SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Catherine Pham, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: July 23, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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https://www.scscourt.org/general_info/court_reporters.shtml

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV407608	MICHAEL HOLYS vs COUNTY OF SANTA CLARA	**Demurrer**. Scroll down to Line 1 for Tentative Ruling.
LINE 2	24CV433834	Ye Wang et al vs Zaid Hanna et al	**Demurrer.** OFF CALENDAR per Attorney Bussman.
LINE 3	24CV435855	KIMBERLY CRAWFORD vs WALDEMAR SISKENS et al	**Demurrer.** Scroll down to Line 3 for Tentative Ruling.
LINE 4	24CV436461	Shirley Getty vs Villa Verde et al	**Demurrer.** Scroll down to Lines 4 and 5 for Tentative Ruling.
LINE 5	24CV436461	Shirley Getty vs Villa Verde et al	**Motion to Strike.** Scroll down to Lines 4 and 5 for Tentative Ruling.
LINE 6	20CV366373	Jane Doe vs East Side Union High School District et al	**Motion for Summary Judgment/ Adjudication.** Continued by stipulation and order to September 5, 2024 at 9 a.m.
LINE 7	23CV414579	Bahareh Olfatpour et al vs Subaru of America, Inc.	**Motion to Compel (Discovery)**. OFF CALENDAR. Notice of Settlement of Entire case filed July 5, 2024.
LINE 8	23CV415947	James Fok et al vs Peter Wong et al	**Motion to Compel (Discovery).** Per parties - OFF CALENDAR.
LINE 9	23CV415947	James Fok et al vs Peter Wong et al	**Motion to Compel (Discovery).** Per parties - OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	23CV423952	Santa Clara Valley Transportation Author vs Lenzen Associates, LLC, a California limited liability company et al	**Application for Withdrawal of Deposit of Probable Just Compensation.** Before the Court is an application by Defendant Lenzen Associates, LLC. to withdraw the probable just compensation of $369,000 deposited in this eminent domain proceeding. This matter has been continued several times as Plaintiff Santa Clara Valley Transportation Authority identified *other* defendants that may claim an interest or compensation in this action (those defendants included the City of San Jose, Wells Fargo Bank, Bank of America, PRLAP, Inc., Federal Home Loan Mortgage Corporation, and the County of Santa Clara.) On June 6, 2024, the City of San Jose, filed a notice of non-opposition to the application. On June 27, 2024, defaults were entered against Defendants Bank of America. PRLAP, and the County of Santa Clara. However, the remaining defendants (Wells Fargo Bank and Federal Home Loan Mortgage Corporation) have still not been properly served with the application to allow them to oppose or consent to the application or any default entered against them. The Court has already continued this motion twice to enable service of the application to be effectuated. Parties to appear to explain the lack of service of defendants Wells Fargo Bank and Federal Home Loan Mortgage Corporation. No further continuances of this application will be granted.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	24CV439544	Absolute Resolutions Investments, LLC vs Kristie Prinz	**Petition Compel Arbitration**. Defendant Kristie Prinz brings a petition to compel arbitration based on an agreement to arbitrate contained in a Comerica Bank Visa Cardmember Agreement (para. 43), agreed upon with Plaintiff's predecessor, Elan Financial Services, on behalf of Comerica Bank. The Cardmember Agreement specifically provided that the terms would survive any assignment or transfer of the account or amounts owed thereunder and be binding upon any assignee (para. 33). Defendant also requests that this matter be stayed pending the completion of the arbitration. The petition was filed on June 6, 2024, and the proof of service to Plaintiff was filed June 25, 2024. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party has met her burden of proof. Good cause appearing, the petition is GRANTED (Code of Civil Procedure §1281.2). This matter is STAYED and SET for arbitration review on January 16, 2025 at 10:30 a.m. in Department 18b. Moving party to prepare the formal order.

Calendar Line 1
Case Name: *Michael Holys v. County of Santa Clara, et al.*
Case No.: 22CV407608

Before the court is defendant County of Santa Clara's demurrer to plaintiff's third amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

Defendant County of Santa Clara ("County") was authorized by the State of California to place and care for children in foster care, including in private homes, juvenile halls, and group homes in Santa Clara County. (Third Amended Complaint ("TAC"), ¶2.) Children in foster care within County are in the legal custody of defendant County. (*Id.*) Defendant County was responsible for the care and safety of children within Santa Clara County. (*Id.*)

Defendant County provided child welfare, child protective, and childcare services to foster children in Santa Clara County, including plaintiff Michael Holys ("Holys"). (TAC, ¶9.)

At all relevant times, plaintiff Holys was in foster care under the custody, care, and control of defendant County. (TAC, ¶23.) In approximately 1998, defendant County placed plaintiff Holys in the foster home of Jason Mero and Eric Morrison ("Foster Parents") located in Palo Alto ("Foster Home"). (TAC, ¶24.) Foster Parents and Foster Home were approved, licensed, trained, supervised, and/or compensated by defendant County. (*Id.*)

From approximately 1998 to 2001, when plaintiff Holys was approximately thirteen (13) to sixteen (16) years old, plaintiff Holys's foster father, Jason Daniel Mero ("Perpetrator"), sexually abused and assaulted plaintiff Holys approximately daily while plaintiff Holys resided in the Foster Home. (TAC, ¶25.) Perpetrator was an individual to whom defendant County entrusted plaintiff Holys's care and custody. (TAC, ¶27.)

Perpetrator and plaintiff Holys's other foster parent were so open about their sexuality that dildos as well as pornographic videos and materials would be openly displayed throughout the Foster Home for anyone visiting the home to observe in plain sight. (TAC, ¶29.) Immediately upon moving in the subject Foster Home, Perpetrator made plaintiff Holys regularly sleep with him in Perpetrator's bed. (*Id.*)

During the course of the aforementioned sexual abuse, plaintiff Holys's other foster parent observed plaintiff Holys being sexually assaulted by Perpetrator and was undeniably aware of the ongoing abuse. (*Id.*) Plaintiff Holy's biological sister told her therapist that plaintiff Holys was sleeping with his Foster Parents in their bed and said therapist reported this information to defendant. (*Id.*)

The Foster Home was filthy and had only one bed which was observed by the social worker or defendant County's agent checking on plaintiff Holys while at Foster Home, who then instructed Foster Parents to make improvements to the living conditions. (*Id.*) Plaintiff Holys was regularly bruised and dirty with inadequate clothing during social worker visits. (*Id.*) Plaintiff Holys reported to defendant County that he was not being given enough food and that he was regularly locked in the garage and had to wear dirty clothing to school. (*Id.*) Foster parents stopped taking plaintiff to medical appointments immediately after plaintiff was placed into foster care. (*Id.*) Plaintiff Holys threatened to notify the social worker about the abuse and reported the abuse along with his friends to plaintiff's school including his teachers Pace, Ms. G, and Leo. (*Id.*) Perpetrator forced plaintiff Holys to write a letter to the social worker stating he was not being abused. (*Id.*) No action was taken, no investigation completed, and Perpetrator continued to sexually assault and abuse plaintiff Holys. (*Id.*)

Defendant County knew the foster home in which it placed plaintiff Holys was unsafe and it was thus foreseeable that plaintiff Holys would be sexually assaulted and/or abused. (TAC, ¶30.) Defendant County knew of Perpetrator's misconduct that created a risk of childhood sexual assault and/or abuse against plaintiff Holys and defendant County failed to take reasonable steps and/or implement safeguards to avoid such acts of childhood sexual assault and abuse. (TAC, ¶¶31 – 34.) Despite such actual knowledge, defendant County provided Perpetrator unsupervised access to plaintiff Holys. (TAC, ¶35.) Defendant County knew or were otherwise on notice of sexual assault and abuse of plaintiff Holys by Perpetrator and failed to take reasonable steps/ implement safeguards to avoid foreseeable acts of childhood sexual assault. (TAC, ¶36.) In addition to actual notice provided to defendants, there were substantial structural and systemic flaws and deficiencies in the foster care system designed and/or implemented by defendant County. (TAC, ¶37.) Sexual assaults and abuse of

juveniles placed in foster care was a chronic, unmitigated, systemic, and pervasive problem known to defendants. (TAC, ¶¶38 and 40.)

