S S274553

SERVICE ON ATTORNEY GENERAL REQUIRED BY CIV. CODE, § 51.1 AND CAL. RULES OF COURT, RULE 8.212(c).

IN THE SUPREME COURT OF CALIFORNIA

SAMANTHA B. et al.,
Plaintiffs and Appellants,

v.

AURORA VISTA DEL MAR, LLC et al.,
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B302321

PETITION FOR REVIEW

HORVITZ & LEVY LLP
*ANDREA M. GAUTHIER (BAR NO. 158955)
BRADLEY S. PAULEY (BAR NO. 187298)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
agauthier@horvitzlevy.com
bpauley@horvitzlevy.com

KENDALL BRILL & KELLY LLP
PATRICK J. SOMERS (BAR NO. 318766)
10100 SANTA MONICA BOULEVARD, SUITE 1725
LOS ANGELES, CALIFORNIA 90067-4013
(310) 556-2700 • FAX: (310) 556-2705
psomers@kbkfirm.com

BEACH LAW GROUP, LLP
THOMAS E. BEACH (BAR NO. 096321)
MINDEE J. STEKKINGER (BAR NO. 146698)
MOLLY M. LOY (BAR NO. 274703)
500 EAST ESPLANADE DRIVE, SUITE 1400
OXNARD, CALIFORNIA 93036-0561
(805) 388-3100 • FAX: (805) 388-3414
tbeach@beachlawgroup.com
mstekkinger@beachlawgroup.com
mloy@beachlawgroup.com

ATTORNEYS FOR DEFENDANTS AND APPELLANTS
AURORA VISTA DEL MAR, LLC d/b/a AURORA VISTA DEL MAR HOSPITAL (ERRONEOUSLY SUED AS AURORA VISTA DEL MAR HOSPITAL, LLC) AND SIGNATURE HEALTHCARE SERVICES, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Miscellaneous

PETITION FOR REVIEW

ISSUES PRESENTED

1. California courts have consistently held that—outside a narrow exception applicable to on-duty police officers—employers are not vicariously liable for an employee's sexual misconduct as that conduct is outside the scope of employment. Should the law be extended to permit a healthcare employer to be held vicariously liable for the actions of an employee who, based on his own unknown and aberrant predisposition, engages in sexual misconduct with patients? Alternatively, may the healthcare employer be held liable for *ratification* of such conduct when it immediately terminates the employee even before it learns the full extent of the misconduct?

2. May a healthcare employer be held liable for failing to uncover an employee's prior convictions—including *expunged* convictions—when the employer conducts a professional background check that comes back clear and a California regulation expressly *prohibits* employers from seeking information about expunged convictions?

3. In *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 (*Covenant Care*), this Court reaffirmed that the statutory definition of "neglect" under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) (Welf. & Inst. Code, § 15600 et seq.) "refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults . . . to carry out their custodial

obligations.' " (*Covenant Care*, at p. 783, quoting *Delaney v. Baker* (1999) 20 Cal.4th 23, 34 (*Delaney*).) Does a psychiatric hospital's alleged negligent supervision or training of an unlicensed mental health worker constitute "neglect" under the act? If so, can a finding of recklessness be based on the hospital's policy of hiring unlicensed mental health workers when California law expressly permits a psychiatric hospital to do so?

4. The Elder Abuse Act expressly incorporates the $250,000 cap on noneconomic damages set forth in Civil Code section 3333.2, part of the Medical Injury Compensation Reform Act of 1975 (MICRA). Does the Elder Abuse Act cap apply to all noneconomic damages awarded for "neglect," or is it limited to damages awarded in survival actions under Code of Civil Procedure section 377.30 et seq. for a decedent's pain and suffering?

INTRODUCTION

At a time when the availability of healthcare services is paramount, this case presents, in a single vehicle, several critical, unresolved issues affecting California healthcare employers. These issues are of substantial interest to both courts and litigants, and the continued uncertainty caused by conflicting holdings on several of them demands this Court's attention and resolution.

The facts concern the conduct of an unlicensed mental health worker who secretly engaged in sexual misconduct with two women while they were patients at a psychiatric hospital. There is no dispute that the negligent hiring, supervision, or

training of such an employee would support an action against the psychiatric hospital for negligence. The Court of Appeal's published decision, however, arrives at several holdings that dramatically expand a healthcare employer's liability well beyond what has been recognized under established law.

