 15, 2009); *Clark v. Clark*, No. A11811, 2009 WL 1863897 (Cal. Ct. App. June 29, 2009); *Fernandez v. Beaton*, No. A118592, 2009 WL 1588055 (Cal. Ct. App. June 8, 2009); *Jay v. Kubly*, No. A117103, 2008 WL 77572 (Cal. Ct. App. Jan 8, 2008); *Cohen v. Five Brooks Stable*, 72 Cal. Rptr. 3d 471 (Ct. App. 2008); *Feaster v. Wynn*, No. A105792, 2007 WL 1649414 (Cal. Ct. App. June 7, 2007); *Trigueros v. Transamerica Corp.*, No. A108936, 2006 WL 2724034 (Cal. Ct. App. Sept. 25, 2006); *Megrabian v. Saenz*, 30 Cal. Rptr. 3d 262 (Ct. App. 2005); *Feied v. Regents of the Univ. of Cal.*, No. A102968, 2004 WL 378186 (Cal. Ct. App. Mar. 2, 2004); *Moon v. Guardian Postacute Servs., Inc.*, 116 Cal. Rptr. 2d 218 (Ct. App. 2002); and *Kavanaugh v. W. Sonoma Cnty. Union High Sch. Dist.*, 111 Cal. Rptr. 2d 829 (Ct. App. 2001).

119. No. A108730, 2006 WL 52260 (Cal. Ct. App. Jan. 10, 2006).

120. *Id.* at \*1.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at \*2.

infected Stage IV ulcers within eight weeks and should not go from being 'well-nourished' to being 'significantly malnourished' within six weeks. Proper monitoring and caring for patients prevent this type of progression of these conditions."<sup>126</sup>

Locatell noted that Woods failed to adequately assess Leong's heels and her nutritional requirements during her stay at Ynacio Valley Care Center.<sup>127</sup> Locatell stated:

From the time of her admission (January 10, 2002) until the date he transferred the patient for surgical intervention of the infected ulcers (March 5, 200[2]), there is no evidence that he examined the wounds on any specific date. Mrs. Leong's heel ulcers continued to progress and her nutritional status continued to decline throughout the time Dr. Woods was her attending physician. Dr. Woods's failure to properly diagnose the condition of the wounds and Mrs. Leong's malnutrition in a timely manner led to his failure to issue appropriate orders for her care.<sup>128</sup>

The court held that:

The question is whether Woods's failure to ensure that others complied with his orders and his failure to notice or make sure that Leong's weight was being taken regularly demonstrated a "deliberate disregard" of the 'high degree of probability' that an injury will occur" or made a "conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it." Woods's testimony that he could not recall whether he reviewed Leong's chart to determine whether his orders concerning care for her heel wounds were followed and his testimony that he normally did not check to see if his orders had been followed does evince a callous disregard.<sup>129</sup>

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126. *Id.* at \*5.

127. *Id.*

128. *Id.*

129. *Id.* at \*16 (quoting *Delaney v. Baker*, 971 P.2d 986, 991 (Cal. 1999)) (citation omitted).

In contrast to *Leong*, in *Trengali v. Northern California Presbyterian Homes, Inc.*,<sup>130</sup> the Court of Appeal, First District, affirmed the trial court's dismissal of an elder abuse claim against the nursing staff at The Sequoias, a residential facility for the elderly where Helen Steffen spent seventeen years of her life.<sup>131</sup> Ms. Steffen was suffering from extreme pain, swelling, and abdominal cramps over a period of five weeks.<sup>132</sup> One of Ms. Steffen's daughters stopped a doctor on his rounds and asked him to help her mother.<sup>133</sup> He replied "he could not do anything because there was nothing wrong with Ms. Steffen."<sup>134</sup> A month later, another daughter took her to the emergency room where they intubated 400cc's of gastric and fecal matter through a tube in her nose.<sup>135</sup> The hospital found an ileocecal tumor had blocked her bowel.<sup>136</sup> After a month of care in the hospital, Ms. Steffen was discharged to another nursing home, where she died three months later.<sup>137</sup> Her heirs brought suit against the nursing home's staff for failing to "inform the attending physicians of Ms. Steffen's true medical status" resulting in a "denied . . . opportunity to be properly diagnosed and to receive medical care in the first instance."<sup>138</sup> Ms. Steffen's heirs argued that earlier detection of the tumor would have improved her quality of life during her last year.<sup>139</sup> The Court of Appeal, First District, rejected the elder abuse claim, explaining:

In contrast to these cases illustrating egregious abuse of the elderly, this case involves an allegation that members of the nursing staff at The Sequoias were remiss in not reporting sufficient information to the physicians so that

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130. No. A094106, 2002 Cal. App. Unpub. LEXIS 4742 (Ct. App. Jan. 18, 2002). Somewhat surprisingly, this case is not included in Westlaw's California case database. If appellate courts release unpublished opinions to Thomson Reuters and LexisNexis for *de facto* publication in the two big legal research services, it is imperative that everyone involved in the process ensures that the databases are complete and correct. "Old-fashioned" publication in print reporters gives the publishers ample opportunity to check for error, including missing opinions. Digital publication needs to be conducted with the same degree of care.

131. *Id.* at \*3.

132. *Id.* at \*4.

133. *Id.*

134. *Id.*

135. *Id.* at \*5.

136. *Id.*

137. *Id.*

138. *Id.* at \*5-6.

139. *Id.* at \*9.

the cause of Ms. Steffen's abdominal distress could be more rapidly diagnosed. Significantly, there has been no showing in this case that the nursing staff ignored Ms. Steffen's medical condition, deprive [sic] her of needed care in any significant sense, or displayed an intention of harming her by withholding treatment. Instead, the undisputed evidence demonstrates rather conclusively that the nursing staff was not fully aware of the significance of some of the warning signs of intestinal blockage displayed by Ms. Steffen and may have been remiss in not communicating more effectively with her physicians. In sum, the proof falls far short of supporting a finding that the nursing staff acted with recklessness, oppression, fraud or malice in providing medical care to Ms. Steffen.

Appellants attempt to promote their claim of negligence to one of recklessness by dressing it up with bits and pieces of the deposition testimony of three of Ms. Steffen's treating physicians. When questioned, the physicians indicated they had no independent recollection of certain conversations with the nursing staff or medical record entries with respect the treatment provided Ms. Steffen several years earlier. Appellants argue: "The discrepancies in [the head nurse's] testimony and that of the physicians and the irregularities in the medical records give rise to a strong inference that the medical records were falsified, an act of recklessness in itself." To allow the jury to find the type of wrongful conduct necessary to qualify for the heightened remedies under the Elder Abuse Act from these facts, however, would be to sanction an impermissible degree of speculation. The fact the physicians could not remember these events is not surprising given the amount of time that had passed. Appellants have failed to show that there is a triable issue of fact as to their claims under the Elder Abuse Act.<sup>140</sup>

While somewhat harsh in tone, especially given the horrific medical facts, *Trengali* clearly stands for the position that finding recklessness requires more than a showing of poor medical outcomes and questionable record keeping. It also illuminates a key tension in nursing home litigation, the inherent conflict between negligent nursing staff and attending, off-site physicians

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140. *Id.* at \*16–18.

who make occasional rounds.<sup>141</sup>

The other two relevant Court of Appeal, First District, opinions contrasting professional negligence and elder abuse are also unpublished, but are less instructive regarding the difference between professional negligence and elder abuse. In *Marasovic v. Alta Bates Medical Center*,<sup>142</sup> the court of appeal sustained a demurrer in which the trial court rejected an argument that a hospital and hospital social worker committed elder abuse when they caused Elizabeth Marasovic to be “admitted to a nursing home against her will, knowing that the nursing home in question (Shields-Richmond) did not honor do not resuscitate (DNR) orders and had unsafe conditions.”<sup>143</sup> The plaintiff, the decedent’s daughter, failed to prove that this allegation constituted professional negligence.<sup>144</sup> The court of appeal reasoned that “[i]f respondents’ treatment of Elizabeth was not negligent, then a fortiori it did not involve intentional, willful, or reckless misconduct.”<sup>145</sup>

Similarly, in *Mooradian v. Convalescent Center Mission Street*,<sup>146</sup> the Court of Appeal, First District, affirmed summary judgment against the plaintiff in a case where an elderly resident with significant cognitive and physical maladies died from a stroke brought on by a brain injury caused by an unobserved fall.<sup>147</sup> The court held that the plaintiff “failed to present evidence of any conduct”<sup>148</sup> of the facility, intentional or otherwise, that inflicted head trauma on decedent:

Because appellant cannot show a triable issue of material fact that Center acted negligently, it is clear that appellant cannot meet the higher burden, required under the Elder Abuse Act, of showing, by clear and convincing evidence, that Center acted recklessly, or is guilty of oppression, fraud, or malice. . . . Center’s reckless neglect cannot be inferred simply because decedent suffered a serious

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141. See Marshall B. Kapp, *The Liability Environment for Physicians Providing Nursing Home Medical Care: Does It Make a Difference for Residents?*, 16 ELDER L. J. 249, 270–71 (2009) (describing legal anxiety experienced by nursing home physicians when they must rely upon nursing staff for information and execution of treatment).

142. No. A106355, 2006 WL 367350 (Cal. Ct. App. Feb. 17, 2006).

143. *Id.* at \*7.

144. *Id.* at \*2.

145. *Id.* at \*8.

146. No. A122009, 2009 WL 1863896 (Cal. Ct. App. June 29, 2009).

147. *Id.* at \*1.

148. *Id.* at \*7.

injury. We conclude that the trial court did not err in granting summary judgment against appellant's elder abuse claim.<sup>149</sup>

*Marasovic* and *Mooradian* demonstrate that, where the trial court finds the evidence insufficient to prove professional negligence, the Court of Appeal, First District, will summarily affirm a trial court's rejection of any elder abuse or neglect claim, and the opinion will likely be unpublished.