On November 17, 2022, plaintiff Holys filed a complaint against defendant County asserting a claim for negligence.

On April 3, 2023, plaintiff Holys filed a first amended complaint ("FAC") alleging causes of action for:

(1) Negligence [against defendant County]

(2) Breach of a Mandatory Duty [against defendant County]

(3) Negligence [against Doe defendants 2 through 25]

On May 1, 2023, defendant County filed a demurrer to plaintiff Holys's FAC. On January 18, 2024, the court sustained defendant County's demurrer to the FAC with leave to amend.

On January 26, 2024, plaintiff Holys filed a second amended complaint ("SAC") which continues to assert the same causes of action asserted in the FAC.

On February 29, 2024, defendant County filed a demurrer to plaintiff Holys's SAC. On April 19, 2024, the court sustained defendant County's demurrer to the SAC with leave to amend.

On April 29, 2024, plaintiff Holys filed the operative TAC which continues to assert the same causes of action asserted in the FAC and SAC.

On May 23, 2024, defendant County filed the motion now before the court, a demurrer to plaintiff Holys's TAC.

II. Procedural violation.

As a preliminary matter, the court notes that plaintiff Holys's memorandum of points and authorities in opposition exceeds the page limitations set forth in California Rules of Court, rule 3.1113, subdivision (d) which states, "no opening or responding memorandum may exceed 15 pages." Plaintiff Holy's opposition memorandum of points and authorities, exclusive of the table of contents and table of authorities, is 18 pages. Plaintiff Holys did not seek leave in advance from this court for a page extension as permitted by California Rules of Court, rule 3.113, subdivision (e).

“A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper.” (Cal. Rules of Court, rule 3.1113, subd. (g).) A court may, in its discretion, refuse to consider a late-filed paper but must indicate so in the minutes or in the order. (Cal. Rules of Court, rule 3.1300, subd. (d).) Plaintiff Holys and his counsel are hereby placed on notice that any future failure to comply with the California Rules of Court may result in the court’s refusal to consider their papers.

III. Defendant County's demurrer to the first and second causes of action in plaintiff Holys's TAC is SUSTAINED.

As before, defendant County points out that, "because 'all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, "to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity." ' (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 [221 Cal.Rptr. 840, 710 P.2d 907] (*Lopez*).)" (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138; see also *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020-"Under the Government Tort Liability Act, all liability is statutory. Hence, the rule that statutory causes of action must be specifically pleaded applies, and every element of the statutory basis for liability must be alleged.").) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

A. First cause of action - negligence.

With that particular rule in mind, the two causes of action plaintiff Holys asserts against defendant County are negligence and breach of a mandatory duty. "To prevail in a negligence action, a plaintiff must show the defendant owed a legal duty to her, the defendant breached that duty, and the breach proximately caused injury to the plaintiff." (*Doe v. L.A. County Dep't of Children & Family Servs.* (2019) 37 Cal.App.5th 675, 682 (*Doe*).) However, "[u]nder the [Government Claims] Act, governmental tort liability must be based on statute; all common law or judicially declared forms of tort liability, except as may be required by state or federal

Constitution, were abolished." (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 866.) "[P]ublic entities are immune from liability except as provided by statute (§ 815, subd. (a))…." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980.) "Except as otherwise provided by statute[,] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, §815, subd. (a).)

Defendant County's liability for negligence is premised upon Government Code section 815.2 , subdivision (a), which states, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." "This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees." (Legislative Committee Comment to Gov. Code, §815.2; see also *Hoff v. Vacaville Unified School District* (1998) 19 Cal.4th 925, 932-"Through this section, the California Tort Claims Act expressly makes the doctrine of *respondeat superior* applicable to public employers. [Citation.] 'A public entity, as the employer, is generally liable for the torts of an employee committed within the scope of employment if the employee is liable. [Citations.]' [Citation.] Under section 820, subdivision (a), '[e]xcept as otherwise provided by statute . . ., a public employee is liable for injury caused by his act or omission to the same extent as a private person.' Thus, 'the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§815, subd. (b)).'")

Defendant County demurs, initially, by arguing that plaintiff Holys has not adequately alleged the existence of a duty. "[T]he existence of a duty is a question of law for the court." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) "The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis." (*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.) "Whether a legal duty of care exists in a given factual situation is a question of law to be

determined by the court, not the jury." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.) "The existence and scope of duty are legal questions for the court." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163.

Defendant County relies principally upon *Doe*, *supra*, 37 Cal.App.5th at pp. 682-683 where the court explained:

> A defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235 [30 Cal. Rptr. 3d 145, 113 P.3d 1159].) In that circumstance, "[i]n addition to the special relationship … , there must also be evidence showing facts from which the trier of fact could reasonably infer that the [defendant] had prior actual knowledge, and thus must have known, of the offender's assaultive propensities. [Citation.]" (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1084 [107 Cal. Rptr. 2d 801] (*Romero*).) In short, the third party's misconduct must be foreseeable to the defendant. (*Delgado*, *supra*, 36 Cal.4th at p. 244; *Romero*, *supra*, 89 Cal.App.4th at p. 1081.)

In *Doe*, minor plaintiff sued a county department of children and family services and a private foster care agency for negligence and failure to perform mandated duties after becoming pregnant by one adult son of the foster parent she had been placed with and being raped by another adult son. On plaintiff's claim against the private foster care agency for negligently screening the foster parent's home, placing plaintiff there, and monitoring plaintiff's placement, the trial court granted nonsuit finding no evidence that the private foster care agency owed plaintiff a duty to protect against the foster parent's two adult sons because their sexual abuse was not foreseeable or imminent.

> Here, there is no real dispute that Children's Institute had a special relationship with Doe. However, nonsuit was properly granted as there was no evidence from which the jury could reasonably infer Children's Institute knew Doe had contact with [the adult sons of the foster parent], much less that the [adult sons] possessed criminal propensities that posed a risk to Doe. … Because there was

> no evidence showing Defendants had actual knowledge of the [adult sons'] criminal tendencies or that they posed any risk of harm, their conduct was not foreseeable. Children's Institute thus did not owe Doe an affirmative duty to protect her from the [adult sons].

(*Doe, supra*, 37 Cal.App.5th at p. 683.)