First, the opinion holds that the hospital and its management company may be *vicariously liable* for the employee's sexual misconduct under a respondeat superior theory or may be directly liable for *ratifying* that conduct even though the hospital terminated the employee upon learning he had violated the hospital's fraternization policy and before learning the full extent of his misconduct. The holding on vicarious liability conflicts with a long line of appellate decisions recognizing that employers may not be vicariously liable for an employee's sexual misconduct as that conduct is outside the scope of employment. The one exception to that line of cases is *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 207, 213–221 (*Mary M.*), in which this Court held that a police department may be vicariously liable for the conduct of an on-duty police officer who misused his official authority by raping a woman he had detained for a traffic violation. The Court of Appeal's decision conflicts with decisions of this Court and lower appellate courts recognizing that *Mary M.* is limited to its facts. In addition, the Court of Appeal's holding that an employer may be liable under a ratification theory despite having terminated the employee conflicts with appellate decisions finding sufficient evidence or

allegations of ratification only where the employee was *not* disciplined or terminated.

Second, the opinion upholds several special jury instructions that effectively told the jury that the hospital and its management company had a duty to uncover the mental health worker's prior *expunged* statutory rape conviction even though the hospital had arranged for a professional background check that came back clear. The court's decision conflicts with a California regulation expressly precluding employers from seeking out expunged convictions when making employment decisions.

Third, the opinion holds that the hospital and its management company are liable for "neglect" under the Elder Abuse Act based on their negligent supervision or training of the mental health worker. That holding conflicts with decisions of this Court and the Courts of Appeal recognizing that "neglect" is *not* the *negligent undertaking* of medical services—which includes negligent supervision or training of medical staff—but the *failure to provide* for an elder or dependent adult's basic needs and comforts. Moreover, the court concludes that the conduct was "reckless" based, in part, on the hospital's decision to hire unlicensed mental health workers, yet California law expressly *permits* psychiatric hospitals to do so.

Finally, the opinion holds that a provision in the Elder Abuse Act incorporating MICRA's $250,000 noneconomic damages cap is limited to pain and suffering damages recovered on behalf of decedents in survival actions. The court's decision—

the first to specifically address that issue—is of great interest to custodians of elders and dependent adults and therefore warrants review.

STATEMENT OF THE CASE

A. In 2011, Juan Valencia applies for a mental health worker position at Aurora Vista Del Mar Hospital, an acute psychiatric care hospital owned by Signature Healthcare Services.

Aurora Vista Del Mar Hospital is a licensed acute psychiatric hospital serving Ventura and Santa Barbara counties. (Typed opn. 2; 27 RT 4719.) Aurora is owned and managed by Signature Healthcare Services, LLC, a hospital management company. (Typed opn. 2.)

In June 2011, Juan Valencia applied to Aurora for a mental health worker position. (17 RT 2622–2623; 7 AA 4546.) Under California law, psychiatric hospitals may employ unlicensed mental health workers to assist with nursing procedures. (Cal. Code Regs., tit. 22, §§ 71053, subd. (a)(7), 71215, subd. (f).) Aurora employed mental health workers to carry out various duties such as taking patients' vital signs, assisting with daily living activities, accompanying patients to doctor visits, leading group meetings, and performing safety checks. (Typed opn. 3; 14 RT 2132; 17 RT 2645–2646; 20 RT 3244–3245; 26 RT 4409–4415; 34 RT 6143–6156; 37 RT 6816, 6818–6824.)

B. Valencia's background check comes back clear.

As permitted by California law (see Lab. Code, § 432.7, subd. (f)(1)(A)), Aurora's employment application included a

question asking whether Valencia had been arrested "for a sex offense for which registration as a sex offender may be required under [s]ection 290 of the Penal Code." (7 AA 4547; see 17 RT 2623; typed opn. 3.)

Unbeknownst to Aurora, in 1999, Valencia had been arrested in Santa Barbara County for having sex with his underage girlfriend. (See typed opn. 3; 8 AA 5295–5297; 18 RT 2873; 20 RT 3355; 38 RT 7189–7190.) Valencia was charged with two offenses: (1) penetration by foreign object (Pen. Code, § 289, subd. (b)); and (2) unlawful sexual intercourse with a minor, i.e., statutory rape (Pen. Code, § 261.5, subd (c)). (Typed opn. 3.) The first charge, which would have required registration under Penal Code section 290, was dismissed, and Valencia pleaded guilty to statutory rape, which did not require registration. (Typed opn. 3; see Pen. Code, § 290.) In 2008, the court expunged Valencia's conviction. (20 RT 3357; 8 AA 5313–5314; typed opn. 3.)

Although Valencia had been arrested (though not convicted) for a crime that may have required registration under Penal Code section 290, Valencia falsely answered "no" to the question on Aurora's application. (Typed opn. 3.)

Aurora retained an investigative consumer reporting agency to conduct a background check on Valencia. (Typed opn. 3.) California law prohibits such agencies from reporting convictions more than seven years old. (*Ibid.*; Civ. Code, § 1786.18, subd. (a)(7).) The agency therefore did not report Valencia's 11-year-old expunged conviction to Aurora. (Typed opn. 3.)