### C. Court of Appeal, Second District

The Court of Appeal, Second District, has by far the greatest number of citations to *Delaney* of any of the courts of appeal. Of the thirty-two citations, sixteen are irrelevant to the issue of professional negligence and elder abuse by health care practitioners.<sup>150</sup> Of the remaining opinions, five are published, and the remaining eleven are unpublished. Two of the published cases have been discussed above.<sup>151</sup> As noted in the introduction, *Sababin v. Superior Court*<sup>152</sup> highlights the bar's desire to have an unpublished elder abuse case reconsidered for publication.<sup>153</sup> In *Sababin*, the court reversed summary adjudication on behalf of the defendants, holding:

[I]t is reasonably deducible that Covina's employees neglected to follow the care plan by failing to check

149. *Id.*

150. The irrelevant opinions are: *Andrews v. Superior Court*, No. B219388, 2010 WL 1694468 (Cal. Ct. App. Apr. 28, 2010); *Lewis v. Good Samaritan Hosp.*, No. B199966, 2008 WL 4076000 (Cal. Ct. App. Sep. 04, 2008); *Sanders v. Lawson*, 78 Cal. Rptr. 3d 851 (Ct. App. 2008); *DeWalsche v. Genis*, No. B183044, 2006 WL 3804521 (Cal. Ct. App. Dec. 28, 2006); *McCray v. Garcia*, No. B179477, 2006 WL 1900873 (Cal. Ct. App. July 12, 2006); *Pitluck v. Beverly Enter., Inc.*, No. B179680, 2005 WL 3008579 (Cal. Ct. App. Nov. 10, 2005); *In re Conservatorship of Kayle*, 35 Cal. Rptr. 3d 671 (2005); *Gonzales v. Whittier Hosp. Medic. Center*, No. B175273, 2005 WL 2360080 (Cal. Ct. App. Sep. 27, 2005); *Gonzales v. Nasser-Moaddeli*, No. B176152, 2005 WL 1970955 (Cal. Ct. App. Aug. 17, 2005); *In re Estate of Lowrie*, 12 Cal. Rptr. 3d 828 (Ct. App. 2004); *Sandore v. State Farm Gen. Ins. Co.*, No. B157766, 2003 WL 1950252 (Cal. Ct. App. Apr. 25, 2003); *Johnson v. Superior Court*, 124 Cal. Rptr. 2d 650 (Ct. App. 2002); *Conservatorship of Pers. and Estate of Marion Adams v. Butler*, No. B143700, 2002 WL 111356 (Cal. Ct. App. Jan. 29, 2002); *California Amplifier, Inc. v. RLI Ins. Co.*, 113 Cal. Rptr. 2d 915 (Ct. App. 2001); *Hellinger v. Farmers Group, Inc.*, 111 Cal. Rptr. 2d 268, 91 Cal. App. 4th 1049 (2001); and *Perry v. Shaw*, 106 Cal. Rptr. 2d 70 (Ct. App. 2001).

151. *See supra* Part I.

152. 50 Cal. Rptr. 3d 266 (Ct. App. 2006).

153. *See Sababin v. Superior Court*, No. B190060, 2006 WL 2615418 (Cal. Ct. App. Sept. 13, 2006).

Renteria's skin condition on a daily basis and failing to notify a physician of the need for a treatment order. Thus, there is a triable issue as to whether Covina's employee's conduct was neglect under section 15610.57 because they failed to provide Renteria with medical care for physical needs and to protect her from health and safety hazards. Moreover, when the evidence and inferences are liberally construed, we easily conclude that there is a triable issue as to whether Covina's employees acted with recklessness, oppression or malice. A trier of fact could find that when a care facility's employees ignore a care plan and fail to check the skin condition of a resident with Huntington's Chorea, such conduct shows deliberate disregard of the high degree of probability that she will suffer injury.<sup>154</sup>

Since the defendant's failure to follow a resident's treatment plan can constitute elder abuse and neglect under EADACPA,<sup>155</sup> it is clear why the plaintiff's bar wanted *Sababin* published. It arguably expands the definition of recklessness to a pattern of "repeated withholding of care" which "leads to the conclusion that the pattern was the result of choice or deliberate indifference."<sup>156</sup> A pattern and practice of neglectful behaviors is one of the key factual findings in *Sababin* about abusive behavior by health care professionals as it evinces an on-going disregard of the patient's well-being.<sup>157</sup>

The other previously discussed published opinion is *Covenant Care, Inc. v. Superior Court*,<sup>158</sup> which was affirmed by the supreme court and discussed under the supreme court heading in this part.<sup>159</sup>

The remaining three published opinions from the Court of Appeal, Second District, that cite *Delaney* address tangential issues that illuminate the difference between professional negligence and elder abuse and neglect committed by health care professionals. In *Country Villa Claremont Healthcare Center, Inc. v. Superior Court*,<sup>160</sup> over a period of fourteen months, Ms. Ernestina Rodriguez, a seventy-six-year-old nursing home resident with Parkinson's disease,

154. *Sababin*, 50 Cal. Rptr. 3d at 272-73.

155. *See id.*

156. *Id.* at 273.

157. *See id.*

158. 107 Cal. Rptr. 2d 291 (Ct. App. 2001).

159. *See supra* Part IV.A.

160. 15 Cal. Rptr. 3d 315 (Ct. App. 2004).

suffered extensively due to poor care.<sup>161</sup> She rarely received the pain reliever prescribed by her physician.<sup>162</sup> She developed pressure ulcers on both heels which resulted in amputation of her left leg due to gangrene.<sup>163</sup> After the surgery, when she was admitted to Country Villa Claremont Healthcare Center, the ulcer on her right heel worsened and she was often left in filthy and unsanitary conditions.<sup>164</sup> She eventually died of aspirational pneumonia “as a result of Country Villa’s failure to provide her with the proper diet of puree food, monitor her food intake, and assist with her eating.”<sup>165</sup> Her heirs sued pursuant to EADACPA, including a claim for punitive damages.<sup>166</sup> The court of appeal, relying on *Covenant Care, Inc.*, held that Section 425.13 of the California Code of Civil Procedure inapplicable in elder abuse actions, and thus would not bar punitive damages.<sup>167</sup>

*Benun v. Superior Court*<sup>168</sup> also applied the analysis from *Covenant Care, Inc.*, when it held that the three year statute of limitations for professional negligence does not apply to actions under EADACPA.<sup>169</sup> The court explained:

Thus, *Delaney* makes clear that a cause of action for custodial elder abuse against a health care provider is a separate and distinct cause of action from one for professional negligence against a health care provider. It follows that egregious acts of elder abuse are not governed by laws applicable to negligence. Specifically, section 15657.2 was enacted “to make sufficiently clear that ‘professional negligence’ was to be beyond the scope of section 15657.” Section 15657.2 specifies that actions for professional negligence as defined in section 340.5 are governed by laws specifically applicable to actions for professional negligence (e.g., § 340.5), so it would seem to follow that section 340.5 has no application to actions brought under section 15657.<sup>170</sup>

Consequently, the court of appeal reversed the trial court,

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161. *Id.* at 317.

162. *Id.*

163. *Id.*

164. *Id.* at 317–18.

165. *Id.* at 318.

166. *Id.* at 318.

167. *Id.* at 322.

168. 20 Cal. Rptr. 3d 26 (Ct. App. 2004).

169. *Id.* at 35–37.

170. *Id.* at 34 (quotation omitted).

which had applied the three-year statute of limitations on the premise that the facts in the case showed professional negligence rather than elder abuse.<sup>171</sup>

Most recently, in *Perlin v. Fountain View Management, Inc.*,<sup>172</sup> a partially published opinion, the Court of Appeal, Second District, addressed the question whether Section 15657 of EADACPA's clear and convincing standard for recovery of attorney fees applied to both causation and liability or just liability.<sup>173</sup> Ms. Helen Perlin developed a leg wound due to inappropriate use of a continuous passive motion machine after she had a knee replaced.<sup>174</sup> She died a month later of pneumonia while still in the hospital for her leg wound.<sup>175</sup> The jury found the defendants guilty of elder abuse and awarded the plaintiffs \$300,000, which was remitted to \$250,000 plus pre-judgment interest pursuant to section 15657.<sup>176</sup> Plaintiffs moved for \$781,945.25 in attorney's fees, arguing that they were entitled to such fees because:

[T]he jury found by clear and convincing evidence that one or more of Summit Care's employees acted recklessly in the medical or custodial care of Perlin, and the parties had stipulated that Summit Care ratified the acts and omissions of its employees. The jury found causation under a preponderance of the evidence standard, but was unable to reach a verdict for causation under the clear and convincing evidence standard.<sup>177</sup>

The Court of Appeal, Second District, affirmed the denial of the fees motion as the plaintiffs had failed to prove causation of Ms. Perlin's injury by clear and convincing evidence.<sup>178</sup> The plaintiffs argued that elder abuse actions were not independent actions, but only grounds for additional remedies that rested upon a base of negligence, which only require a preponderance of the evidence to establish causation.<sup>179</sup> The court of appeal rejected this argument, holding that EADACPA creates an independent cause of action for elder abuse.<sup>180</sup>

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171. *Id.* at 29–30.

172. 77 Cal. Rptr. 3d 743 (Ct. App. 2008).

173. *Id.* at 746–51.

174. *Id.* at 745.

175. *Id.* at 746.

176. *Id.* at 745.

177. *Id.* at 747.

178. *Id.* at 750.

179. *See id.* at 748–49.

180. *Id.* at 749–50.; *see also* Sande L. Buhai & James W. Gilliam, Jr., *Honor Thy*

The remaining ten unpublished opinions, not including the unpublished version of *Sababin* discussed above, are split regarding whether the reviewing court of appeal found elder abuse, professional neglect, or neither on the part of the defendant health care provider. In four of the ten cases, the evidence of elder abuse committed by health care practitioners was found sufficient to state a claim or sustain a judgment.

In *Hubbard v. Zargarian*,<sup>181</sup> the Court of Appeal, Second District, made an important distinction between elder abuse and neglect committed by the staff of a hospital as opposed to possible professional negligence, committed by a treating physician.<sup>182</sup> Ms. Hattie Southall, an eighty-two-year-old, was admitted for a myocardial infarction.<sup>183</sup> During her sixteen-day stay in the hospital, she had developed a gangrenous foot and serious decubitus ulcers.<sup>184</sup> The court of appeal reversed the trial court's grant of demurrer on the pleading in favor of the hospital, holding the "allegations show a deliberate disregard of the high degree of probability Southall would suffer severe pressure ulcers/gangrene and are sufficient to assert a cause of action for elder abuse based on reckless neglect."<sup>185</sup> Interestingly, the court of appeal affirmed the demurrer of the elder abuse claim against the treating physician for failing to ensure that the nurses carried out a skin integrity plan.<sup>186</sup> It noted:

There are no fact allegations that Dr. Zargarian provided custodial care or was responsible for supervising the nurses at SFMC and appellant cites no legal authority imposing such a duty on a cardiologist. At best, the other allegations against Dr. Zargarian reflect professional negligence, i.e., the lack of the use of reasonable care.<sup>187</sup>

Citing *Covenant Care, Inc.*, the court of appeal distinguished between the custodial care responsibilities and the medical care conducted by the treating physician, dismissing the importance of

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*Mother and Father: Preventing Elder Abuse Through Education and Litigation* 36 LOY. L.A. L. REV. 565, 572-73 (2003) (analyzing the conflict regarding whether EADACPA creates a separate cause of action).

181. No. B207427, 2009 WL 4043507 (Cal. Ct. App. Nov. 24, 2009).

182. *See id.* at \*3.

183. *Id.* at \*1.

184. *Id.*

185. *Id.* at \*7.