As against the defendant county and the county social worker, the Doe court's "conclusion that there was insufficient evidence of foreseeability applies equally to the negligence claim against [the county social worker] as it does to [the private foster care agency]." (*Id.* at p. 687, fn. 8.)

Although *Doe* involves a motion for nonsuit, it is nevertheless instructive. "A motion for nonsuit has the effect of a demurrer to the evidence: it concedes the truth of the facts presented by the plaintiff, but contends those facts are insufficient as a matter of law to establish a prima facie case." (*Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1266.) Similarly, in ruling on a demurrer to a complaint, the court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendant County contends, even if there is a special relationship between plaintiff Holys and defendant County, there are no specific allegations that defendant County had prior actual knowledge, and thus must have known, of Perpetrator's sexually assaultive propensities despite plaintiff Holys now having had two more opportunites to plead his claims. As this court previously concluded, it is insufficient for plaintiff Holys to make generic and conclusory allegations that defendant County had knowledge of Perpetrator's "misconduct … that created a risk of childhood sexual assault and/or abuse against Plaintiff" and "knew that Perpetrator was unfit, dangerous, and a threat to the health, safety, and welfare of minors." (TAC, ¶¶31 and 34.)

As defendant County points out, the only new factually specific allegations found in the TAC but not in either the FAC or SAC are the following: "Perpetrator and Plaintiff's other foster parent were so open about their sexuality that Dildo's [sic] as well as pornographic videos and materials would be openly displayed throughout the foster home for anyone visiting the home to observe in plain sight;" "Plaintiff's biological sister told her therapist that Plaintiff

was sleeping with Perpetrator and his partner/husband/boyfriend (other foster parent) in their foster parent's bed and said therapist reported this information to Defendants;" and "Defendants' social workers did not perform thorough interviews, inspected only a limited portion of the entirety of the home, and never allowed Plaintiff or his biological sister to speak with the social workers." (TAC, ¶¶29 and 43.)

As this court previously explained and the *Doe* court requires, a plaintiff must be able to establish and allege the defendant had ***actual*** knowledge of the offender's assaultive propensities. Moreover, since plaintiff is complaining of sexual abuse, plaintiff Holys must allege defendant County's ***actual*** knowledge of Perpetrator's sexually assaultive propensities, not just generally assaultive propensities. From these new allegations, plaintiff Holys essentially alleges defendant County ***should have or could have*** known of Perpetrator's assaultive propensities. The court finds such allegations, at best, are tantamount to constructive knowledge and insufficient under *Doe*.

In opposition, plaintiff Holys contends constructive knowledge is sufficient and that the additional requirement of actual knowledge set forth in *Doe*, an opinion by the Second Appellate District Court of Appeal, has since been criticized by a separate division of the same appellate court in *Doe v. Lawndale Elementary School Dist.* (2021) 72 Cal.App.5th 113, 129 (*Lawndale*) where the court wrote, "To the extent *Doe v. DCFS* suggests that, in all cases where a defendant has a special relationship with a plaintiff, the defendant has a duty to protect the plaintiff from third party assaults or abuse only if the defendant has actual knowledge of the third party's propensity for assault or abuse, California law does not support such a proposition."

Rather, the *Lawndale* court instructs, "After the court determines there is a special relationship, the court must "consider whether the policy considerations set out in *Rowland* warrant a departure from that duty in the relevant category of cases." [Citation omitted.]" (*Lawndale*, *supra,* 72 Cal.App.5th at p. 129; italics removed.) The California Supreme Court in *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 209 (*Brown*), stated the proper legal framework requires: "First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to

protect. Second, if so, the court must consult the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting that duty."

"The cases recognize that even when two parties may be in a special relationship, the ***unforeseeability of the kind of harm suffered by the plaintiff*** or other policy factors may counsel against establishing an affirmative duty for one party to protect the other." (*Brown*, *supra*, 11 Cal.5th at p. 219; emphasis added.)

Plaintiff Holys acknowledges that the "ultimate issue in finding a duty in a particular case is foreseeability."[1] Plaintiff Holy's opposition places some reliance on knowledge *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118 (*USYSA*) where the court held that defendants, a national youth soccer association, its state designee association, and a local affiliate, had a duty to conduct criminal background checks of all adults who would have contact with children involved in their programs.

After finding that a special relationship existed between the defendants and plaintiff, a minor sexually abused by one of her coaches, the court considered the *Rowland* factors to determine the scope of defendants' duty to protect the plaintiff. In relevant part, the *USYSA* court explained:

> "'[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated. [Citations.]' [Citation.] Basically, 'the reasonableness standard is a test which determines if, in the opinion of a court, the degree of foreseeability is high enough to charge the defendant with the duty to act on it.' [Citation.]" (*Juarez, supra*, 81 Cal.App.4th at p. 402.) Courts use a "sliding-scale balancing formula" under which "imposition of a high burden requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 243 [30 Cal. Rptr. 3d 145, 113 P.3d 1159].) Heightened foreseeability can be shown by evidence of prior similar criminal incidents or "other indications of a reasonably foreseeable risk of violent criminal assaults … ." (*Id.* at p. 244.)

[1] See page 8, line 23 of the Opposition to Demurrer to Third Amended Complaint.

(*USYSA, supra*, 8 Cal.App.5th at p. 1131.)

> Here, defendants had no knowledge that Fabrizio had previously sexually or physically abused anyone or had a propensity to do so. But US Youth was "aware of incidents of physical and sexual abuse of US Youth Soccer's members by its coaches at a steady yearly rate of between 2 and 5 per year." More importantly, in recognition of the risks of sexual abuse to its players, US Youth had developed the KidSafe Program, which included a pamphlet that stated: "'One out of every 4 girls and one out of every 6 boys will be sexually abused before the age of 18. Fact: Pedophiles are drawn to places where there are children. All youth sports, including youth soccer, are such places.'" Though these statements did not establish the rate of sexual abuse in youth soccer programs, they were an acknowledgement by US Youth that children playing soccer were at risk for sexual abuse. As to Cal North and West Valley, there is no indication of the frequency of sexual abuse incidents affecting players in their leagues. However, Cal North and West Valley had adopted the KidSafe Program, which acknowledged that their soccer programs attracted those who might sexually abuse their players and that there had been incidents of sexual abuse. Moreover, the year before Fabrizio submitted his application, both Cal North and West Valley were aware of multiple sexual abuse incidents involving Anderson, the founder of West Valley. It is not clear whether these incidents occurred as a result of his participation as a coach, volunteer, or referee for US Youth soccer activities, but these incidents demonstrated that pedophiles were drawn to activities involving children. Thus, while this record does not present evidence of heightened foreseeability, we conclude that it was reasonably foreseeable to defendants that a child participating in their soccer program would be sexually abused by a coach.

(*Id.* at pp. 1132-1133.)

As there were no allegations to support a heightened foreseeability, the *USYSA* court did find sexual abuse to be at least reasonably foreseeable and, thus, found it justifiable to

impose a duty upon defendants to conduct criminal background checks. *USYSA* does not expressly confront the issue of whether actual knowledge of a third party's wrongful conduct is required to establish foreseeability or whether constructive knowledge is sufficient. In *USYSA*, the national association had actual awareness "of incidents of physical and sexual abuse of US Youth Soccer's members by its coaches at a steady yearly rate of between 2 and 5 per year" and the local affiliate had actual awareness "of multiple sexual abuse incidents involving" its founder. The *USYSA* court seemingly suggests that these instances of actual knowledge imparted constructive knowledge on defendants "that a child participating in their soccer program would be sexually abused by a coach."