C. Aurora hires Valencia. His supervisors consider him a good employee and do not notice any sexually inappropriate behavior with patients.

Aurora hired Valencia as a mental health worker, and he began work in July 2011. (Typed opn. 2–3.) Valencia's orientation included three to five minutes of training on Aurora's staff/patient interaction policy and therapeutic boundaries, including countertransference.[1] (Typed opn. 4; 17 RT 2666–2679; 7 AA 4695–4698.) Under the staff/patient interaction policy, one-on-one interactions with members of the opposite sex could not be conducted behind closed doors unless the door contained an unobstructed observation window and such interactions were limited to 15 to 20 minutes. (Typed opn. 4; 7 AA 4695; 17 RT 2670–2672; 27 RT 4734–4735.)

As a mental health worker, Valencia was supervised by charge nurses in the intensive care units, who were, in turn, supervised by shift supervisors, the assistant director of nursing, and the director of nursing. (14 RT 2135–2136; 15 RT 2389–2390; 18 RT 2889–2890; 20 RT 3252–3253, 3294–3295; 23 RT 3835, 3838; 26 RT 4409–4411; 27 RT 4732–4736; 34 RT 6139–

---

[1] "Countertransference" refers to "the therapist's unconscious (and often conscious) reactions to the patient and to the patient's transference. These thoughts and feelings are based on the therapist's own psychological needs and conflicts and may be unexpressed or revealed through conscious responses to patient behavior." (*Countertransference*, American Psychological Association Dictionary of Psychology <https://dictionary.apa.org/countertransference> [as of May 6, 2022].)

6141, 6161; 37 RT 6832–6833.) The nursing staff generally considered him to be a reliable and good worker. (20 RT 3334–3335; 23 RT 3846–3847; 26 RT 4423–4424; 34 RT 6157, 6166–6167; 35 RT 6433–6434; 37 RT 6829–6831.)

While working at Aurora, Valencia had been jokingly nicknamed " 'Rapey Juan' " by a coworker because he wore his own black gloves rather than blue hospital-issued gloves. (Typed opn. 5; 15 RT 2395, 2410–2411; 25 RT 4263; 35 RT 6406–6409; see 23 RT 3851–3852; 27 RT 4750–4751, 4773.) Valencia explained that he was allergic to the usual blue gloves, though he later testified he preferred black gloves because they were sturdier. (35 RT 6407–6408; 38 RT 7183–7184.)

Aurora's assistant director of nursing testified she never heard Valencia's nickname while he was working at Aurora. (20 RT 3342–3343.)[2] Regardless, no supervisor or any other employee ever observed Valencia acting in a sexual manner with any patient. (14 RT 2152; 15 RT 2403, 2412–2414; 20 RT 3262, 3335, 3341–3342; 25 RT 4267; 27 RT 4751–4752, 4758; 34 RT 6157; 35 RT 6434–6435; 37 RT 6830–6831.)

D. In 2013, unbeknownst to Aurora and Signature, Valencia secretly has sexual contact with each plaintiff during her stay at Aurora.

Plaintiffs Samantha B. and Danielle W., both of whom were diagnosed with psychosis among other conditions, were patients

---

[2] In granting nonsuit on the ratification issue, the trial court noted that "there [was] insufficient evidence that a higher-up responsible agent or party was aware of that moniker" (35 RT 6334; see ARB/X-RB 114.)

at Aurora in 2013 when Valencia worked there. (Typed opn. 4.) Valencia engaged in sexual relations with each plaintiff during her admission. (Typed opn. 4–5.) At the time, neither plaintiff reported the sexual conduct to anyone. (19 RT 3133–3134, 3139; 31 RT 5599; 33 RT 5972–5973, 5977–5978, 6010–6011; 35 RT 6481–6482, 6485; 38 RT 7057–7060, 7080.)

E. In December 2013, Aurora learns that Valencia attended a party with Danielle W. after her discharge and promptly terminates him.

Aurora discharged Danielle W. as a patient in November 2013. (Typed opn. 6.) The day after her discharge, she attended a party with Valencia. (*Ibid.*) Soon after, Aurora learned that a former nursing student had seen Valencia and Danielle W. at the party and that they appeared to be romantically involved. (*Ibid.*)

Aurora's policy prohibited all fraternization by staff with former patients for up to two years after discharge. (26 RT 4462–4463.) Aurora immediately suspended Valencia and conducted an investigation. (Typed opn. 6.) Pam Yvarra, Aurora's director of nursing, interviewed Aurora's staff and was told they never saw Valencia engage in any inappropriate behavior with patients. (26 RT 4470–4474; see 23 RT 3965–3970.) However, Valencia's brother-in-law confirmed he had seen Valencia at the party with a woman fitting Danielle W.'s description. (17 RT 2699–2700, 2704–2705; 26 RT 4473.) On December 12, two days after his suspension, Aurora terminated Valencia. (Typed opn. 6.)