186. *Id.*

187. *Id.*

the physician's skin care plan because he was a cardiologist.<sup>188</sup>

In *Camacho v. Meridian Neurocare*,<sup>189</sup> the Court of Appeal, Second District, affirmed a judgment against a nursing home for wrongful death and elder abuse.<sup>190</sup> The nursing staff failed to adequately treat and record the decedent's fever, infection, and pressure sores and used "canned" comments on the care charts that did not reflect actual treatment.<sup>191</sup> As a result of these actions, the decedent rapidly lost weight.<sup>192</sup> The court of appeal, relying on *Delaney*, found that there was sufficient evidence of egregious neglect to warrant a judgment of elder abuse and neglect.<sup>193</sup>

In *Gibson v. Superior Court*,<sup>194</sup> the court of appeal vacated the trial court's demurrer, and found that an estate's complaint alleged sufficient facts to initiate a claim under EADACPA for elder abuse which resulted in the wrongful death of Ms. Thelma Gibson.<sup>195</sup> Ms. Gibson, suffering from dementia,<sup>196</sup> was in a skilled nursing facility recovering from a hip replacement when she suffered another broken hip because she tried to get out of her wheelchair when no assistant was nearby.<sup>197</sup> The court of appeal observed:

Among other things, the estate's complaint alleges (1) the defendants were aware that Gibson needed "Full Assist[ance] . . . for eating, transferring, and ambulating"; (2) Gibson was unsupervised by any nurse at the time of the fall that is the subject of the elder abuse claim; (3) the nursing facility consciously failed to provide a geri-chair with a tray to restrain Gibson from getting up unassisted; (4) the nursing facility consciously failed to provide sufficient budget and staffing to meet patient needs; and (5) the facility had received several deficiency notices relating to the risks of patients falling. Together, these facts were sufficient to withstand a demurrer to the elder abuse claim.<sup>198</sup>

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188. *Id.* at \*3.

189. No. B178473, 2006 WL 1391223 (Cal. Ct. App. May 23, 2006).

190. *Id.* at \*1.

191. *Id.* at \*3.

192. *Id.* at \*7.

193. *See id.* at \*6–11.

194. No. B192421, 2006 WL 2865652 (Cal. Ct. App. Oct. 10, 2006).

195. *Id.* at \*3.

196. *Id.* at \*1 n.1.

197. *Id.*

198. *Id.* at \*3.

Thus, insufficient staffing resulting in bodily harm is sufficient in some cases to show recklessness under EADACPA.<sup>199</sup>

Insufficient staffing is also at the core of *Trujillo v. Superior Court of Los Angeles County*,<sup>200</sup> where the Court of Appeal, Second District, reversed the demurrer sustained by the trial court, holding that “[w]hile certainly not as egregious as the situations depicted in *Delaney* and *Mack*, the facts alleged by petitioner here state a cause of action for elder abuse.”<sup>201</sup> In *Trujillo*, the plaintiff’s mother, Clara Reyes, died of sepsis caused by an infected skin ulcer.<sup>202</sup> She was first treated on January 11, 2000, by a home health nurse who scheduled a subsequent visit on January 13, 2000.<sup>203</sup> When no nurse appeared on January 13, the patient’s family called because her infection was seeping, smelling awful, and getting worse.<sup>204</sup> The Home Health Agency informed them that they did not have a nurse available.<sup>205</sup> The next day someone from the agency called to instruct the family how to change the dressings.<sup>206</sup> When a nurse failed to appear for two more days, the plaintiffs took Ms. Reyes to the hospital, where she died on February 20, 2000.<sup>207</sup>

Associate Justice Grignon dissented in *Trujillo*, arguing that the facts did not demonstrate, by clear and convincing evidence, that the defendants neglected Ms. Reyes.<sup>208</sup> He concluded:

Here, in stark contrast to *Delaney* and *Mack*, plaintiff has failed to allege any facts showing reckless neglect, but has alleged only conduct showing professional negligence. Patient was not a residential patient, but rather resided in the home of her family. Home Health Agency had no control over Patient’s hospitalization. Patient was under the sporadic care of Home Health Agency for only five days. Home Health Agency did not cause Patient’s decubitus ulcers that eventually led to Patient’s death. Home Health Agency did not leave Patient to deteriorate for an extended period of time. Home Health Agency did not abandon Patient. Home Health Agency missed a

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199. See also Arnold & Arnold, *supra* note 80, at 32.

200. No. B155860, 2002 WL 1558830 (Cal. Ct. App. July 16, 2002).

201. *Id.* at \*4.

202. *Id.* at \*1.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at \*5 (Grignon, J., dissenting).

single at-home visit and instead telephoned wound care instructions to the Patient's family the next day. Two days later, Patient's family had admitted her to the hospital. . . .

In my view, the trial court properly sustained the demurrer as to the elder abuse cause of action. Though dressed up with exaggerated allegations of the Home Health Agency's broader misconduct, the actual deficiencies alleged do not constitute egregious acts of neglect, but ordinary professional negligence.<sup>209</sup>

Surprisingly, despite the being a very close case with a strong dissent, the Court of Appeal, Second District, chose not to publish *Trujillo* as precedent.

In *Pagarigan v. Greater Valley Medical Group, Inc.*,<sup>210</sup> the court of appeal heard a complicated appeal with a number of interrelated defendants. The plaintiffs alleged that the nursing home operator, LibbyCare-Longwood, allowed the decedent to develop a severe pressure sore on her lower back that measured five by eight inches.<sup>211</sup> Additionally, she developed a severe infection at the entry site of her gastric feeding tube, which caused her abdomen to distend and darken in color.<sup>212</sup> Finally, the plaintiffs alleged that the defendant did not transfer her to an acute care facility until it was too late, when she was sent to hospice care to die.<sup>213</sup> On the issue of professional negligence and elder abuse, the court held that the plaintiff had "failed to allege a sufficient degree of recklessness," and that the trial court had abused its discretion in refusing to permit amendment of the complaint.<sup>214</sup> Presumably, the claim, as alleged, lacked evidence of a callous disregard of the decedent's welfare, necessary to connect her horrific injuries with the defendant's behavior.

In *Marchesano v. Dekkers*,<sup>215</sup> the Court of Appeal, Second District, affirmed the trial court's judgment on the pleadings in favor of the defendant, a physician who failed to identify a hip fracture in a nursing home patient.<sup>216</sup> Richard Marchesano, an

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209. *Id.* at \*8-9.

210. No. B172642, 2006 WL 2425298 (Cal. Ct. App. Aug. 23, 2006).

211. *Id.* at \*1.

212. *Id.*

213. *Id.*

214. *Id.* at \*14.

215. No. B180297, 2006 WL 1351474 (Cal. Ct. App. May 18, 2006).

216. *Id.* at \*1.

eighty-year-old, injured himself getting out of a wheelchair.<sup>217</sup> Dr. Dekkers did not diagnosis the fracture in the x-ray.<sup>218</sup> Despite Mr. Marchesano's complaint of severe leg pain and request for additional x-rays, Dr. Dekkers did not examine Mr. Marchesano until his next scheduled rounds.<sup>219</sup> About two months later, family members took Mr. Marchesano "to an orthopedist who diagnosed a fractured hip that was two to three months old."<sup>220</sup> Both the trial court and court of appeal found that the plaintiffs, Marchesano's heirs, failed to prove any degree of recklessness or maliciousness on the part of Dr. Dekker.<sup>221</sup> The court concluded that the plaintiffs "may not recast the medical malpractice action as a claim for elder abuse."<sup>222</sup>

In *Renko v. Northridge Care Center, Inc.*,<sup>223</sup> the Court of Appeal, Second District, reversed the trial court's dismissal of professional negligence and wrongful death claims against a nursing home and physician, but affirmed the dismissal of the elder abuse and neglect claim.<sup>224</sup> The decedent, Paul J. Renko Sr., developed stage IV pressure sores, which "became severely infected with, among other things, necrotizing fasciatus (the so-called 'flesh-eating bacteria') which 'ate' into important organs and structures in his body including portions of his genitalia. His infections remained untreated for a lengthy period of time, leading to the loss of substantial tissue, excruciating pain and death."<sup>225</sup> The court of appeal found the allegations that the physician, Dr. Dowds, failed to properly treat severe anemia, dehydration, malnutrition, and decubitus ulcers alongside his failure to transfer Mr. Renko to a hospital when it became clear that the nursing home could not meet his needs, were sufficient to demonstrate professional negligence.<sup>226</sup> Nonetheless, because the plaintiffs "failed to plead the level of culpability required to establish elder abuse," the court of appeal sustained the dismissal of elder abuse and neglect claims.<sup>227</sup> The court observed:

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at \*1-2.

222. *Id.* at \*4.

223. Nos. B173512, B175474, 2005 WL 2045352 (Cal. Ct. App. Aug. 25, 2005).

224. *Id.* at \*24.

225. *Id.* at \*1.

226. *Id.* at \*7.

227. *Id.* at \*20.

Here, in contrast to the facts in both *Mack v. Soung* and *Delaney v. Baker*, appellants have alleged conduct rising only to the level of professional negligence, not reckless neglect. The key distinction between this matter and the foregoing cases is that appellants have failed to allege that any defendant knew about decedent's deteriorating condition and thereafter failed to act. Rather, appellants alleged that defendants failed to provide adequate medical care and that, as a result of that failure, decedent suffered injury. They further alleged that defendants "knew or should have known" that decedent required hospitalization to avoid further injury. But there is no indication in the elder abuse statutes that constructive knowledge suffices to establish recklessness.<sup>228</sup>

Thus, the court of appeal, Second District, was unwilling to impute constructive knowledge, the "should have known" standard, to determine whether a defendant acted beyond gross negligence into a state of recklessness.<sup>229</sup>

In *Reyome v. Sunrise Senior Living Services, Inc.*,<sup>230</sup> the court applied the *Delaney* standard to an accident wherein a nursing home resident with Alzheimer's disease was dropped during a transfer from her wheelchair to her bed and the resulting brain trauma caused her death within six hours.<sup>231</sup> While the transfer did not completely comply with the facility's written transfer policy, the court found there was no indication that the deviation from those procedures constituted a "deliberate disregard" for the decedent's safety resulting in a "high degree of probability" that an injury would result, or that it was part of a "conscious choice of a course of action . . . with knowledge of the serious danger to others."<sup>232</sup> Thus, the actions of the staff constituted negligence at most, not elder abuse.<sup>233</sup>

In *Furlong v. Catholic Healthcare West*,<sup>234</sup> the plaintiffs brought an EADACPA abuse complaint against physicians and other health care providers for failing to honor an elder's "do not resuscitate" order, keeping her alive and in debilitating pain for an additional

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228. *Id.* at \*22.

229. *See id.*

230. No. B174986, 2004 WL 2749811 (Cal. Ct. App. Dec. 2, 2004).

231. *Id.* at \*1.

232. *Id.* at \*7.

233. *Id.* at \*8.