Here, plaintiff Holys makes the following allegations: "sexual assaults and abuse of juveniles placed in foster care under Defendants' legal custody and care was a chronic, unmitigated, systemic, and pervasive problem well known to Defendants." (TAC, ¶38.) "Children within the foster care system were habitually sexually abused and assaulted while in Defendants' custody and care, Defendants' agents and/or employees were aware of such sexual abuse and assaults, yet said sexual abuse and assaults were not reported as required." (TAC, ¶40.)

Even the allegations in *USYSA* are more specific than these. If the court is to follow *USYSA*, constructive knowledge must still be predicated upon some underlying factual circumstances. It is this court's opinion that the new factual allegations of the TAC, discussed above, in combination with the non-specific allegations of defendant County's awareness of chronic/ habitual sexual abuse of children within the foster care system are still insufficient to establish a degree of foreseeability high enough to charge defendant County with the duty to act on it.

Consequently, defendant County's demurrer to the first cause of action in plaintiff Holys's TAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Second cause of action – breach of a mandatory duty.

Another "[o]ne of the provisions 'otherwise' creating an exception to the general rule of immunity is Government Code section 815.6, which provides: 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.'" (*State of California v. Superior Court (Perry)* (1984) 150 Cal.App.3d 848, 854 (*Perry*).)

"Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*Perry, supra,* 150 Cal.App.3d at p. 854; citations omitted.)

"Whether an enactment is intended to impose a mandatory duty, as opposed to a mere obligation to perform a discretionary function, is a question of law for the court." (*Corona v. State of California* (2009) 178 Cal.App.4th 723, 728.) "An enactment creates a mandatory duty if it requires a public agency to take a particular action." (*County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 639.) For purposes of Government Code section 815.6, the term "enactment" means "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6.)

As to this second cause of action for breach of mandatory duty, the *Doe* court granted nonsuit because there was insufficient evidence that the breach of a mandatory duty was a proximate cause of the injury suffered. Just like plaintiff Holys here, the plaintiff in *Doe* asserted a claim that the defendant county breached mandatory duties to visit her at the foster home at least three times in the first 30 days of her placement; failed to conduct monthly visits; and failed to report plaintiff's statutory rape despite knowing she was pregnant by an 18 year old. The court found it "pure speculation to conclude the sexual abuse would not have occurred had" the county social worker fulfilled her mandatory duties and met with the plaintiff

additional times. (*Doe*, *supra*, 37 Cal.App.5th at p. 688.) Additionally, the court held that the county social worker's failure to report plaintiff's pregnancy as statutory rape was the proximate cause of plaintiff's injury "as the injury had already occurred by the time she asserts it should have been reported." (*Id.* at p. 688.)

This court previously sustained defendant County's demurrers because, in light of the requirement for specificity for pleading statutory claims, "plaintiff Holys ha[d] not sufficiently alleged facts to support the generic allegation that his injuries were proximately caused by defendant County's failure to discharge mandatory duties. (FAC, 72 - 73.) … Again, plaintiff Holys fails to address the lack of particularity with regard to proximate causation in its SAC." Defendant County again reiterates this deficiency and notes that although plaintiff Holys's TAC made some minor edits, the TAC nevertheless continues to make generic allegations concerning proximate causation which amount to nothing more than conjecture. (See TAC, ¶72.) In opposition, plaintiff Holys fails to address the lack of particularity with regard to proximate causation in his TAC.

Accordingly, defendant County's demurrer to the second cause of action in plaintiff Holys's TAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is SUSTAINED WITHOUT LEAVE TO AMEND.

In light of the court's rulings above, the court declines to address defendant County's argument concerning immunity.

The Court will prepare the formal order.

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Calendar Line 3
Case Name: *Kimberly Crawford v. Waldemar Siskens, et al.*
Case No.: 24CV435855

Before the court is defendants' demurrer to plaintiff's complaint based on statute of limitations. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

IV. Background.

On April 13, 2022, plaintiff Kimberly Crawford ("Crawford") was traveling northbound on the US-101 freeway, north of Ellis Street. (Complaint, ¶GN-1.) At the same time, defendant Waldemar Siskens was also traveling northbound on the US-101 freeway, north of Ellis Street. (*Id.*) Traffic ahead was coming to a stop and to avoid a collision, defendant changed lanes to the left and struck plaintiff Crawford's vehicle in the express lane causing plaintiff to sustain serious injuries. (*Id.*)

Defendant Suzanne Siskens owned the motor vehicle which was operated by defendant Waldemar Siskens with defendant Suzanne Siskens's permission. (Complaint, ¶MV-2(c).) Defendant Suzanne Siskens entrusted the motor vehicle to defendant Waldemar Siskens. (Complaint, ¶MV-2(d).) Defendant Suzanne Siskens was the agent or employee of defendant Waldemar Siskens and acted within the scope of the agency. (Complaint, ¶MV-2(e).)

On April 19, 2024, plaintiff Crawford filed a Judicial Council form complaint against defendants Waldemar Siskens and Suzanne Siskens (collectively, "Defendants") asserting causes of action for: (1) Motor Vehicle [Negligence]; and (2) General Negligence.

On May 15, 2024, plaintiff Crawford filed an ex-parte application to correct the filing date nunc pro tunc.

Also on May 15, 2024, Defendants filed the motion now before the court, a demurrer to plaintiff Crawford's complaint.

On May 31, 2024, the court (Hon. Pennypacker) granted plaintiff Crawford's motion for nunc pro tunc order correcting the complaint filing date to April 12, 2024. Thereafter, the court clerk amended the filing date of plaintiff Crawford's complaint to April 12, 2024 with the notation, "Correcting filing date to 4/12/2024 per 5/31/2024 Order."

V. Defendants' demurrer to plaintiff Crawford's complaint based on statute of limitations is OVERRULED.

Defendants demur to plaintiff Crawford's complaint on the ground that it is barred by the applicable statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab*). A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take judicial notice]. (*Id.*, at pp. 1315-1316.) When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id.*, at p. 1316.)

Defendants contend Crawford's complaint is subject to a two-year statute of limitations since it is "[a]n action for … injury to … an individual caused by the wrongful act or neglect of another." (Code Civ. Proc., §§335.1.) The subject incident allegedly occurred on April 13, 2022 and so according to Defendants, plaintiff Crawford's complaint is barred if not filed by April 13, 2024.

At the time Defendants filed their demurrer, plaintiff Crawford's complaint bore a filing date of April 19, 2024. As explained above, the court issued an order correcting the filing date nunc pro tunc to April 12, 2024. As such, plaintiff Crawford's complaint is timely.

Defendants demurrer to plaintiff Crawford's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., is barred by the statute of limitations, is OVERRULED.

VI. Plaintiff Crawford's request for sanctions is DENIED.

In opposition, plaintiff Crawford requests the court impose monetary sanctions against Defendants and/or Defendants' counsel for refusing to withdraw their demurrer despite the nunc pro tunc order correcting the filing date. "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another

party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., §128.5, subd. (a).)

