



Wrotten Associates
Attorneys at Law
WROTTEN PLEISS CASEY STEAR ROSS

SERVING THE UNIQUE NEEDS OF HEALTH CARE PROFESSIONALS

5510 Trabuco Road · Irvine · CA · 92620 · (949)788-1790 · www.wrottenlaw.com

WINN V. PIONEER MEDICAL GROUP, INC.;
Analytical Integrity Demands Clarification

by Larry T. Pleiss

The California Supreme Court in *Delany v. Baker* (1999) 20 Cal.4th 23 and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 endeavored to draw a bright line distinction between actions for “neglect” under the Elder Abuse Dependent Adult Civil Protection Act [Elder Abuse Act] and actions for “professional negligence” under the Medical Injury Compensation Reform Act [MICRA]. Recently, in *Winn v. Pioneer Medical Group, Inc.* (2d. Dist., 2013) 216 Cal.App.4th 875, this demarcation was blurred arguably to the point of extinction and now requires reaffirmation and clarification to avoid unnecessary confusion and foster needed certainty in this area of the law. More specifically, and from a pragmatic standpoint, the Supreme Court must, and will, determine whether creative plaintiff attorneys can circumvent the panoply of MICRA protections and apply the Elder Abuse Act, with its potential for recovery of enhanced non-economic damages and attorneys fees, to non-custodial defendants such as physicians, home health agencies, hospice services, etc., and to managed care entities such as medical groups and healthcare maintenance organizations.

In *Winn* the plaintiffs allege that their 83 year-old mother was provided inadequate medical care from her physicians over a five year period of time resulting in additional and profound medical problems. They asserted the typical causes of action predicated upon professional negligence and elder abuse. After the latter cause of action was dismissed, plaintiffs appealed and the appellate court held that a healthcare provider can be liable for elder abuse “reckless neglect” even though the healthcare provider never had custodial obligations to the patient. This is the first reported decision to apply the Elder Abuse Act in the context of outpatient care.

Further, the *Winn* Court held that medical error in failing to recognize the need for specialized care constituted “reckless neglect” invoking the specter of enhanced non-economic damages and attorneys fees, under the Elder Abuse Act, and effectively circumventing MICRA protections for healthcare providers, for patients who receive inadequate medical care. In doing so, the appellate court conflated professional negligence (which involves the diagnosis and treatment by a healthcare provider) and elder abuse (which entails the withholding of medical care by a caregiver). In other words, the appellate court rejected the Supreme Court’s carefully crafted distinction between the two claims as set forth in both *Delaney* and *Covenant Care* and, among other things, eradicated the requirement of custodial care.

In response the defendants in *Winn* successfully petitioned the Supreme Court for review. As of this date, all briefing, including amicus briefs by the CMA, CJAC, CANHR, CAOC, ASCDC, and AMA, has been completed and oral argument was conducted on March 1, 2016. It is anticipated that the Supreme Court will reinforce the “bright line” distinction between professional negligence and elder abuse neglect. To do otherwise, will shape future professional negligence actions by encouraging medical negligence plaintiffs to plead elder abuse to skirt MICRA protections. Moreover, it will not further the Legislature’s purpose in enacting the Elder Abuse Act – to protect a particularly vulnerable portion of the population (residents of nursing homes who are unable to carry out normal activities or

protect their basic rights) from gross mistreatment by their custodial caregivers. The only thing that the decedent in *Winn* had in common with segment of the population which the Elder Abuse Act is designed to protect is that she was over the age of 65. But, that alone does not elevate a professional negligence claim to elder abuse. Rather, it is the nature of the relationship between the custodial caregiver and the elder – as well as the interactions – that should control.

When, as in *Winn*, a healthcare provider/physician treats a patient solely on an outpatient basis and that patient is not in a custodial setting, there can be no “neglect” under the Elder Abuse Act for failing to refer the patient to a medical specialist or another healthcare provider for further medical care and treatment. A common sense reading of the Elder Abuse Act and the Supreme Court’s previous gloss in *Delaney* and *Covenant Care* on it underscores the correctness of this conclusion.