F. In 2015, both plaintiffs file suit against Aurora and Signature, and Valencia pleads guilty to crimes involving both plaintiffs.

In 2014, another patient, who was originally a party to this action but settled before the Court of Appeal decision, reported Valencia's conduct to the police, which triggered an investigation. (13 RT 1828–1829; 14 RT 2051.)

In late February 2015, nearly two years after her discharge and while the criminal investigation was in progress, Samantha B. sued both Aurora and Valencia and later amended her complaint to add Signature. (Typed opn. 7.) She alleged sexual assault and battery; intentional infliction of emotional distress; violation of Civil Code section 51.9, which prohibits sexual harassment in professional relationships; negligence in hiring, supervising, and retaining Valencia; and dependent adult abuse/neglect under the Elder Abuse Act. (Typed opn. 7.) Danielle W. filed a similar complaint in August 2015. (*Ibid.*; 1 AA 463–489.)

In July 2015, Valencia pleaded guilty to crimes involving both Samantha B. and Danielle W. (14 RT 2026–2028; 17 RT 2608; see 6 RT 377; 23 RT 3942–3945.)

G. The trial court rules that the actions against Aurora and Signature do not involve "professional negligence" and that the Medical Injury Compensation Reform Act therefore does not apply.

Aurora and Signature demurred to plaintiffs' complaints on several grounds, including that the allegations of negligent hiring and supervision were based upon "professional negligence" and

were therefore time-barred by MICRA's one-year statute of limitations in Code of Civil Procedure section 340.5. (See 1 AA 177–179, 364–368, 536–602, 784–788.) The trial court rejected that argument, reasoning that negligent hiring and supervision was not a " 'negligent act or omission to act by a health care provider in the rendering of professional services' " but was "a hiring and supervision issue."[3] (1 AA 516.) The court adhered to that reasoning throughout the trial court proceedings, denying summary judgment and other motions seeking relief under MICRA. (See, e.g., 2 AA 1614–1615, 1618–1619; 3 AA 2681, 2683, 2685.)

H. During trial, plaintiffs present testimony regarding Aurora and Signature's alleged negligence.

During trial, plaintiffs' expert psychiatrist, Dr. Joseph Pierre, testified that Aurora' conduct fell below the standard of care in failing to uncover Valencia's expunged statutory rape

---

[3] The court's ruling conflicted with published case law. (See *So v. Shin* (2013) 212 Cal.App.4th 652, 668 ["Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence," and was, therefore, barred by MICRA's one-year statute of limitations]; *Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1051 [because the effective selection and review of staff "is a necessary predicate to delivering quality health care, its inadequate fulfillment of that responsibility constitutes 'professional negligence' involving conduct necessary to the rendering of professional services within the scope of the services a hospital is licensed to provide"].)

conviction, which was publicly accessible at the Santa Barbara Courthouse. (22 RT 3707–3709; 25 RT 4289–4290; see 20 RT 3348–3352; 23 RT 3824–3828.) He also testified that Aurora's staff training on therapeutic boundaries and the staff/patient interaction policy was inadequate. (22 RT 3725–3728; see typed opn. 4.)

Another plaintiffs' expert, Theresa Berkin, similarly testified that Aurora's training on therapeutic boundaries was inadequate. (31 RT 5507–5508, 5518.) Following a 2004 incident in which another worker had become involved with a patient (the "Bravo" incident), Berkin testified that she had recommended that Aurora increase education on therapeutic boundaries but was told by chief executive officer Mayla Krebsbach that Signature would not pay for it. (Typed opn. 5.) Berkin conceded, however, that additional training would not have changed Valencia's criminal behavior. (31 RT 5534–5535.) Neither Dr. Pierre nor Berkin testified it was below the standard of care for Aurora to hire unlicensed mental health workers rather than certified nursing assistants. (See AOB 40–42 [summarizing testimony].)

Plaintiffs also presented lay witness testimony from former Aurora employees who stated the hospital was often understaffed. (Typed opn. 5–6.)

I. The trial court grants a nonsuit with respect to plaintiffs' causes of action based on respondeat superior or ratification.

In a pretrial proceeding, the trial court ruled that Valencia acted outside the scope of his employment in committing sexual assault and that Aurora and Signature therefore could not be vicariously liable on a respondeat superior theory for those acts. (See 6 RT 378–379, 384–385; see also 6 AA 4222–4224.) The court nevertheless permitted plaintiffs to proceed on the theory that Aurora and Signature later ratified Valencia's conduct. (6 RT 412–413; 8 RT 692.)