Since the nunc pro tunc order did not issue until after Defendants filed their demurrer, the court does not find Defendants' filing of the demurrer to be made in bad faith, frivolous, or solely intended to cause unnecessary delay. However, the court tends to agree with plaintiff Crawford that Defendants' refusal to withdraw their demurrer following issuance of the nunc pro tunc order borders on bad faith. Nevertheless, the court declines to award sanctions in this initial instance and will, instead, remind Defendants' counsel that the court maintains a standing order which adopts the Santa Clara County Bar Association Code of Professionalism.[1] Section 11 of that Code of Professionalism states, "Motions should be filed or opposed only in good faith and when the issue cannot be otherwise resolved."[2]

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[1] See https://santaclara.courts.ca.gov/general-information/local-rules-court.
[2] See https://www.sccba.com/code-of-professional-conduct/.

Calendar Lines 4-5
Case Name: *Getty v. Villa Verde, et al.*
Case No.: 24CV436461

According to the allegations of the complaint, on April 4, 2023, plaintiff Shirley Getty ("Plaintiff") fell while attempting to use the bathroom and was taken to Santa Clara Valley Medical Center where she was hospitalized for "recurrent falls and weakness." (See complaint, ¶ 23.) On April 14, 2023, she was discharged to White Blossom Care Center, a skilled nursing facility, for short-term rehabilitation, and Plaintiff's condition improved within weeks. (*Id*.) Plaintiff's condition improved such that she was discharged from White Blossom Care Center to defendant Villa Verde on May 4, 2023. (See complaint, ¶¶ 24-25.) However, at Villa Verde, Plaintiff received neither a documented assessment, nor a resident appraisal, nor a service plan, and received a lack of custodial care that resulted in her suffering a decreased lack of mobility and deconditioning, as well as lying in her own urine and feces for hours despite her family bringing in a bedside commode. (See complaint, ¶¶ 25-26.)

On May 8, 2023, Plaintiff's insurer authorized defendant Sequoia Home Health & Hospice ("Sequoia") to provide home health services and Sequoia indicated that it was ready to staff. (See complaint, ¶ 27.) However, Sequoia did not first see Plaintiff until May 11, 2023, and Plaintiff's condition further deteriorated as a result of Sequoia's failure to see Plaintiff immediately. (*Id*.) When Sequoia did first assess Plaintiff's functional status on May 11, 2023, it determined that Plaintiff was at risk for developing a pressure injury because her mobility was very limited, and thus identified its responsibility to teach and ensure Villa Verde staff knew what to do to prevent Plaintiff from developing a pressure injury. (See complaint, ¶¶ 28-29.) However, Sequoia failed to provide any education regarding pressure injury prevention and failed to devise or implement any pressure injury prevention interventions for Plaintiff. (See complaint, ¶ 29.) Villa Verde failed to mobilize Plaintiff or provide any activities for Plaintiff, failed to reposition Plaintiff, and Sequoia did not see Plaintiff from May 12-15, 2023, thereby failing to supervise Villa Verde in its care to Plaintiff. (See complaint, ¶ 30.)

On May 16, 2023, a Sequoia LVN assessed Plaintiff as alert, oriented, forgetful and verbally responsive with normal vital signs and no pain or shortness of breath. (See complaint, ¶ 31.) Sequoia put Plaintiff on a low sodium diet and limited her intake of canned foods, processed foods, pickles, frozen foods and bacon, and had Plaintiff sit up when eating to prevent choking and aspiration. (*Id*.) Sequoia also educated Plaintiff on eating small portions, to eat many times a day to have enough nutrition and to sit for 30 minutes after eating for better digestion. (*Id*.) Sequoia was trying to prevent Plaintiff from experiencing acid reflux. (*Id*.) Sequoia also instructed Plaintiff to comply with her medications and taught her infection control. (*Id*.)

Plaintiff complained on May 16, 2023 that it was painful for her to sit and her family asked Villa Verde and Sequoia to check Plaintiff for injury; however, neither Villa Verde nor Sequoia checked for injury, investigated the cause of her pain nor documented its existence. (See complaint, ¶ 32.) While Sequoia identified Plaintiff's skin integrity as its responsibility, care was delayed to the next visit and failed to provide any pressure injury prevention education to Villa Verde and failed to provide any pressure injury prevention care. (*Id*.) On May 17, 2023, a Sequoia therapist documented that Plaintiff had "increased complaints of pain" in her lower back area but neither Sequoia nor Villa Verde checked to see why Plaintiff

was in pain in her lower back area, assessed the cause of her pain nor checked her lower back area for injury. (See complaint, ¶ 33.)

On May 18, 2023, a Villa Verde caregiver noticed blood in Plaintiff's diaper at 5:30 a.m.; Plaintiff's family was notified of the wound at 9:18 a.m. and Plaintiff's family immediately called Sequoia and left a voice message. (See complaint, ¶ 34.) Sequoia visited at 12:35 p.m. that day, sending a licensed vocational nurse who assessed Plaintiff's wound as a Stage 2 pressure injury and did not require a higher level of care or physician involvement and left a sample tube of TheraHoney and three bandages. (See complaint, ¶ 35.) Sequoia also educated Plaintiff on urinary tract infections and adequate hydration as she was identified as being at risk for infection. (See complaint, ¶ 36.) Sequoia encouraged Plaintiff to call it if she had any concerns and planned to address wound care, safety, nutrition, medication management, skin integrity and her condition for the next visit. (*Id*.)

Villa Verde expressed concerns about its ability to care for Plaintiff's wound and asked Sequoia when it would return to care for Plaintiff's wound; however, Sequoia "only told us that [they] will call first with no definite date for the next visit." (See complaint, ¶ 37.) On May 20, 2023, Villa Verde was concerned about Plaintiff's wound because of Sequoia's failure to provide education, assistance, wound care and supervision; Villa Verde was also out of wound care supplies that Sequoia promised to provide and its administrator left a message for Sequoia to follow up, monitor and check the wound and follow up the supplies. (See complaint, ¶ 38.) On May 21, 2023, Villa Verde asked Sequoia for a nurse to come and monitor Plaintiff, check on the wound, and for more medical attention and support for Plaintiff. (See complaint, ¶ 39.) On May 22, 2023, Villa Verde asked Sequoia, if possible, to come to check and care for Plaintiff more than twice a week and was told that a nurse would come the following day to provide medical support and supplies. (See complaint, ¶ 40.) Plaintiff's family also reached out to Sequoia who responded that Plaintiff's wound was a Stage 2 pressure injury and offered to send a wound care physician to see Plaintiff. (*Id*.)