It is anticipated that the Supreme Court will appreciate that the appellate court’s reasoning in *Winn* cuts against the strong public policy underpinnings of MICRA by endorsing the practice of plaintiffs converting their medical negligence claims, based upon alleged failures to provide proper care and treatment, into elder abuse claims by merely pleading such. As a result, plaintiffs will achieve circumvention of the protections of MICRA in order to maximize damages, and, potentially, obtain a coerced settlement. It is manifest that to permit such artful pleading reclassification conflicts with the laudable goals of both the Elder Abuse Act and MICRA and the Supreme Court hopefully will recognize such and declare, once again, elder abuse neglect and professional negligence are mutually exclusive. The sooner the Supreme Courts intervenes the better.

About the Author:

A Shareholder at Wroten & Associates, Larry T. Pleiss previously served as the Managing Partner at Madory, Zell, Pleiss, McGrath, APC. Mr. Pleiss has almost 37 years of experience defending healthcare professionals and governmental entities and has argued cases before the United States and California Supreme Courts. He has achieved the rank of Diplomat, the highest ranking of the American Board of Trial Advocates, which he has been a member of since 1987 and has tried and arbitrated disputes as lead counsel in over 130 cases.

Mr. Pleiss has been called on to speak on such topics as trial skill and defense strategies with the California Continuing Education of the Bar, University of California, Orange County Bar Association, Orange County College of Trial Advocacy, American Board of Trial Advocates, and The Rutter Group. Mr. Pleiss also serves on numerous hospital ethics and quality of care improvement committees in the Southern California community. In 2004 he received the National Business Advisory Council’s Ronald Reagan Gold Medal and National Leadership Awards. For over 20 years he has held AV rating of preeminent AV® in Martindale-Hubbell, which ranks him at the highest level of legal ability and ethical standards.

He was admitted to the California State Bar in 1979, United States District Court for the Central District of California and United States Court of Appeals for the Ninth Circuit in 1980, United States Supreme Court in 1985, United States District Court of Appeals for the Southern District of California in 1988, the United States District Court of Appeals for the Northern District of California in 1989, and the United States District Court for the Eastern and Southern Districts of California in 2013.

Mr. Pleiss concentrated his undergraduate and graduate studies in economics and marketing, and was a member of Alpha Gamma Sigma and Beta Gamma Sigma Honor Societies. At Pepperdine University School of Law, Mr. Pleiss was a member of Law Review and Moot Court Honor Board. He received American Jurisprudence awards in Torts, Evidence, and Civil Procedure. He was published in Law Review [“Deceptive Advertising and the FTC: A Perspective,” *Pepperdine Law Review* (1979); “Beyond Kent and Gault: Consensual Searches and Juveniles,” *Pepperdine Law Review* (1979)] and taught legal research and writing. Mr. Pleiss participated in both the prestigious Roger J. Traynor California State Moot Court competition in 1978 and 1979 and the Vincent S. Dalsimer Pepperdine University School of Law Moot Court competitions, winning best appellate brief awards in each competition and best advocate in the latter competition. He was also a member of Phi Alpha Delta Law Fraternity.

In addition to the professional memberships mentioned above Mr. Pleiss is affiliated with the following: American Bar Association; State Bar of California; Orange County Bar Association; Orange County Trial Lawyers Association; Association of Trial Lawyers of America; Cambridge Who’s Who in America; Who’s Who in American Law; Who’s Who in Practicing Attorneys; Southern California Defense Counsel; Southern California Association for Healthcare Risk Management; American Society for HealthCare Risk Management; Phi Alpha Delta Law Fraternity; American Hospital Association; California Association for Health Care Attorneys; Board of Trustees, and Business Advisory Council.