234. No. B172067, 2004 WL 2958274 (Cal. Ct. App. Dec. 22, 2004).

ten days.<sup>235</sup> The trial court dismissed the action and the Court of Appeal, Second District, affirmed the dismissal, holding that “the resuscitation of a dying patient does not amount to the failure to provide medical care as discussed in *Delaney*, but rather describes negligence in the undertaking of medical care.”<sup>236</sup>

In *Doepke v. Ponhold*,<sup>237</sup> the court of appeal affirmed summary judgment against a plaintiff who sued his doctor for medical negligence and elder abuse.<sup>238</sup> When Mr. Doepke, who was recovering from a stroke in an assisted living facility, complained of leg pain, a therapist measured his legs and found a three to four inch difference.<sup>239</sup> Dr. Ponhold read the x-rays when they arrived, five days after they were taken, but failed to discover Mr. Doepke’s fractured hip.<sup>240</sup> Based on expert testimony that Dr. Ponhold did not breach the standard of care sufficient to support a professional negligence action, the court of appeal affirmed the grant of summary judgment, holding that the plaintiff “failed to raise a triable issue of material fact with respect to his negligence cause of action and, therefore, cannot show ‘something more than negligence’ as required under Welfare & Institutions Code section 15657.”<sup>241</sup>

#### D. Court of Appeal, Third District

The Court of Appeal, Third District, cited *Delaney* six times, with two published opinions which addressed professional negligence and elder abuse, and four irrelevant decisions.<sup>242</sup> In *Mack v. Soung*,<sup>243</sup> an opinion certified for partial publication, the court reversed the trial court’s demurrer of an elder abuse and neglect claim against Dr. Lian Soung and the Covenant Care Nursing and Rehabilitation Center.<sup>244</sup> The plaintiffs, the children

235. *Id.* at \*1.

236. *Id.* at \*10.

237. No. B153989, 2003 WL 116454 (Cal. Ct. App. Jan. 14, 2003).

238. *Id.* at \*1.

239. *Id.*

240. *Id.*

241. *Id.* at \*3.

242. The irrelevant opinions are: *Towns v. Davidson*, 54 Cal. Rptr. 3d 568, 575 (Ct. App. 2007); *Teachers’ Ret. Bd. v. Genest*, 65 Cal. Rptr. 3d 326, 337 (Ct. App. 2007); *Souza v. Squaw Valley Ski Corp.*, 41 Cal. Rptr. 3d 389, 396 (Ct. App. 2006); and *Arbuckle-College City Fire Prot. Dist. v. Cnty. of Colusa*, 130 Cal. Rptr. 2d 182, 192 (Ct. App. 2003).

243. 95 Cal. Rptr. 2d 830 (Ct. App. 2000).

244. *Id.* at 837.

of Ms. Girth Mack, alleged that in August 1996 Ms. Mack was left in a bedpan for thirteen consecutive hours, resulting in the development of an untreatable stage III bedsore.<sup>245</sup> Dr. Soung and the nursing home concealed the existence of the bedsore until September 4, 1996, and refused to permit the plaintiffs to inspect the injury until an ombudsman intervened on their behalf on September 10, 1996.<sup>246</sup> Dr. Soung opposed her hospitalization until her condition worsened in October, and then he abandoned Ms. Mack and refused to respond to repeated requests by nursing staff to permit her hospitalization.<sup>247</sup> On October 8, 1996, Dr. Soung mailed a notice of withdrawal of care to Ms. Mack's former address despite the fact that she was no longer competent, and that he knew plaintiffs were making surrogate decisions on her behalf.<sup>248</sup> On October 9, 1996, he advised Sylvester Mack, Ms. Mack's son, that he would withdraw in thirty days unless the plaintiffs found another physician earlier.<sup>249</sup> Two days later, the nurses advised the plaintiffs that Ms. Mack was dying, but that Dr. Soung refused to permit her hospitalization.<sup>250</sup> Because his authority was essential in order to transfer her to the hospital, the plaintiffs were forced to remove Ms. Mack's wristband and "tell the emergency room staff that she had no primary physician, in order to secure her admission to the hospital."<sup>251</sup> Ms. Mack died on October 13, 1996.<sup>252</sup>

After the trial court granted Dr. Soung a demurrer on the claims of elder abuse and intentional infliction of emotional distress, he "obtained an order granting summary judgment as to plaintiffs' only surviving cause of action, that of professional negligence, on the ground that the total recoverable damages against Dr. Soung could not exceed the amount plaintiffs already received from a settling codefendant."<sup>253</sup> On appeal, Dr. Soung argued that his conduct was, at most, professionally negligent.<sup>254</sup> The court of appeal reversed the demurrer and summary judgment, explaining that "[r]ecklessly withdrawing needed

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245. *Id.* at 832.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 832-33.

252. *Id.* at 832.

253. *Id.* at 833.

254. *Id.* at 834.

medical care from an elderly patient with conscious disregard for the high probability of injury or suffering, whether ‘willful misconduct’ or not, is precisely the sort of egregious behavior which the Legislature sought to remedy in passing the Act.”<sup>255</sup>

The court also rejected Dr. Soung’s more sophisticated argument, in which he claimed he was an on-call physician who did not have “care and custody” over the patient, and, therefore, pursuant to the definition of neglect in EADACPA,<sup>256</sup> he was not in violation.<sup>257</sup> In rejecting this interpretation, the court found that Dr. Soung could be seen as liable under EADACPA, because there were two groups defined in EADACPA as giving “care and custody” to elders: “health practitioners” and “care custodians.”<sup>258</sup> “Health practitioner” explicitly includes physicians.<sup>259</sup> The court reinforced its finding by noting that the legislature intended to convey that each of these two groups had “care and custody,” as noted in the “Mandatory and Nonmandatory Reports of Abuse” section of EADACPA: “[a]ny person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation, including . . . any elder or dependent adult care custodian, health practitioner, . . . is a mandated reporter.”<sup>260</sup> The court concluded:

Dr. Soung’s interpretation would impose liability on residential institutions housing the elderly for willful deprivation of medical care, but exempt physicians from engaging in the same conduct. The statutory language does not so provide. Moreover, there is no evidence the Legislature intended to leave such a loophole in the Act. As *Delaney* teaches, liability under the Act should not turn upon the licensing status of the defendant. We conclude that Dr. Soung’s status as a physician does not immunize

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255. *Id.* at 835 n.4.

256. CAL. WELF. & INST. CODE § 15610.57 (West 2010) (“‘Neglect’ means either of the following: (1) 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. (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.”).

257. *Mack*, 95 Cal. Rptr. 2d at 835.

258. *Id.*

259. *Id.*; see also CAL. WELF. & INST. CODE § 15610.37 (defining “health practitioner”).

260. *Mack*, 95 Cal. Rptr. 2d at 835 (quoting CAL. WELF. & INST. CODE § 15630(a)) (emphasis removed).

him from liability for elder abuse.<sup>261</sup>

*Mack*, resting on evidence of reckless behavior on the part of a resentful physician, provides a second egregious example of physician elder abuse and neglect which amplifies the facts and holding of *Delaney*. As a partially published opinion, it is frequently cited alongside *Delaney* to elucidate the definition of reckless and oppressive behavior sufficient to trigger section 15657's heightened remedies.<sup>262</sup>

As the only published opinion which found a health care practitioner guilty of professional negligence, but not elder abuse, *Massey v. Mercy Medical Center Redding*,<sup>263</sup> provides factual details which contrast with the holding in *Mack*. *Massey* is a rare appellate EADACPA case because it was brought by the patient himself, as he survived the poor quality care.<sup>264</sup> Carl R. Massey, a sixty-five-year-old at the time of the incident, underwent bifemoral bypass surgery.<sup>265</sup> The nursing staff at Mercy Medical Center Redding noted after the operation that Mr. Massey was a substantial fall risk, and would need a walker and assistance.<sup>266</sup> On March 9, 2006, Mr. Massey rang for a nurse to help him to the bathroom.<sup>267</sup> Nurse Ken O'Bar came to his room and helped him out of bed and into his walker.<sup>268</sup> Nurse O'Bar then said he had to leave to do something.<sup>269</sup> After fifteen minutes of waiting, Massey attempted to walk, fell backwards, and hit his head, back, and behind on the wall and floor of his room.<sup>270</sup> He sustained a compression fracture to his back.<sup>271</sup> He was apparently not found for two hours.<sup>272</sup> Nurse O'Bar administered morphine sulfate approximately four hours after the fall.<sup>273</sup>

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261. *Id.* at 836 (citation omitted).

262. *See, e.g.*, *Trujillo v. Superior Court of Los Angeles Cnty.*, No. B155860, 2002 WL 1558830 (Cal. Ct. App. July 16, 2002) (citing both *Mack* and *Delaney* numerous times).

263. 103 Cal. Rptr. 3d 209 (Ct. App. 2009).

264. *Id.* at 211.

265. *Id.* at 212.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 212-14.

The original complaint alleged that nurse O'Bar was "negligent" for leaving the plaintiff unattended in his walker.<sup>274</sup> The amended complaint alleged "medical negligence" not only for the original complaint, but also for nurse O'Bar administering morphine sulfate without a valid prescription and without informed consent.<sup>275</sup>

The Court of Appeal, Third District, upheld the trial court's decision to sustain the defendant's motion for nonsuit, holding that the evidence did not show "the necessary recklessness or deliberate disregard that would sustain a cause of action for Elder Abuse."<sup>276</sup> Additionally, there was insufficient evidence to show that the nurse acted fraudulently by hiding the severity of the plaintiff's fall.<sup>277</sup> The fall and subsequent back pain were both noted in Mr. Massey's chart, making it difficult for the plaintiff to prove that the defendant hid the severity of the fall.<sup>278</sup> The court concluded that elder abuse requires more than negligence.<sup>279</sup> Because the acts of the defendant were negligent at most, they were barred by the statute of limitations for professional negligence.<sup>280</sup>

#### *E. Court of Appeal, Fourth District*

The Court of Appeal, Fourth District, has cited *Delaney* in seventeen opinions, including twelve that are irrelevant to the comparison of professional negligence and elder abuse or neglect.<sup>281</sup> The remaining five relevant opinions include three

274. *Id.* at 215.

275. *Id.* at 216.

276. *Id.* at 217.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 216–17.

281. The irrelevant opinions are: *Cotton v. StarCare Med. Grp., Inc.*, 107 Cal. Rptr. 3d 767, 778 (Ct. App. 2010); *Olsen v. N. Am. Co. for Life & Health Ins.*, Nos. E041640, E045194, 2009 WL 3166639, at \*7 (Cal. Ct. App. Oct. 2, 2009); *Hammermueller v. N. Am. Co. for Life & Health Ins.*, Nos. E041640, E045194, 2008 WL 4684773, at \*5 (Cal. Ct. App. Oct. 23, 2008); *Oshiro v. All Nations Mission Church*, No. E041323, 2008 WL 2082140, at \*8 (Cal. Ct. App. May 19, 2008); *McElroy v. Walsh*, No. G038211, 2008 WL 2058169 (Cal. Ct. App. May 14, 2008); *Wedbush Morgan Secs., Inc. v. Wilson*, No. D049974, 2007 WL 3298901, at \*2 (Cal. Ct. App. Nov. 8, 2007); *Hogan v. Country Villa Health Servs.*, 55 Cal. Rptr. 3d 450, 456 (Ct. App. 2007); *Abrahams v. Jacob Health Care Ctr., L.L.C.*, No. D046939, 2006 WL 2924841, at \*6 n.13 (Cal. Ct. App. Oct. 13, 2006); *Kuperman v. Assessment Appeals Bd. No. 1*, 40 Cal. Rptr. 3d 703, 716 (Ct. App. 2006) (Aaron, J., concurring); *Smith v. Ben Bennett, Inc.*, 35 Cal. Rptr. 3d 612, 615 (Ct. App.

published and two unpublished opinions.