After plaintiffs' opening statement and again at the close of their case, Aurora and Signature moved for nonsuit on all causes of action, including those based on respondeat superior or ratification, i.e., sexual battery, intentional infliction of emotional distress, and sexual harassment under Civil Code section 51.9. (4 AA 3022–3042, 3097–3125, 3157–3219.) After plaintiffs' case, the court granted nonsuit as to those causes of action based on vicarious liability or ratification but denied the motion as to (a) negligent hiring, supervision, or retention, and (b) neglect under the Elder Abuse Act. (35 RT 6329–6337; typed opn. 2.)

J. Plaintiffs prevail on their negligence and Elder Abuse Act causes of action.

The jury returned a verdict against Valencia on sexual battery and against Aurora and Signature on negligent hiring, supervision, or retention and neglect under the Elder Abuse Act. (Typed opn. 7; 4 AA 3373–3377; 42 RT 8057–8077.) The jury awarded $3.75 million in noneconomic damages to Samantha B.

and $3 million in noneconomic damages to Danielle W., allocating 30 percent fault to Signature, 35 percent fault to Aurora, and 35 percent fault to Valencia. (Typed opn. 7–8.) The jury also found that Signature (but not Aurora) had acted with malice or oppression and awarded each plaintiff $50,000 in punitive damages against Signature. (*Ibid.*)

Following entry of judgment (see 4 AA 3389–3422), Aurora and Signature filed motions for new trial and judgment notwithstanding the verdict, which the trial court denied. (6 AA 4071–4076.) The court later awarded plaintiffs costs and attorney fees under the Elder Abuse Act. (6 AA 4143–4145, 4199–4204.)

K. In a published opinion, the Court of Appeal orders a new trial on the issues of respondeat superior and ratification but otherwise affirms the judgment against Aurora and Signature.

Aurora and Signature appealed from the judgment, and plaintiffs appealed from the trial court's grant of nonsuit on their causes of action alleging respondeat superior and ratification. (Typed opn. 2.)

In a published opinion, the court ordered a new trial on the issues of respondeat superior and ratification but otherwise affirmed the judgment. (Typed opn. 2.) Without addressing *Mary M.* or the long line of appellate decisions declining to hold employers vicariously liable for an employee's sexual misconduct, the court found sufficient evidence for the jury to conclude that Valencia's sexual misconduct was within the scope of employment. (Typed opn. 24–27.) The court also found sufficient

evidence from which the jury could conclude that Aurora ratified Valencia's acts (typed opn. 27), departing from published decisions finding no basis for ratification where an employer terminates the employee.

As for Aurora and Signature's appeal, the court acknowledged that plaintiffs' "cause of action based on professional negligence may be barred by the statute of limitations." (Typed opn. 11.) The court nevertheless affirmed the judgment against Aurora and Signature in its entirety, concluding that (a) plaintiffs were entitled to relief under the Elder Abuse Act because the conduct constituted reckless neglect as defined under the statute; (b) the trial court's instructions that effectively told the jury that Aurora and Signature had a duty to uncover Valencia's expunged conviction were correct; and (c) Aurora and Signature were not entitled to a reduction of damages under the Elder Abuse Act's noneconomic damages cap because the cap applied only to pain and suffering damages awarded in survival actions for losses suffered by decedents. (Typed opn. 9–18, 19–21.)

Aurora and Signature petitioned for rehearing asking the Court of Appeal to address several material misstatements or omissions in its discussion of the evidence and the law. The court modified the opinion to correct two of the misstatements but denied rehearing. (Order Modifying Opn. and Denying Petn. for Rehg. 1.)

LEGAL ARGUMENT

I. Review should be granted to resolve the uncertainty over when an employer may be liable for an employee's sexual misconduct under either a vicarious liability or ratification theory.

A. The Court of Appeal's decision departs from earlier cases holding that, outside a narrow exception, employers may not be held vicariously liable for an employee's sexual misconduct.