On May 23, 2023, Sequoia's LVN visited Plaintiff and documented that Plaintiff's injury had progressed to a Stage 3 pressure injury with 100% slough but did not remove Plaintiff from Villa Verde as required by California Code of Regulations, Title 22, section 87615. (See complaint, ¶¶ 41-43.) On May 24, 2023, a Sequoia physical therapist assistant documented that Plaintiff was suffering from a burning pain and reported to Plaintiff's family that Plaintiff's wound was larger and deeper. (See complaint, ¶ 44.) Plaintiff's family visited and asked Sequoia when its wound care physician was coming to see Plaintiff; however Sequoia now indicated that Plaintiff needed a referral from her physician. (*Id*.) After Plaintiff's family contacted Plaintiff's physician, Sequoia then told Plaintiff's family that Sequoia's wound care physician would not see Plaintiff because the wound care physician was not an in-network provider. (*Id*.) On May 24, 2023, a Sequoia nurse filled out a physician order identifying Plaintiff's pressure injury as unstageable; the order was approved on May 25, 2023. (See complaint, ¶ 45.) On May 25, 2023, Plaintiff's family asked Sequoia about the wound care supplies and was told that it was difficult to order supplies. (See complaint, ¶ 46.) Plaintiff's family also contacted Sequoia about its nurse that failed to show up as promised to treat Plaintiff's wound. (*Id*.) Plaintiff's family called Plaintiff's physician to see if he could look at Plaintiff's wound and an appointment was made for the following morning. (*Id*.)

On May 26, 2023, Plaintiff was seen by her physician who, after seeing the size and severity of the wound, had her immediately taken to O'Connor Hospital. (See complaint, ¶

47.) O'Connor Hospital identified a "wound infection" that was now a large, infected Stage 4 sacral pressure injury with a wound that measured 6 cm x 6 cm x 3 cm, and noted that Plaintiff had lost 13 pounds in a month. (*Id*.) Plaintiff had surgery with a skin substitute graft applied. (*Id*.) On June 6, 2023, Plaintiff was discharged to Almaden Health & Rehabilitation Center for wound care where she now remains with s severe, open Stage 4 wound. (See complaint, ¶ 48.)

On April 22, 2024, Plaintiff filed a complaint against Villa Verde, Villa Verde owner Dominica Oliva ("Oliva"), Sequoia, Pennant Services, Inc. ("Pennant"), and Cornerstone Healthcare, Inc. ("Cornerstone"), asserting causes of action for:

1) Elder neglect (against Villa Verde and Oliva (collectively, "Villa Verde defendants"));
2) Elder neglect—enhanced remedies sought (against Villa Verde defendants);
3) Negligence (against Villa Verde defendants);
4) Elder neglect (against Sequoia, Pennant and Cornerstone (collectively, "Sequoia defendants"));
5) Elder neglect—enhanced remedies sought (against Sequoia defendants);
6) Negligence (against Sequoia defendants);
7) Violation of Resident's Bill of Rights (Health & Safety Code § 1569.261, et seq.) (against Villa Verde defendants);
8) Fraud (constructive) (against Villa Verde defendants);
9) Fraud (constructive) (against Sequoia defendants);
10) Negligent infliction of emotional distress (direct victim) (against Villa Verde defendants); and,
11) Professional negligence (against Sequoia defendants).

Sequoia defendants demur to the fourth, fifth, sixth and ninth causes of action and also move to strike portions of the complaint seeking statutory and punitive damages and attorney's fees.

I. SEQUOIA DEFENDANTS' DEMURRER TO THE COMPLAINT

Sequoia defendants' request for judicial notice

Sequoia defendants request judicial notice of the following documents:

1) The complaint in the prior case, *Getty v. Villa Verde, et al*. (Super. Ct. Santa Clara County, 2023, No. 23CV418773) (hereinafter, "prior case") (attached as Exhibit A to declaration of Elton S. Rushing);
2) The docket in the prior case (attached as Exhibit B);
3) The December 12, 2023 order granting Sequoia's motion for judgment on the pleadings as to fourth through sixth, ninth, eleventh and thirteenth causes of action (attached as Exhibit C); and,
4) The December 13, 2023 request for dismissal of the prior case (attached as Exhibit D).

Sequoia defendants' request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

Fourth through sixth causes of action for elder neglect and custodial negligence

The allegations of the complaint do not compel the conclusion that, as a matter of law, the Sequoia defendants lacked a caretaking or custodial relationship of Plaintiff.

Sequoia defendants argue that the fourth through sixth causes of action for elder neglect and custodial negligence fail to state facts sufficient to constitute causes of action against them because "the complaint fails to allege facts that support the existence of 'a robust caretaking or custodial relationship' between plaintiff and Sequoia, precluding plaintiff's elder abuse claims against Sequoia." (Defs.' memorandum of points and authorities in support of demurrer to complaint ("demurrer memo"), p.12:1-3.) Sequoia defendants rely on *Oroville Hospital v. Super. Ct. (Ambrose)* (2022) 74 Cal.App.5th 382, in which a patient also had an infected wound from a pressure injury, and the defendants also provided wound care and failed to recommend the patient to be transferred to the hospital for evaluation and wound debridement. (*Id*. at p.389.) After the hospital treated her wound, the wound healed considerably and the patient was transferred to the defendants for treatment; however, the patient developed new wounds and did not transfer her back to the hospital for either treatment or evaluation of the new wound. (*Id*. at pp.390-391.) Ultimately, the patient's wounds worsened, her family called 911, where she was taken to the hospital, but despite undergoing surgery, and post acute care, she died of complications from sepsis. (*Id*. at p.391.) The defendants argued on a motion for summary judgment, that they did not have a substantial caretaking or custodial relationship with decedent, and thus, according to *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, they could not be liable for neglect under the elder abuse act. (See *Oroville Hospital, supra*, 74 Cal.App.5th at pp.391-411.)

The California Supreme Court in *Winn, supra*, 63 Cal.4th 148, noted that "[t]he Elder Abuse Act's heightened remedies are available only in limited circumstances," and that [s]ection 15610.57… provides two definitions of neglect: '[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise... [and t]he 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.'" (*Id*. at p.156.) As in *Winn*, the instant case only involves the first definition of neglect, as there is no allegation regarding neglect in the context of self care.

The *Winn* court then analyzed the language of the statute, case law and the legislative history to determine "what kind of caretaking or custodial relationship is required to justify the conclusion that an individual or organization may be subjected to the Act's heightened remedies," and ultimately concluded that "neglect requires a caretaking or custodial relationship that arises where an elder or dependent adult depends on another for the provision of some or all of his or her fundamental needs… [and] prior case law… illustrates the type of caretaking or custodial relationship that the Act requires: one where a party has accepted responsibility for attending to the basic needs of an elder or dependent adult." (*Id*. at pp.157-164 (also stating that "it is the defendant's relationship with an elder or a dependent adult—not the defendant's professional standing or expertise—that makes the defendant potentially liable for neglect… the distinctive relationship contemplated by the Act entails more than casual or limited interactions… the Legislature enacted a scheme distinguishing between—and decidedly not lumping together—claims of professional negligence and neglect… the terms 'care' and 'custody' are used together [throughout the Act] and are best understood to denote a distinctive caretaking or custodial relationship").) The *Winn* court also stated that even if a

particular defendant is one of the listed "care custodians" as listed in Welfare and Institutions Code section 15610.17, the Act "plainly… requires a separate analysis to determine whether such a [caretaking or custodial] relationship exists." (*Id*. at pp.164-165.) The complaint in *Winn* only alleged that the defendants "treated Mrs. Cox at outpatient 'clinics' operated by defendants, but failed to allege any "explanation for why defendants' intermittent, outpatient medical treatment forged a caretaking or custodial relationship between Mrs. Cox and defendants." (*Id*. at p.165.) The *Winn* court held that "defendants lacked the needed caretaking or custodial relationship with the decedent… because "[n]o allegations in the complaint support an inference that Mrs. Cox relied on defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers." (*Id*. at p.165.)