In *Marron v. Superior Court*,<sup>282</sup> summary judgment on behalf of the defendant, the Regents of the University of California, was vacated because deposition testimony sufficiently described reckless neglect of a dependent adult.<sup>283</sup> The decedent, Ms. Lidia Marron, a forty-four-year-old dependent adult, had her middle colic vein perforated during a liver biopsy.<sup>284</sup> She died four months later, after suffering multiple complications “including fungus infections in her blood and lungs, peritonitis, intra-abdominal and pelvic abscesses, sepsis syndrome, hypotension, fevers, abdominal pain and hemorrhaging.”<sup>285</sup> The deposition testimony supporting a possible finding of reckless neglect on behalf of the nurses included evidence of feces soiling Ms. Marron’s bed for hours, a failure to bathe Ms. Marron despite her being soiled with blood and feces, not brushing Ms. Marron’s teeth to prevent fungus growing in her mouth, not assisting her to the bathroom despite her incontinent condition, and, during one hemorrhaging incident, not assisting “in putting pressure on the wound or sopping up the blood, thus requiring the family members who were present to attempt to control the bleeding on their own.”<sup>286</sup> Additionally, there was evidence that the hospital administration had received complaints from the nurses about inadequate staffing levels but failed to take remedial action.<sup>287</sup>

In *Norman v. Life Care Centers of America, Inc.*,<sup>288</sup> the court of appeal found that a nursing home’s failure to comply with regulations regarding fall prevention constituted negligence per se.<sup>289</sup> The failure to comply with regulations was sufficiently related to the decedent’s multiple falls and her eventual death, so the lack of compliance constituted neglect under EADACPA.<sup>290</sup> The court of appeal held that the trial court committed prejudicial error when it refused to instruct the jury on the doctrine of negligence

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2005); *People v. Davis*, 25 Cal. Rptr. 3d 92, 101 (Ct. App. 2005); and *Bitters v. Rutledge*, No. E032427, 2003 WL 22701482, at \*2 n.2 (Cal. Ct. App. Nov. 17, 2003).

282. 134 Cal. Rptr. 2d 358 (Ct. App. 2003).

283. *Id.* at 371.

284. *Id.* at 361.

285. *Id.*

286. *Id.* at 372 n.13.

287. *Id.* at 371–72.

288. 132 Cal. Rptr. 2d 765 (Ct. App. 2003).

289. *Id.* at 776–78.

290. *Id.* at 777.

per se, explaining that “[t]he doctrine of negligence per se does not apply only to professional negligence causes of action. Rather, it generally can apply to any cause of action based on or involving negligence, including an elder abuse cause of action on a neglect theory.”<sup>291</sup>

The final published case from the Fourth District, *Community Care and Rehabilitation Center v. Superior Court*,<sup>292</sup> involved the same issue as *Covenant Care, Inc.*: whether Section 425.13(a) of the California Code of Civil Procedure requires application of heightened procedural requirements for EADACPA claims seeking punitive damages.<sup>293</sup> The Fourth District answered in the affirmative, the opposite of the California Supreme Court in 2004 in *Covenant Care, Inc.*; thus, *Community Care and Rehabilitation Center* is no longer good law.<sup>294</sup>

In addition to the published cases, the Fourth District has two unpublished cases that cite *Delaney* regarding the relationship between professional negligence and elder abuse. In *Eichenberg v. San Diego Medical Services Enterprises, LLC*,<sup>295</sup> the court found that a medical transportation company that convinced a nurse to downgrade an elder’s transportation order from a gurney in an ambulance to a wheelchair van did not act in a reckless manner sufficient to sustain an elder neglect action because the evidence did not establish “a conscious and deliberate decision to place [the patient] in a high degree of risk.”<sup>296</sup>

In *Klinkner v. Alta Vista Health Care Center*,<sup>297</sup> the plaintiffs failed to plead sufficient facts to indicate that a nursing home’s acts and omissions were reckless, “with knowledge of or in conscious disregard of a high probability of serious danger to” the patient.<sup>298</sup> The patient had a pre-existing decubitus ulcer on her coccyx and suffered a badly dislocated hip in the facility.<sup>299</sup> Although the court found that there were “numerous failures to provide her with proper care” the facts did “not indicate that Alta Vista acted with

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291. *Id.* at 778.

292. 94 Cal. Rptr. 2d 343 (Ct. App. 2000).

293. *Id.* at 344.

294. *Id.* at 349–50.

295. No. D049243, 2007 WL 4480735 (Cal. Ct. App. Dec. 21, 2007).

296. *Id.* at \*7.

297. No. E037164, 2005 WL 3344801 (Cal. Ct. App. Dec. 9, 2005).

298. *Id.* at \*6.

299. *Id.*

recklessness.”<sup>300</sup> The court reasoned that there was:

[N]o indication that any of Alta Vista’s alleged failures to provide Isabell with timely or appropriate care occurred over an extended period of time. For example, allegations that Alta Vista allowed Isabell to lie in her own feces for “unreasonable amounts of time” and failed to maintain staffing levels adequate to meet her needs do not show that Alta Vista acted with a level of culpability exceeding negligence. . . . Plaintiffs’ reliance on Delaney . . . is misplaced.<sup>301</sup>

*F. Court of Appeal, Fifth District*

The Court of Appeal, Fifth District, only has two cases that Keycite identifies as citing *Delaney* as authority: *People v. Gahagan*<sup>302</sup> and *Estate of Morelli v. Eustice*.<sup>303</sup> Both cases are unpublished opinions. *People v. Gahagan* includes a typographical error in a citation to *People v. Buckhalter*,<sup>304</sup> which causes it to be incorrectly identified by Keycite as citing *Delaney*. *Estate of Morelli* cites *Delaney* only tangentially in relation to a will contest involving undue influence and allegations of financial abuse.<sup>305</sup> Neither case involves issues of professional negligence in comparison to elder abuse or neglect.

*G. Court of Appeal, Sixth District*

The Court of Appeal, Sixth District, has five opinions that cite *Delaney*. Four of the five opinions, two published and two unpublished, are not relevant to the relationship of professional negligence and elder abuse.<sup>306</sup> The other opinion, *Intrieri v. Superior Court*,<sup>307</sup> is a published opinion that provides an in-depth analysis of

300. *Id.* at \*7.

301. *Id.*

302. No. F055847, 2009 WL 2767757 (Cal. Ct. App. Sept. 2, 2009).

303. No. F046443, 2006 WL 1107599 (Cal. Ct. App. Apr. 27, 2006) .

304. *Gahagan*, 2009 WL 2767757, at \*2.

305. *Morelli*, 2006 WL 1107599, at \*12 n.13.

306. The irrelevant opinions are: *Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 242 (Ct. App. 2006); *Guardian N. Bay, Inc. v. Super. Ct.*, 114 Cal. Rptr. 2d 748, 758 (Ct. App. 2001); *Sempervirens Fund v. Fox (In re Conservatorship of Pers. & Estate of Collord)*, No. H027610, 2005 WL 1983893, at \*7 (Cal. Ct. App. Aug. 17, 2005); and *Listman v. Listman*, No. H021975, 2002 WL 194248, at \*7 (Cal. Ct. App. Feb. 5, 2002).

307. 12 Cal. Rptr. 3d 97 (Ct. App. 2004).

elder abuse committed by health care professionals.

In *Intrieri*, Amalia Intrieri's husband and son brought suit under EADACPA against Guardian Postacute Services, Inc.<sup>308</sup> Ms. Intrieri was an Alzheimer's patient who was pushed by a non-Alzheimer's patient, Janet Lawry, causing Ms. Intrieri to fall and break her hip.<sup>309</sup> Ms. Intrieri died two months later.<sup>310</sup>

The trial court's entry of summary judgment for Guardian was reversed by the court of appeal as it found "triable questions of fact exist[ed] as to the reckless neglect element of the cause of action for elder abuse."<sup>311</sup> The court found that the Guardian staff was recklessly negligent in posting the keypad code above the keypad to the entrance of the Alzheimer's unit, leaving Ms. Lawry "unfettered access" to the unit.<sup>312</sup> This recklessness constituted a conscious disregard for the safety of Ms. Intrieri and other Alzheimer's patients because Ms. Lawry was allowed to enter the Alzheimer's unit and verbally abuse the patients without Guardian staff intervention, despite knowledge that Ms. Lawry was in a confused and hostile state—she already had threatened to kill a patient so she could leave the nursing home.<sup>313</sup>

Additionally, after Ms. Intrieri's surgery to repair her hip, the plaintiffs alleged that the nursing staff failed to follow a new care plan for treatment of Ms. Intrieri's bed sores, leading to the amputation of her right toe, and eventually the amputation of her leg up to the knee.<sup>314</sup> The court of appeal reversed the trial court, holding that there was sufficient evidence alleged of elder neglect for both the insufficient security as well as the pressure sores.<sup>315</sup>

#### H. Federal Cases

Three of the eight federal cases that cite *Delaney* are relevant and warrant a brief mention, although they are not appellate decisions and they will not be included in the final analysis.<sup>316</sup> In

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308. *Id.* at 100.

309. *Id.*

310. *Id.* at 101.

311. *Id.* at 108.

312. *Id.* at 107.

313. *Id.* at 107–08.

314. *Id.* at 108.

315. *Id.* at 107–08.

316. The other five irrelevant opinions are: *Martinez v. Adams*, No. CV F 09-0899 LJO DLB, 2010 WL 892186, at \*10 (E.D. Cal. Mar. 9, 2010); *McGill v. Wachovia Mortg. FSB Loan*, No. 2:09-cv-2002 FCD/GGH, 2010 U.S. Dist. LEXIS

*Hougue v. City of Holtville*,<sup>317</sup> a nursing home patient with Alzheimer's escaped, prompting the nursing staff to call the police as they tried to follow him and bring him back to the facility.<sup>318</sup> The police violently subdued the patient, severely damaging his left arm beyond repair.<sup>319</sup> Applying California law, the federal trial court granted the nursing home's motion to dismiss for abuse under EADACPA but refused to dismiss the neglect claims or the negligence claims.<sup>320</sup>

In *George v. Sonoma County Sheriff's Department*,<sup>321</sup> a dependent adult with sickle cell anemia was returned from a hospital to a jail, where he died alone six days later, even though he was nonresponsive, incontinent, and bed-ridden.<sup>322</sup> Several doctors allegedly transferred him back to jail because they thought he was malingering.<sup>323</sup> In partially dismissing some of the claims, the trial court dismissed an elder abuse claim against one of the doctors, finding that there was insufficient evidence to show that he acted recklessly.<sup>324</sup> Independently, the trial court also found that the complaint did not adequately allege that the doctor had "care or custody" of the patient sufficient to meet the definition of neglect under EADACPA.<sup>325</sup>

In *Von Mangolt Hills v. Intensive Air, Inc.*,<sup>326</sup> the federal trial court denied a motion to dismiss an elder neglect case where an air ambulance service left a patient on a gurney on an airport tarmac for half-an-hour when it was over 100°F.<sup>327</sup> The court found that the sunburn and exposure to extreme heat constituted a breach of custodial care standards and refused to apply Section 425.13 of the California Code of Civil Procedure to the case.<sup>328</sup> In sum, like the California trial courts, the federal courts look back to *Delaney* for

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43393, at \*34 (E.D. Cal. Mar. 3, 2010); *Quintero Family Trust v. OneWest Bank*, F.S.B., No. 09-CV-1561-IEG (WVG), 2010 WL 392312, at \*16 (S.D. Cal. Jan. 27, 2010); *Cabral v. Cnty. of Glenn*, 624 F. Supp. 2d 1184, 1194 (E.D. Cal. 2009); and *Negrete v. Fid. & Guar. Life Ins. Co.*, 444 F. Supp. 2d 998, 1002 (C.D. Cal. 2006).