The appellate courts of this state—including this Court—have consistently held that an employer may not be held vicariously liable for an employee's sexual misconduct as such conduct is not within the scope of employment. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299–306 (*Lisa M.*) [hospital not liable for ultrasound technician's sexual molestation of patient during exam]; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1007–1008, 1017 (*Farmers*) [county not liable for deputy sheriff's lewd propositioning and offensive touching of other deputies]; *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 441, 447–452 [school district not liable for teacher's molestation of 14-year-old student].)[4]

---

[4] See also *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 891 (*Z.V.*) (county not liable for social worker's sexual assault of 15-year-old foster child); *M.P. v. City of Sacramento* (2009) 177 Cal.App.4th 121, 129–133 (city not liable for firemen's sexual assault); *Maria D. v. Westec Residential Sec., Inc.* (2000) 85 Cal.App.4th 125, 128–129 (private security company not liable for guard's sexual assault); *Juarez v. Boy Scouts of America, Inc.*

The one exception to this line of cases is *Mary M.*, *supra*, 54 Cal.3d at pages 207, 213–221, in which this Court held that a police department could be vicariously liable for the conduct of an on-duty police officer who misused his official authority by raping a woman he had detained for a traffic violation. In so holding, the Court explained that, because police officers "act with the authority of the state," the public employer must be held accountable when on-duty officers "misuse that formidable power to commit sexual assaults." (*Id.* at p. 221.)

In the over 30 years that have elapsed since *Mary M.*, no California court has extended that decision beyond its unique facts. Indeed, in *Lisa M.*, a case involving facts similar to those at issue here, this Court found that the reasoning in *Mary M.* did not apply, observing that its holding was "expressly limited" to the " 'unique authority vested in police officers.' " (*Lisa M.*, *supra*, 12 Cal.4th at p. 304.) Taking a different approach, *Lisa*

(2000) 81 Cal.App.4th 377, 393–395 (Boy Scouts and church not liable for scoutmaster's sexual molestation of scout), disapproved of on another ground by *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 212–213; *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal.App.4th 222, 225–226 (dance studio not liable for dance instructor's sexual assault of student), superseded on another ground by Code of Civil Procedure section 340.1, subd. (a)(2); *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal.App.3d 718, 724 (church not liable for Sunday school teacher's sexual assault of minor); *Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453, 1461–1462 (Roman Catholic archbishop not liable for priests' sexual abuse of minor parishioner); *Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 137, 144 (school district not liable for janitor's sexual assault of 11 year old).

M. held that an ultrasound technician's sexual molestation of a patient during an exam was not within the scope of his employment because it was not "engendered by" or an "outgrowth" of his employment. (*Id.* at pp. 300–301.) Rather, the technician "simply took advantage of solitude with a naive patient to commit an assault for reasons unrelated to his work." (*Id.* at p. 301.) Moreover, because the technician's assault was "the independent product of [his] aberrant decision to engage in conduct unrelated to his duties," his "actions were not foreseeable from the nature of the work he was employed to perform." (*Id.* at p. 303.)

Other courts have similarly distinguished *Mary M.* as limited to its facts. (See, e.g., *Z.V.*, *supra*, 238 Cal.App.4th at p. 891 ["there is considerable doubt that *Mary M.* has any applicability beyond the narrow context of an arrest performed by a uniformed, armed police officer in the normal course of that officer's duties"].) Indeed, a former Chief Justice of this Court questioned *Mary M.*'s continuing viability, describing it as an "aberrant holding" that was "wrongly decided" and should be "overrule[d]." (*Farmers*, *supra*, 11 Cal.4th at p. 1020 (conc. opn. of George, J.)

The facts here are distinguishable from those in *Mary M.* and analogous to those in *Lisa M.* As with the technician in *Lisa M.*, Valencia's employment as a mental health worker provided him the opportunity to meet plaintiffs and be alone with them, but his assaults were not "engendered by" or an "outgrowth" of his employment because his "motivating emotions were [not]

fairly attributable to work-related events or conditions." (*Lisa M.*, *supra*, 12 Cal.4th at p. 301.) Instead, as in *Lisa M.*, the opposite was true: Valencia "simply took advantage" of his employment "to commit an assault for reasons unrelated to his work." (*Ibid.*) " '[T]he assault was not motivated or triggered off by anything in the employment activity but was the result of only propinquity and lust.' " (*Ibid.*)

In the present case, the Court of Appeal does not address *Mary M.* but instead relies on dicta in *Lisa M.* to find sufficient evidence to support a finding that Valencia acted within the scope of employment. The court quotes *Lisa M.*'s observation that it was not dealing " 'with a physician or therapist who becomes sexually involved with a patient as a result of mishandling the feelings predictably created by the therapeutic relationship.' " (Typed opn. 26.) The court summarily concludes that this is "what is happening here." (*Ibid.*)

The Court of Appeal's reliance on *Lisa M.*'s dicta is misplaced. First, *Lisa M.* did not consider—let alone decide—if vicarious liability *would* be appropriate in the hypothetical situation described. (See *Lisa M.*, *supra*, 12 Cal.4th at p. 303, fn. 7 [stating that it "need not decide" whether conduct resulting from a physician's inability to control his emotions, as distinguished from conscious exploitation, "might, under some circumstances, create respondeat superior liability"].)