In *Oroville Hospital, supra*, the hospital and defendant provided in-home wound care on six occasions in July 2015 and four additional occasions in October 2015. (See *Oroville Hospital, supra*, 74 Cal.App.5th at p.404.) Ultimately, the *Oroville Hospital* court stated that "[b]ased on our review of the undisputed facts, we conclude defendants' provision of wound care to decedent did not give rise to the substantial caretaking or custodial relationship required to establish neglect under the Elder Abuse Act." (*Id*. at p.405.) However, at issue in *Oroville Hospital, supra*, was a motion for summary judgment, and as indicated in the above statement, the court came to its conclusion based on the evidence proffered. (*Id*. at pp. 397 (stating that "[a]ccording to defendants, plaintiffs' own evidence demonstrated defendants' nurses did not assume responsibility for attending to decedent's basic needs or put themselves in a position where they could assert control over whom she sought out to treat her wound… Defendants assert plaintiffs failed to tender admissible evidence to show defendants' nurses had a ''substantial,' 'significant,' and 'robust' caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient,' as required under the Elder Abuse Act'"), 407 (stating that "[t]he evidence here demonstrates defendants were providing medical care… there is nothing in the record suggesting defendants somehow impeded or interfered with decedent seeking medical care elsewhere… Plaintiffs rely on the written contract in asserting that they 'presented abundant evidence that [defendants] assumed a significant measure of responsibility for attending to [decedent's] needs'").) Unlike *Oroville Hospital*, in which the court analyzed a motion for summary judgment, at issue here is a *demurrer* to the neglect causes of action.

The Sequoia defendants assert that the number of times that they provided services to Plaintiff demonstrate that they "did not have a substantial caretaking or custodial relationship with plaintiff as a matter of law." (Demurrer memo, pp.12:6-28, 13:1-28, 14:1-28, 15:1-28, 16:1-10 (also stating that "[t]hese allegations aver that Sequoia had only six (6) physical interactions with plaintiff, and only four (4) of those physical interactions being with a nurse, during her twenty-two (22) day stay at Villa Verde… [t]he factual recitation within the complaint alleges Sequoia had a limited relationship with plaintiff, which is legally insufficient to support any cause of action for elder abuse… Plaintiff lived at Villa Verde for twenty-two (22) days, which were comprised of approximately five hundred and twenty-eight (528) hours… [f]or the first seven (7) days, or one-hundred and sixty-eight (168) hours, Sequoia did not interact with plaintiff at all…[o]ver the next fifteen (15) days, or three hundred sixty (360) hours, Sequoia is alleged to have had six (6) physical interactions with plaintiff, of which only four (4) interactions were with a nurse… [a]ssuming the four (4) physical interactions between plaintiff and Sequoia nursing staff alleged lasted two (2) hours each (generously), that equates to Sequoia interacting with plaintiff for a total of eight (8) hours out of the three hundred and

sixty (360) hours plaintiff lived at Villa Verde after Sequoia first saw her to provide nursing services… [t]his represents only 2.2% of the time she lived at Villa Verde after Sequoia first physically interacted with her and only 1.5% of the total time plaintiff lived at Villa Verde").) However, the *Oroville Hospital* court specifically stated that "the mere number of occasions on which a defendant furnishes medical care is not dispositive to the question whether a substantial caretaking or custodial relationship required under the Elder Abuse Act has arisen." (*Oroville Hospital, supra,* 74 Cal.App.5th at p.404.) Rather, in *Oroville Hospital,* the court considered that the patient was being provided in-home wound care, the patient had a caretaker to fulfill a number of the patient's basic needs, including dressing the patient, getting food for the patient, administering medications to the patient, helping the patient ambulate in her home, assisting the patient with toileting, changing the patient's diapers, taking the patient to her doctor appointments and helping to manage the patient's diabetes, the type of wound care treatment that the patient received, and the fact that the defendant did not delegate their responsibility for wound care to the caretaker but rather trained her on wound care to assist the patient when they were not onsite. (*Id*. at pp.404-408.) The *Oroville Hospital* court stated that "[i]t must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship" (*id*. at p.405), and "in assessing defendants' potential liability under the Elder Abuse Act, our focus must be on the specific relationship developed between defendants and decedent." (*Id*. at p.406.) The *Oroville Hospital* court ultimately "conclude[d that] defendants' provision of wound care to decedent did not give rise to the substantial caretaking or custodial relationship required to establish neglect under the Elder Abuse Act" after a review of the evidence supplied in support of and in opposition to the motion for summary judgment. (*Id.* at pp.405-406 (stating that "Defendants providing in-home nursing for wound care **did not establish** they had 'assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance'… [w]ound care **such as that at issue here** is not a 'basic need' of the type an able-bodied and fully competent adult would ordinarily be capable of managing on his or her own… we conclude the allegations and **evidence here** do not 'support an inference that [decedent] relied on defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers'… [and that] **the relationship at issue here** is not the type of arrangement the Legislature was addressing in the Elder Abuse Act") (emphasis added).) The Sequoia defendants argue that *Oroville Hospital* mandates a similar conclusion; however, that would require the inappropriate admission of the evidence submitted in *Oroville Hospital* and apply that evidence as to the instant parties.

Here, the complaint alleges that Sequoia defendants accepted the responsibility with regards to pressure injury prevention of Plaintiff (see complaint, ¶ 29), the supervision of Plaintiff and the care being provided to her by Villa Verde (see complaint, ¶ 30 (alleging that "Sequoia generally and specifically assumed… [the] responsibility… to supervise Shirley and the care being provided to her by Villa Verde")), Plaintiff's skin integrity (see complaint, ¶ 32 ("Sequoia identified Shirley's 'skin integrity' as its responsibility"), and "general responsibility for helping with most if not all of Shirley's basic needs—including but not limited to pressure injury prevention nutrition, hydration, medications, fall prevention (environmental safety because of Shirley's recurrent falls), hygiene (including grooming and toileting hygiene), exercise, and mobility." (Complaint, ¶ 75 (also alleging that "plaintiff is not alleging that the Sequoia Defendants were only responsible for providing in-home wound care services, but rather services for all of Shirley's care needs").) These allegations with regards to accepted

responsibilities are beyond than those alleged in the complaint in *Winn, supra*, and also beyond that alleged and demonstrated in *Oroville Hospital, supra*. Thus, the allegations of the complaint do not compel the conclusion that, as a matter of law, the Sequoia defendants lacked a caretaking or custodial relationship of Plaintiff. The demurrer to the fourth through sixth causes of action cannot be sustained on this basis.

Sequoia defendants' argument that the fourth and fifth causes of action fail to allege facts supporting misconduct beyond professional negligence is without merit.