317. No. 07cv2229 WQH (WMC), 2008 WL 1925249 (S.D. Cal. Apr. 30, 2008).

318. *Id.* at \*1.

319. *Id.*

320. *Id.* at \*5-7.

321. No. C-08-02675 EDL, 2009 WL 656299 (N.D. Cal. Mar. 12, 2009).

322. *Id.* at \*2.

323. *Id.*

324. *Id.* at \*6.

325. *Id.*

326. No. C06-03300 JSW, 2007 WL 521222 (N.D. Cal. Feb. 15, 2007).

327. *Id.* at \*5.

328. *Id.* at \*4.

guidance on finding abuse and neglect under EADACPA.

*I. Summary*

Of the ninety-six opinions that cite *Delaney*, twenty-two are California Court of Appeal decisions that cite it regarding the delineation of professional negligence and elder abuse or neglect committed by health care professionals. An additional five published opinions cite related issues of the applicability of punitive damages, statutes of limitations, and attorney fees standards of proof under section 15657, and were included in this article to give a fully rounded view of the statutory interpretation of section 15657.

Of the court of appeal opinions, only six are published cases that squarely address the difference between professional negligence and elder abuse: *Sababin* from the Second District; *Mack* and *Massey* from the Third District; *Marron* and *Norman* from the Fourth District; and *Intrieri* from the Sixth District. These decisions are indistinguishable from the sixteen unpublished opinions<sup>329</sup> addressing the same issue. In eleven of the sixteen relevant unpublished opinions, the court sided with the defendant on appeal concerning the issue of imposition of elder abuse or neglect against a health care professional. When considered as a whole, plaintiffs won ten of the twenty-two identified appellate cases, five published and five unpublished decisions. Defendants won the remaining twelve cases.

Nevertheless, of the six published cases, only *Massey* represents a victory for the defendant health care practitioner.<sup>330</sup> Only *Massey* illuminates the other side of the line, examining actions that would likely have been found negligent but not abusive, had they not been barred by MICRA's statute of limitations.<sup>331</sup> Only *Massey*, and the five published opinions on the other side of the line, may be cited in California courts as authority.<sup>332</sup>

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329. The unpublished version of *Sababin* is not included in this total as it was replaced by the published version.

330. See *Massey v. Mercy Med. Ctr. Redding*, 103 Cal. Rptr. 3d 209, 211–12 (Ct. App. 2009).

331. See *id.* at 217.

332. See CAL. RULES OF COURT, R. 8.1115.

## V. PRECEDENT AND THE CITATION OF UNPUBLISHED OPINIONS

The citation of unpublished opinions has been a significant topic of interest since the release of Judge Richard Arnold's decision in *Anastasoff v. United States*.<sup>333</sup> In *Anastasoff*, Judge Arnold responded to the Internal Revenue Service lawyers' citation of an unpublished Eighth Circuit mailbox rule decision, *Christie v. United States*,<sup>334</sup> as authority, which he believed should have controlled his decision in *Anastasoff*.<sup>335</sup> He held that the Eighth Circuit's publication rule, Rule 28A(i), which allowed panels to declare some opinions like *Christie* "non-precedential" was unconstitutional under Article III of the United States Constitution because "it purports to confer on the federal courts a power that goes beyond the 'judicial.'" <sup>336</sup> Judge Arnold reasoned that "[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law,"<sup>337</sup> and that the declarations of law are "authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."<sup>338</sup> He concluded that the declaration and interpretation of law and its subsequent application in similar cases forms the foundation of the doctrine of precedent that the founders intended the federal courts to follow when they wrote Article III.<sup>339</sup>

In an en banc decision of the Eighth Circuit, also authored by Judge Arnold, *Anastasoff* was rendered moot, and thus vacated on procedural grounds because the Internal Revenue Service acquiesced to another circuit's decision, and Faye Anastasoff was paid the full amount of her claim, plus interest.<sup>340</sup> The constitutionality of the Eighth Circuit's publication rule remained an open question as the underlying case was vacated.

Many academic and judicial articles and lectures have drawn battle lines around the key question in *Anastasoff*: do the federal courts have the power to determine that some opinions have no precedential effect?<sup>341</sup> Much like California, some federal circuits,

333. 223 F.3d 898 (8th Cir. 2000).

334. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam).

335. See *Anastoff*, 223 F.3d at 899.

336. *Id.*

337. *Id.* at 899-900.

338. *Id.* at 900.

339. *Id.*

340. See *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000).

341. See, e.g., David R. Cleveland, *Overturing the Last Stone: The Final Step in*

notably the Fifth and Ninth Circuits, had publication rules that gave unpublished opinions no precedential weight, and then, as an extra measure, forbade the citation of unpublished opinions, except in limited circumstances involving *res judicata* and law of the case.<sup>342</sup> But, unpublished decisions had risen to over eighty-four percent of all circuit decisions by 2006.<sup>343</sup>

It may seem unnecessary to explore the *Anastasoff* debate in more detail, as the Federal Appellate Rules Committee spearheaded a rule to standardize the nation's publication and citation rules—Federal Rule of Appellate Procedure 32.1—which went into effect on January 1, 2007.<sup>344</sup> The rule prohibits federal courts from restricting the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been “designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like,” and which were issued on or after January 1, 2007.<sup>345</sup> If a party cites such an unpublished opinion, they must file and serve a copy of the opinion if it is not available in a publicly accessible electronic database, such as a

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*Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 62 (2009) (“Do American courts have the authority to render decisions not binding on future courts, and, even if they do, should they issue such decisions?”); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 27 (2005) (discussing “the simple question whether a litigant who submits a paper to, say, the Second Circuit may cite in that paper an unpublished opinion of the Second Circuit (or any other federal court).”); William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1724 (2005) (discussing proposed rule’s treatment of unpublished decisions); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1236 (2004) (discussing precedential value of unpublished opinions); Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: *Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 LAW LIBR. J. 589, 589 (2001) (examining “the debate regarding unpublished opinions in the federal courts.”); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2d 17, 18 (2000) (“The unpublished opinion is tolerated for reasons involving such pedestrian considerations as efficiency in judicial administration.”); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 219 (1999) (examining the effect of “opinions handed down by the federal courts of appeals are marked ‘Not To Be Published.’”).

342. For an excellent summary of the debate concerning *Anastasoff* and a list of each circuit and state publication and citation rule, circa 2002, see Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold’s Anastasoff Opinion is Saving America’s Courts from Themselves*, 2002 ARK. L. NOTES 85 (2002).

343. Cleveland, *supra* note 341, at 62.

344. FED. R. APP. P. 32.1.

345. *Id.*

circuit's website.<sup>346</sup> Nonetheless, some commentators have noted that this rule change does nothing to address Judge Arnold's most important question: whether these unpublished decisions have any precedential value.<sup>347</sup>

#### A. California's Opinion Publication and Citation Rules

Rule 976, the predecessor of California's current publication and citation rule, was established in 1964,<sup>348</sup> the same year the Federal Judicial Conference recommended federal publication of only opinions that had "general precedential value" because of the cost and difficulty of keeping up with the exponentially increasing size of case reporters.<sup>349</sup> The 1966 California Constitution Revision Committee incorporated this concept of selected precedential value.<sup>350</sup> Rule 976 prohibited the publication of opinions in the Official Reports unless the opinion:

- (1) [E]stablishes a new rule of law, applies an existing rule

346. *Id.*

347. Cleveland, *supra* note 341, at 62; J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIRCUIT REV. 27 (2005) (considering the then-proposed language to the rule).

348. Kenneth J. Schmier & Michael K. Schmier, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 J. L. & SOC. CHALLENGES 233, 239 (2005). The Schmier brothers are California activists against non-publication and, especially, citation prohibition rules. They maintain a valuable website on the issue, [www.nonpublication.com](http://www.nonpublication.com), where they reprint many of the articles and press clippings regarding the debate, especially in California. THE COMMITTEE FOR THE RULE OF LAW, <http://www.nonpublication.com>.

349. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1964, 11 (Government Printing Office 1964); *see also* CALIFORNIA SUPREME COURT ADVISORY COMMITTEE ON RULES FOR PUBLICATION OF COURT OF APPEAL OPINIONS, REPORT AND RECOMMENDATIONS, 9 (Nov. 2006), [http://www.courtinfo.ca.gov/courts/supreme/comm/documents/sc\\_report\\_12-7-06.pdf](http://www.courtinfo.ca.gov/courts/supreme/comm/documents/sc_report_12-7-06.pdf) [hereinafter "REPORT AND RECOMMENDATIONS"] ("During the 1950's, the courts annually produced an average of about 10 volumes of Court of Appeal opinions, with each volume averaging about two-thirds of the number of pages of modern volumes. This increased to an average of approximately 13 volumes a year in the early 1960's. The increase in the number of volumes raised concerns that the bench and the bar were being inundated by the volume of Court of Appeal opinions.").

350. Article VI, section 14 of the California Constitution provides in part: "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person." CAL. CONST. art. VI, § 14.

to a set of facts significantly different from those stated in the published opinions, or modifies or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.<sup>351</sup>

In 1977, Rule 977, the citation prohibition for unpublished opinions, was added to ensure a level playing field as some lawyers, such as district attorneys, had ready access to unpublished opinions due to the number of cases they collectively handled, whereas most lawyers did not.<sup>352</sup>

California's limited publication rule, combined with the almost unique depublication rule and the citation prohibition, led to significant rancor among some lawyers.<sup>353</sup> Starting in 2000, members of the bar began approaching legislators to try to change the publication and citation rules.<sup>354</sup> In response to legislative pressure, Chief Justice George of the California Supreme Court appointed an Advisory Committee in 2004 with the mandate to "review the rules for publication of Courts of Appeal opinions and recommend whether the rules should be changed to better ensure the publication of those opinions that may assist in the reasoned and orderly development of the law."<sup>355</sup>

In 2006, the California Supreme Court's Advisory Committee on Rules for Publication of Court of Appeal Opinions released a report evaluating Rule 8.1105.<sup>356</sup> The Committee was chaired by Associate Justice Kathryn Werdegar of the California Supreme Court and was comprised of six Associate Justices of the California courts of appeal, and six attorneys, including the principal attorney to the chief justice of the California Supreme Court and the

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351. Schmier & Schmier, *supra* note 348, at 239 (citing CAL. RULES OF COURT R. 976 (1996)).