Second, the facts here are not comparable to *Lisa M.*'s hypothetical situation. Valencia was not a physician or therapist; his job duties entailed assisting nurses with their duties. (See

Cal. Code Regs., tit. 22, §§ 71053, subd. (a)(7), 71215, subd. (f).) Valencia's conduct was not "engendered by [his] employment" (*Lisa M.*, *supra*, 12 Cal.4th at p. 301), but by his own aberrant predisposition and compulsions. Indeed, plaintiffs themselves referred to Valencia as an "opportunistic predator." (RB/X-AOB 50; see RB/X-AOB 144, 146 [Valencia was a "deviant sexual predator"].) Valencia's prior conviction for statutory rape—a fact plaintiffs emphasized throughout trial to demonstrate his predatory nature and to argue that the case did *not* involve professional negligence—reaffirms that the conduct was *not* generated by his employment but was the result of his conscious decision to exploit plaintiffs.

In holding that the facts here could support vicarious liability for an employee's sexual tort, the Court of Appeal's decision represents an expansion of vicarious liability far beyond that previously recognized by this Court and many Court of Appeal decisions. This Court should grant review to resolve the resulting uncertainty in the law created by the decision and to prevent the significant and unwarranted expansion of vicarious liability the decision risks imposing upon employers.

B. The Court of Appeal's decision departs from earlier cases recognizing ratification only where the employer does not discipline or terminate the employee.

In the employment context, "the theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery." (*Baptist v. Robinson* (2006) 143

Cal.App.4th 151, 167.) Thus, "[t]he failure to discharge an agent or employee may be evidence of ratification." (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852 (*Murillo*).) By contrast, where the undisputed facts show that the employer *terminated* the employee upon learning of the employee's tortious conduct, there is no basis to conclude that the employer treated the conduct "as its own," and "thus no triable issue" that the employer ratified the conduct. (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 811.)

Here, the evidence is undisputed that Aurora terminated Valencia even before the full extent of his misconduct surfaced; it did so immediately upon learning of his fraternization with Danielle W. following her discharge. (See *ante*, p. 17.) There is thus no evidence to suggest that Aurora and Signature adopted Valencia's acts as their own and therefore no evidence that they ratified his conduct.

In its decision, the Court of Appeal concludes that, even though Aurora terminated Valencia after it learned of the fraternization, a jury could have determined that Aurora should have investigated sooner, when it first learned that coworkers had dubbed him " 'Rapey Juan.' " (Typed opn. 27.) There is no evidence, however, that Valencia's nickname had anything to do with his conduct toward patients or that Aurora's director of nursing was even aware of that nickname. Indeed, no supervisor or any other employee ever observed Valencia acting in a sexual manner with any patient. (See *ante*, p. 16.)

The court's decision finding sufficient evidence to support ratification *despite* Valencia's immediate termination even *before* the hospital was aware of his misconduct in the workplace departs from other Court of Appeal decisions finding sufficient evidence or allegations of ratification only where the employer fails to discipline or terminate the employee.[5] Indeed, we have uncovered no California case in which ratification was found despite the employer's prompt termination of the employee.

Unless review is granted, employers throughout the state may be subject to expanded liability for an employee's misconduct even where the employers behave responsibly by taking

---

[5] See, e.g., *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110–1112 (complaint alleged that the defendant had received numerous complaints about an employee's sexual misconduct but refused to investigate the allegations and "continued to employ" him); *Murillo*, *supra*, 65 Cal.App.4th at pages 839, 852 (employer did not investigate alleged acts of harassment or terminate the offending employee but, instead, fired the *plaintiff*); *Iverson v. Atlas Pacific Engineering* (1989) 143 Cal.App.3d 219, 228 (employer allegedly failed to " 'criticize, censure, terminate, suspend or otherwise sanction or take any action' " against an offending employee after learning of his misconduct); *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908, 911–916 (union did not punish or discharge union employees after being informed of their assault on plaintiff); *Shoopman v. Pacific Greyhound Lines* (1959) 169 Cal.App.2d 848, 856 (plaintiff testified that he told the principal about its agents' misconduct yet the principal retained the agents in service); *Caldwell v. Farley* (1955) 134 Cal.App.2d 84, 90 (union failed to remove union steward him from his position after learning of his assault); *McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 256–257 (theater owner knew of its employee's assault on theater patron but retained the employee with no investigation or attempt to redress the wrong).

immediate steps to terminate the employee. This Court should grant review to clarify the law in this important area.

II. Review should be granted to address whether a healthcare employer has a duty to uncover an employee's prior convictions where the employer conducts a professional background check that comes back clear.