Sequoia defendants also argue that the complaint's allegations do not rise to the level of egregious acts of misconduct distinct from professional negligence; however, the complaint does allege that due to Sequoia's failure to supervise Plaintiff and carry out their caretaking and custodial obligations, "she was being left in urine soaked and/or feces-soiled briefs for long periods of time." (Complaint, ¶ 30.) The California Supreme Court in *Winn, supra*, specifically noted that such an allegation would constitute "neglect" as defined in the Act in contrast with professional negligence. (See *Winn, supra*, 63 Cal.4th at pp.159-161 (stating that "[w]hat seems beyond doubt is that the Legislature enacted a scheme distinguishing between—and decidedly not lumping together—claims of professional negligence and neglect… *Delaney* concluded that 'neglect' as defined in former section 15610.57 and used in section 15657… [refers] to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations… [i]n both *Delaney* and in *Covenant Care*, the defendants had explicitly assumed responsibility for attending to the elders' most basic needs… [i]n *Delaney*, the elder resided at a skilled nursing facility where she had been left lying in her own urine and feces for extended periods of time because the defendants, upon whom she had relied to provide basic care, had failed to carry out their caretaking and custodial obligations").) The complaint also alleges the abandonment of its caretaking and custodial responsibilities that allegedly led to the worsening of Plaintiff's injury, requiring hospitalization and a violation of staffing regulations. (See *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348-1349 (stating that "a violation of staffing regulations here may provide a basis for finding neglect… [and] might constitute a failure to protect from health and safety hazards").) Sequoia defendants' argument that the complaint fails to allege facts supporting misconduct beyond professional negligence is without merit.

Sequoia defendants' demurrer to the fourth through sixth causes of action is OVERRULED.

Ninth cause of action for constructive fraud

Sequoia defendants argue that the ninth cause of action for constructive fraud fails to allege facts sufficient to constitute a cause of action for constructive fraud because it does not allege the existence of a fiduciary relationship, and the cause of action is not pled with the requisite particularity.

Sequoia defendants cite to *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, which states that "[t]he elements of the cause of action for constructive fraud are: (1) fiduciary relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." (*Id.* at pp.516-517, fn. 14 (also stating that "the elements of a

representation and falsity, are absent from constructive fraud… [t]he fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship").) Sequoia defendants also note that "[b]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (Demurrer memo, p.18:21-24, quoting Cle*veland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338.) The ninth cause of action expressly alleges that "[t]o be clear, plaintiff is not alleging a fiduciary relationship as a matter of law." (Complaint, ¶ 111.) However, the complaint alleges that Sequoia defendants undertook "responsibility for helping with most if not all of Shirley's basic needs—including but not limited to pressure injury prevention nutrition, hydration, medications, fall prevention (environmental safety because of Shirley's recurrent falls), hygiene (including grooming and toileting hygiene), exercise, and mobility… Sequoia Defendants were… responsible… for all of Shirley's care needs." (Complaint, ¶ 75.) The ninth cause of action alleges facts supporting the existence of a fiduciary relationship. To the extent that Sequoia Defendants disagrees with the alleged facts, that is not at issue on demurrer as "[t]he court treats the demurrer as admitting all material facts properly pleaded." (*Bichai v. Dignity Health* (2021) 61 Cal.App.5th 869, 877.)

As to Sequoia defendants' argument regarding the particularity of the allegations, it is true that "[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.4th 979, 993.) "This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Id*.) "This statement of the rule reveals that it is intended to apply to affirmative misrepresentations." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc*. (2009) 171 Cal.App.4th 1356, 1384.) "[I]t is harder to apply this rule to a case of simple nondisclosure." (*Id*.) "[L]ess specificity is required of a complaint when " 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy…." (*Tenet Healthsystem Desert, supra*, 245 Cal.App.4th at p.838.) If discovery would clear any confusion as to who made the representations and by what means, if the allegations of fraud are otherwise sufficiently detailed, defendant cannot persuasively complain that it misunderstands the fraud claim. (*Charpentier v. Los Angeles Rams Football Co*. (1999) 75 Cal.App.4th 301, 312.)

Sequoia defendants acknowledge that the basis of the ninth cause of action is that "Sequoia should have disclosed to plaintiff that Sequoia was not able to properly care for her and was operating in a manner intended to maximize profits." (Demurrer memo, p.19:15-18.) However, the particularity requirement is not applicable to a cause of action for an alleged nondisclosure. Sequoia defendants argue that "the complaint does not state any facts regarding how Sequoia came to be the outfit that would provide her with nursing services, when that arrangement came to be, or when Sequoia should have made this disclosure." (Demurrer memo, p.19:18-21.) This argument only demonstrates why less specificity is required of a complaint when it appears from the allegations that the defendant must necessarily possess full information concerning the facts of the controversy. Plaintiffs generally cannot be expected to read the minds of the defendant before filing a complaint; at the very least, discovery will clear any confusion with regards to the facts that Sequoia defendants seek.

Sequoia defendants' demurrer to the ninth cause of action is OVERRULED.

II. SEQUOIA DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE COMPLAINT

Sequoia defendants move to strike the following portions of the complaint:

- Punitive damages based on the fourth through sixth causes of action in the event that the concurrently filed demurrer to the fourth through sixth causes of action is sustained;
- Plaintiff's prayer for statutory damages, punitive damages and attorney's fees as to the fourth through sixth causes of action, in the event that the concurrently filed demurrer to the fourth through sixth causes of action is sustained; and,
- The entire fifth cause of action because Plaintiff has failed to comply with Code of Civil Procedure section 425.13, and the cause of action is one for professional negligence rather than elder abuse.

As to the first two categories of allegations—punitive damages and the prayer for statutory damages, punitive damages and attorney's fees, the Court above did not sustain the Sequoia defendants' demurrer to the fourth through sixth causes of action. Accordingly, the arguments lack merit.

Sequoia defendants also argue that the prior case's complaint did not allege a custodial relationship between Sequoia and Plaintiff, and that the instant complaint is a sham pleading since the fourth through sixth causes of action merely "are poorly disguised medical malpractice claims." (Sequoia defs.' memorandum of points and authorities in support of motion to strike ("Strike memo"), p.12:1-28, 13:1-26.) However, the Court does not find that the instant complaint is a sham pleading. The allegation of additional facts that demonstrate a caretaking, custodial or fiduciary relationship in a subsequent complaint so as to allege a viable cause of action is not contradictory to the allegations of a prior complaint that did not make those allegations. Sequoia defendants' motion to strike the allegations supporting punitive damages and the portion of the prayer seeking statutory damages, punitive damages and attorney's fees is DENIED.

As to the fifth cause of action, Sequoia defendants argue that it is "irrelevant to this action because Plaintiff must first comply with Code of Civil Procedure § 425.13, which she has not done." (Strike memo, p.14:17-25.) However, as Sequoia defendants note, section 425.13, subdivision (a) expressly states that it applies to an "action for damages arising out of the professional negligence of a health care provider." (Code Civ. Proc. § 425.13, subd. (a).) In *Covenant Care, Inc. v. Super. Ct. (Inclan)* (2004) 32 Cal.4th 771, the California Supreme Court specifically and carefully analyzed the applicability of section 425.13 to elder abuse causes of action, and stated "we cannot conclude… that the Legislature intended the statute [section 425.13] to apply in an action under the Elder Abuse Act." (*Id*. at pp.779-790.) Sequoia defendants' argument is plainly without merit and Sequoia defendants' motion to strike the fifth cause of action is DENIED.

The Court will prepare the Order.

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