352. *Id.*

353. *Id.*, at 239–40; *see also*, Richard H. Cooper & David R. Fine, *What's Past is Prologue*, 43 ORANGE COUNTY LAW. 25, 25 (Feb. 2001) ("The battle between the supporters and opponents of the rule is reaching a flash-point, and the outcome is by no means certain.").

354. Cooper, *supra* note 353, at 27–28.

355. REPORT AND RECOMMENDATIONS, *supra* note 349, at 1, 5–6.

356. *Id.* at 1.

reporter of decisions of the California Supreme Court.<sup>357</sup> The Advisory Committee was charged to “review the rules for the publication of Court of Appeal opinions and recommend whether the rules should be changed to better ensure the publication of those opinions that may assist in the reasoned and orderly development of the law.”<sup>358</sup> Predictably, given the “insider” composition of the Advisory Committee, it only recommended modest changes to the rules.<sup>359</sup>

Methodologically, the Advisory Committee examined the publication statistics of the courts of appeal and the experiences of other states and the federal courts.<sup>360</sup> They also surveyed the justices of the courts of appeal and appellate attorneys concerning the publication rules.<sup>361</sup> Eighty-six of the 101 justices of the courts of appeal responded to the survey.<sup>362</sup> Instead of using a random sample of the California Bar, the Advisory Committee focused the survey towards attorneys and organizations with significant appellate practice, resulting in only about 300 responses.<sup>363</sup>

Despite the potential for statistical skew with such a small sample, the results of the surveys are both interesting and troubling:

Both the justices and the attorneys were asked whether they believe anything other than the rules—such as local traditions, standards, or practices—influences the court’s determination whether or not to certify an opinion for publication. . . . Although the great majority of justices stated that nothing other than the publication rules influences their determinations, 20 percent indicated that other factors may influence their decisions. This finding was consistent statewide; there were no statistically significant differences in the responses received from the districts. Other factors cited by the justices included that

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357. *Id.* at iii–iv.

358. *Id.* at 1.

359. The Committee even prohibited outsiders from attending their meetings. Schmier & Schmier, *supra* note 348, at 243.

360. REPORT AND RECOMMENDATIONS, *supra* note 349, at 19.

361. *Id.* at 32.

362. *Id.* at 7, 32.

363. *Id.* at 33. The lack of participation by trial court litigants and judges makes these results much less reliable. See J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419 (2005) (arguing that trial court judges and attorneys have frequent need to access the analysis found in unpublished decisions and are put into dangerous ethical quandaries by no-citation rules).

the case involves a recurring issue, concern about criticizing an attorney or trial judge, and the pressure of workload. In contrast, a majority of attorneys—56 percent—believed that factors other than the publication rules have an influence on the justices’ publication decisions. Factors that the attorneys suggested influence the courts’ determination of whether to publish included encouraging or avoiding scrutiny or review and a panel’s or district’s preference regarding publication frequency. The attorneys were also asked whether they believe the publication rules are uniformly followed. Here too, the majority of attorneys—67 percent—believed that the publication rules are not uniformly followed.<sup>364</sup>

In addition to the appellate bar’s skepticism about the bench’s adherence to the opinion publication guidelines, ninety-two percent of bar respondents stated that they used unpublished opinions in their practice.<sup>365</sup> Even more surprisingly:

Fifty-eight percent of the justices stated that they have relied on unpublished opinions when drafting opinions. Most of these justices indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own prior rulings as well as those within their district or division. Some justices also use unpublished opinions as a source of boilerplate language.<sup>366</sup>

Nevertheless, when asked whether parties should be allowed to draw the supreme court’s attention to an unpublished opinion, only twenty-eight percent of the justices of the courts of appeals said yes, as compared to sixty-seven percent of the bar.<sup>367</sup> Apparently, the justices of the courts of appeal wanted it both ways—they wanted the guidance garnered from unpublished opinions without the threat of having others draw attention to them through citation.

Despite the admission of most of the justices of the courts of appeal that they rely on unpublished opinions, the Advisory Committee found that “by and large, the current publication rules and practices have been successful in creating and managing an accessible body of precedential appellate opinions that provide

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364. REPORT AND RECOMMENDATIONS, *supra* note 349, at 38–39.

365. *Id.* at 41.

366. *Id.*

367. *Id.* at 41–42.

useful guidance for litigants and the public.”<sup>368</sup> It eventually recommended that the supreme court revise Rule 8.1105 to include a presumption in favor of publication if a court of appeal finds one of the following factors:

Rule 8.1105

(c) Standard for certification

An opinion of a Court of Appeal or a superior court appellate division—whether it affirms or reverse a trial court order or judgment—should be certified for publication in the Official Reports if the opinion:

- (1) Establishes a new rule of law;
- (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- (3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
- (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- (5) Addresses or creates an apparent conflict in the law;
- (6) Involves a legal issue of continuing public interest;
- (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
- (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.<sup>369</sup>

The Advisory Committee also recommended that the supreme court list the factors that should not be considered by the courts of appeal when deciding whether to publish an opinion: “Factors such

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368. *Id.* at 1.

369. REPORT AND RECOMMENDATIONS, *supra* note 349, at 57, 59.

as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion.<sup>370</sup> The supreme court accepted and implemented both recommendations.<sup>371</sup> The Advisory Committee did not recommend modifying the unpublished opinion citation prohibition rule, which currently reads:

Rule 8.1115. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

- (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
- (2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.<sup>372</sup>

The Advisory Committee's efforts in expanding the publication rule may produce more published EADACPA opinions in the future, but only one recent opinion, *Massey*, has been released for publication by any of the courts of appeal. Unless Rule

370. *Id.* at 59.

371. *See* CAL. RULES OF COURT, R. 8.1105.

372. *Id.* R. 8.1115.

8.1115 is relaxed to allow attorneys to cite or argue the unpublished opinions, which fifty-eight percent of the surveyed justices of the courts of appeal admit they are already using while drafting opinions,<sup>373</sup> California is in danger of continuing to muddle the interpretation of EADACPA.

*B. Impact of Unpublished Opinions on EADACPA*

The twenty-two cases that directly address the *Delaney* distinction between professional negligence and elder abuse are complicated as far as their details, but broad generalizations emerge upon close inspection. First, cases that involve missed diagnosis such as *Trengali*, *Marchesano*, and *Doepke* are likely to be deemed professional negligence rather than elder abuse. Diagnosis is at the heart of the practice of medicine. Categorizing missed diagnoses as a negligent mistake rather than a reckless disregard for the patient is relatively easy. These decisions are all unpublished and were decided within a few years of *Delaney*. Perhaps the appellate panels that wrote these decisions were unwilling to publish decisions that openly distinguished the facts in those cases from *Delaney*, but by failing to publish, they deprived the health care industry of precedent for use in cases where the allegations suggest traditional medical malpractice analyses.

Next, cases that involve patterns of failure to treat known injuries or illnesses, such as *Sababin*, *Mack*, *Norman*, *Marron*, *Intrieri*, *Hubbard*, *Camacho*, *Gibson*, *Trujillo*, and *Leong* are likely to have been decided for the plaintiffs, and about half were published. The unpublished cases in this category are similar enough to the published cases that the only rationale as to why they were not all published is that the unpublished cases are, on average, newer than the published ones, thus suggesting that the appellate panels are finding that the facts are no longer significantly different enough from the previous cases to warrant publication. If this is the case, the panels are glossing over the possibility that the specific actions of the physicians and nurses are different enough that future courts could factually distinguish cases if the cases were published.

Finally, cases where health care professionals made isolated harmful decisions, such as the dropped patient in *Reyome*, the wrong transportation methodology in *Eichenberg*, and the fall followed by the unauthorized pain killer in *Massey* are likely to be

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373. REPORT AND RECOMMENDATIONS, *supra* note 349, at 41.

decided for the defendants, and, with the exception of *Massey*, unlikely to be published. This makes some sense in light of the error-correcting function of the courts of appeal. There is little public policy at stake when an employee simply used bad judgment and committed malpractice or another form of negligence. To dispose of these cases with an unpublished decision is a quick, effective course of action for the panel. This does not explain why the panel thought to publish *Massey* when no other panel had decided to publish a case where the defendants had won on the elder abuse action.

Two other elder abuse legal scholars have commented on the relative lack of published precedent that interprets or applies EADACPA. Seymour Moskowitz, a law professor at Valparaiso Law School, explains the over-arching reasons for the lack of EADACPA case law:

Outside the institutional context, i.e., nursing homes and hospitals, few cases employing civil tort or EADACPA remedies may be found in the published California reports. I suspect a variety of reasons are responsible for this lack of precedent. Recovery is often unfeasible against perpetrators, whether family or third parties, who are judgment proof or have limited resources. Elder abuse is often hidden; wrongful behavior is rarely revealed to those outside the family circle. Parents often fail to report maltreatment because of the “shame and stigma of having to admit they raised such a child. . . . Instead they react with denial, psychological acquiescence, and passive acceptance. Fear and illness also deter participation in the legal process. Often, the victim and the abuser are in a mutually dependent relationship, and the victim has no other caretaker.<sup>374</sup>

Thus, based on a careful search for EADACPA cases using LexisNexis, Professor Moskowitz contends that few non-nursing home elder abuse cases are published in California.<sup>375</sup> A case against a physician or other health professional for abusive behavior in an institution is more likely to draw attention than the common abuse that is perpetrated in private homes by family

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374. Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 607–08 (2003) (footnotes omitted).

375. *Id.* at 607 n.94.

members or friends.<sup>376</sup> In addition to being potential—albeit relatively infrequent—perpetrators of elder abuse, physicians as a group are unreliable as mandatory reporters of elder abuse; thus, they are not as effective as they could be in helping to decrease such abuse.<sup>377</sup>

Within the context of nursing home litigation, where most of the non-financial abuse EADACPA cases are found, Bryan Carney, a nursing home defense lawyer, quietly critiques the lack of published decisions:

A series of published and nonpublished opinions since *Delaney* have begun to give a judicial gloss to the term “elder abuse.” After 16 years of experience with enhanced remedies for elder abuse, “reckless neglect” has become the favorite (and the most frequently litigated) species of elder abuse. More importantly, courts are using nonstatutory markers to draw the line between elder abuse and professional negligence—namely, the length of time that the elder is exposed to abuse or neglect and what the healthcare provider knew about the elder’s condition during that time. No opinion expressly claims these two factors are dispositive, but a fair reading of published and unpublished cases strongly suggests that these two factors decide the difference between statutory elder abuse and simple, common law negligence.<sup>378</sup>

Additionally, he notes “*Klinkner* and *Trujillo* are unpublished, but they offer some insight into how the courts look at the period of alleged mistreatment to determine whether the lawsuit is one for elder abuse or negligence.”<sup>379</sup> Finally, he concludes, perhaps as loudly as he finds prudent, that:

Two published cases illustrate how concealing or ignoring an elder’s condition may constitute elder abuse. But no published case defines the goalpost at the opposite end of the field—namely, when will a defendant’s knowledge (or lack of knowledge) of an elder’s condition not be sufficient to support a claim of elder abuse? On that side of the question, little guidance exists. The cases are

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376. See *id.* at 608 (offering several reasons why family member abuse may be reported at a lower rate than institutional abuse).

377. See *id.* at 611 (discussing the evidence of the infrequency of mandatory reporting).

378. Carney, *supra* note 17, at 44.

379. *Id.* at 45.

unpublished.<sup>380</sup>

In 2009, *Massey* began the process of defining the goalpost opposite *Delaney* and *Mack*, but *Massey* is barely adequate in that it does not address the situation where there was a particularly gruesome and long-lasting period of suffering, such as *Renko*.<sup>381</sup> *Renko*, from a defense perspective, would have been a useful case to have had published as it addresses the question of culpability within the context of a case with similar outcomes to *Delaney*, *Mack*, and *Marron*. Defense attorneys, however, are prohibited by Rule 8.1115 from citing *Renko* or *Trengali* for almost any reason.<sup>382</sup>

EADACPA cases are published at a much higher rate—27 percent for the twenty-two case sample—than the historic publication rate of 7.4 percent.<sup>383</sup> Nevertheless, there is little justification for not publishing most or all of the EADACPA cases, even before the standards were relaxed in 2007. EADACPA was passed in response to high levels of elder and dependent adult abuse in society.<sup>384</sup> It should be viewed, in almost every instance, as involving “a legal issue of continuing public interest.”<sup>385</sup> Additionally, the new Rule 8.1105(c)(9) will require publication of close cases like *Trujillo*, where a dissenting justice rejects the majority’s view of professional negligence and elder abuse.<sup>386</sup> Perhaps the most important reason for publishing EADACPA decisions is rooted in the reasons underlying Rule 8.1105(c)(2), which “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions.”<sup>387</sup>

As Mr. Carney explained, most of the EADACPA cases involve questions of the duration of the abusive or neglectful behavior, and the knowledge, or lack thereof, held by the health care professionals regarding the treatment of the elder or dependent

380. *Id.*

381. Compare *Massey v. Mercy Med. Ctr. Redding*, 103 Cal. Rptr. 3d 209 (Ct. App. 2009), with *Renko v. Northridge Care Ctr., Inc.*, Nos. B173512, 175474, 2005 WL 2045352 (Cal. Ct. App. Aug. 25, 2005).

382. Carney, *supra* note 17 at 44; see also CAL. RULES OF COURT, R. 8.1105.

383. REPORT AND RECOMMENDATIONS, *supra* note 349, at 16 (giving average publication rate for the courts of appeal of 7.4 percent for the period 1999–2005).

384. Stafford, *supra* note 9, at 704.

385. CAL. RULES OF COURT, R. 8.1105(c)(6).

386. See *id.* (noting that an appellate decision should be certified for publication if it “[i]s accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.”).

387. *Id.*

adult.<sup>388</sup> There are not yet enough cases delineating the standards of these two common law criteria for either the bench or the bar to have a clear idea of what constitutes too long a duration, or too much knowledge of wrongdoing held by a health care practitioner. The five days Ms. Reyes suffered in *Trujillo* contrast sharply with the four or five weeks that Ms. Trengali suffered in *Trengali*; in *Trujillo* the decedent's son recovered because the health care practitioner failed to provide care resulting in death by infection, whereas in *Trengali*, the decedent's children did not, because the nurses failed to inform the physician of Ms. Trengali's deteriorating condition.<sup>389</sup>

The distinction between the cases is simply not clear. In situations like this, the courts of appeal should publish all of the EADACPA cases rather than falling back on what looks like a reluctance to hurt elders or nursing homes by publishing cases with complicated facts. Instead of trying to manage the development of the case law, the courts of appeal, as an error-correcting court, should release all but the most prosaic of EADACPA opinions for publication, so that enough cases with significantly different facts can further outline the contours of professional negligence versus elder abuse and neglect committed by health care professionals.

The standard response from intermediate courts to such a challenge is that non-judges do not understand the enormous time and resources required to publish more opinions.<sup>390</sup> The Advisory Committee contended:

California is virtually unique in its constitutional requirement that decisions by Courts of Appeal that determine causes "shall be in writing with reasons stated." All other jurisdictions surveyed, except the State of Washington, provide intermediate appellate courts with some discretion to decide causes on appeal summarily, without issuing opinions in writing and stating the

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388. Carney, *supra* note 17, at 44.

389. Compare *Trujillo v. Superior Court of Los Angeles Cnty.*, No. B155860, 2002 WL 1558830 (Cal. Ct. App. July 16, 2002), with *Trengali v. N. Cal. Presbyterian Homes, Inc.* No. A094106, 2002 Cal. App. Unpub. LEXIS 4742 (Ct. App. Jan. 18, 2002).

390. See, e.g., Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 37 (2004) ("[T]he proposed rule would make more difficult our job of keeping the law of the circuit clear and consistent, increase the burden on the judges of our lower courts, make law practice more difficult and expensive, and impose colossal disadvantages on weak and poor litigants.").

reasons.<sup>391</sup>

In the twenty-two opinions squarely relevant to the inquiry in this article, the time pressure argument is unpersuasive. The twenty-two cases are fundamentally similar. All but a few of the cases address relatively gruesome medical experiences suffered by nursing home residents in the last weeks or months of their lives. The cases are of similar length, with an average of 6583.3 words for the six published cases and 6302.1 words for the sixteen unpublished cases.<sup>392</sup> They cite similar cases, including *Delaney*.

The stakes are high for litigators to have their appellate case published. The Advisory Committee reported that:

Of the approximately 92 percent of cases overall that were not certified for publication, only one-tenth of 1 percent resulted in opinions issued by the Supreme Court. Of the approximately 8 percent of cases in which the opinion had been certified for publication, about 7 percent resulted in a Supreme Court opinion.<sup>393</sup>

Practically, without a published decision, access to an appeal to the supreme court is nearly impossible, thus giving potential credence to the suspicion that the courts of appeal shield decisions from review through non-publication of opinions.<sup>394</sup> With all but one of the twelve cases where the defendant was successful in an EADACPA appeal remaining unpublished, a cynic could contend that that the courts of appeal, consciously or unconsciously, shields the health care industry from reversal in the supreme court by choosing not to publish decisions in which the industry wins.

391. REPORT AND RECOMMENDATIONS, *supra* note 349, at 14 (citing CAL. CONST. art. VI, § 14).

392. Bulk words is a relatively meaningless way to measure cases, but it goes to the heart of one justification for unpublished cases—that published decisions take longer to write. Of the twenty-two cases examined, there is no discernable difference in content between the published and unpublished decisions. The two longest decisions, *Pagarigan* and *Renko*, at 17,096 and 13,290 words respectively, are much longer than *Norman*, the longest published decision. If these two outlier opinions are dropped from the pool of unpublished decisions, the average length is 5,302 words, which is still only 19.5 percent shorter than the average published opinion. In this closed universe of cases, there is nothing to suggest that the published opinions took longer to write than the unpublished opinions. This quantitative analysis should not be extrapolated to others areas of law without a similar, careful research process. While this article critiques California's publication and citation prohibition rules, it does so within the context of a very narrow scope of inquiry.

393. REPORT AND RECOMMENDATIONS, *supra* note 349, at 19.

394. Schmier & Schmier, *supra* note 348, at 250.

While non-publication of defense victories may be tactically beneficial to the defendants in a particular case, the California Medical Association routinely petitions the appellate courts to publish successful cases.<sup>395</sup>

## VI. CONCLUSION

There is a simple, first step toward resolving the muddling impact that Rules 8.1105 and 8.1115 have on EADACPA: follow the trend of Federal Rule of Appellate Procedure 32.1 and allow lawyers, justices, and judges to openly read and cite unpublished decisions as persuasive authority but not controlling precedent. Because of article VI, section 14 of the California Constitution, which allows the supreme court to publish the opinions of the supreme court and courts of appeal that it “deems appropriate” and requires the appellate courts to determine causes “in writing with reasons attached,”<sup>396</sup> California is in a significantly different position than the federal judiciary post-*Anastasoff* in regard to the constitutionality of selective publication.<sup>397</sup> The California Supreme Court may simply be unwilling to give up this clear constitutional mandate and adopt universal publication.

Nevertheless, the middle ground solution of allowing citation to non-published opinions would likely address many of the current complaints.<sup>398</sup> First, ending the citation prohibition would

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395. See *Health Policy in the Courts*, CAL. MED. ASS'N (Jan. 2007), <http://www.cmanet.org/member/upload/Accept-cas.pdf> (noting the California Medical Association's unsuccessful attempts to get cases such as *Marron* and *Norman* depublished, and *Reyome* and *Marchesano* published).

396. CAL. CONST. art. VI, § 14.

397. See *Schmier v. Supreme Court*, 93 Cal. Rptr. 2d 580, 584 (Ct. App. 2000) (“The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a policy that California’s highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) ‘the expense, unfairness to many litigants, and chaos in precedent research,’ if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions.” (quoting *People v. Valenzuela*, 35 Cal. Rptr. 314, 322 (Ct. App. 1978))).

398. For more analysis regarding citation prohibition rules, see Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT'L & COMP. L. REV. 307 (2007); Goering, *supra* note 347, at 27; and Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 487 (2003) (reporting that a number of states discarded citation prohibitions since 2001, showing an “increasing recognition by state courts that they can make their opinions citable without impairing performance of their judicial function. The sky

give permission to the courts of appeal to do what most justices are already doing in complicated matters such as medical negligence and abuse of nursing home residents, which is to check the decisions of other panels for persuasive authority. Second, ending the citation prohibition would end the appearance of bias brought about by suspicions that the courts of appeal use unpublished decisions to avoid review. Physicians in California already have an extremely low regard for the judicial system, which threatens the pool of available physicians willing to work as attending physicians in nursing homes and other care facilities.<sup>399</sup> A less facially arbitrary system for deciding which EADACPA cases are precedential may decrease the distrust, but allowing at least citation to helpful unpublished cases with similar facts would likely seem less suspicious. Finally, ending the citation prohibition would limit the gamesmanship of the bar regarding post-decision appeals for publication and depublication based on trying to create helpful legal climates for future cases.

California's elders and dependent adults, and their families, along with the health care practitioners who serve them, deserve a clear, rational explanation of the meaning of recklessness and neglect in order to be able to evaluate care and make wise choices when problems arise.

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does not fall.”).

399. Kapp, *supra* note 141, at 275.