This Court has long recognized that the existence and the scope of a duty are questions of law for the court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, disapproved on another ground by *Reid v. Google* (2010) 50 Cal.4th 512, 522.) Assuming that a healthcare employer has a duty to conduct background checks of its potential employees, the issue here is whether the law imposes on the employer an absolute duty to uncover all prior convictions—including *expunged* convictions—even where a professional background check comes back clear. The answer should be no, but the Court of Appeal's decision holds otherwise.

Out of a concern for consumer privacy rights, California law prohibits investigative consumer reporting agencies who conduct criminal background checks from disclosing convictions more than seven years old. (Civ. Code, §§ 1786, subds. (a), (b), 1786.18, subd. (a)(7).) Thus, here the agency Aurora hired to conduct Valencia's background check did not disclose Valencia's prior conviction for statutory rape that was more than seven years old and had been expunged several years before Valencia's application for employment.

In addition, a Labor Code regulation that was in effect when Valencia was hired provided that "Except as otherwise provided by law . . . it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning . . . [¶] . . . [¶] . . . [a]ny conviction for which the record has been judicially ordered sealed, *expunged*, or statutorily eradicated," (Former Cal. Code Regs., tit. 2, § 7287.4, subd. (d)(1)(B), emphasis added). That regulation precluded Aurora from independently taking any further steps to seek out Valencia's expunged conviction, even assuming it had known to look for it.

The regulation in effect when Valencia was hired has since been renumbered and reworded, but it remains in effect today.[6] Because that regulation prohibits employers from seeking out expunged convictions, employers cannot owe any duty to do so and, a fortiori, such records cannot be considered in determining whether an employer acted reasonably in its hiring decision. (See *Flores v. AutoZone West, Inc.* (2008) 161 Cal.App.4th 373, 384

---

[6] Former California Code of Regulations, title 2, section 7287.4 was renumbered " 'without regulatory effect' " to a new section 11017, with the portion relevant here later being removed to a new section 11017.1. (4 AA 2873; see 4 AA 2931.) At the time of trial in 2019, the regulation was substantively identical to the earlier regulation, providing that "Except if otherwise specifically permitted by law," employers are prohibited from seeking or considering expunged convictions "when making employment decisions such as hiring, promotion, training, discipline, lay-off and termination." (Former Cal. Code Regs., tit. 2, § 11017.1, subd. (b).) The current version of the regulation contains similar language. (Cal. Code Regs., tit. 2, § 11017.1, subd. (c)(3).)

[noting, in the context of juvenile records, that "[r]ecognizing a duty on the part of an employer to uncover those records is simply inconsistent with that confidentiality policy, so we must decline to do so"].)

Here, the Court of Appeal's decision upholds plaintiffs' proposed special jury instructions that were directly *contrary* to the regulation—instructions that told the jury there was *no limit* as to how far back Aurora could search for prior convictions and that the expunged conviction *could be considered* in determining whether Aurora acted reasonably.[7] In so holding, the court relies on Labor Code section 432.7, subdivision (f)(1)(A). (Typed opn. 16–18.) But that section simply provides that the law "does not prohibit an employer at a health facility . . . from asking an applicant" who is applying "for a position with regular access to patients, to disclose an arrest under any section specified in [s]ection 290 of the Penal Code." (Lab. Code, § 432.7, subd. (f)(1)(A).) The provision thus *permits* a healthcare facility to *ask*

---

[7] Specifically, the court instructed the jury that (1) an employer "that does not use the services of an investigative consumer reporting agency, is not limited by how far back they may go in collecting an applicant's criminal history" (4 AA 3333; see 39 RT 7380–7381; 40 RT 7583); and (2) the jury could consider Valencia's prior conviction in determining whether it "was reasonable" for Aurora and Signature to hire Valencia (4 AA 3314, emphasis omitted; see 6 AA 4413 [defense alternative version that was rejected]; 39 RT 7269 [discussing defense objection that prior conviction has no relevance to hiring]; 40 RT 7572–7574). The court also refused defendants' proposed instruction that "An employer may not consider an expunged conviction of a job applicant for an employment hiring decision." (6 AA 4504; see 39 RT 7374–7375.)

about certain arrests—as Aurora did here—but it creates no *duty* to do so.

Nor does Labor Code section 432.7 impose a duty on employers to undertake *further* efforts to unearth expunged convictions of which they are not aware or to consider those convictions in hiring. Thus, while the court is correct that a regulation cannot "override the Labor Code" (typed opn. 18), section 432.7 in no way conflicts with or undermines the regulation at issue here, which expressly *precluded* Aurora from seeking out expunged convictions.[8]

The Court of Appeal's published decision upholding the trial court's instructions sets a dangerous precedent in California. If the decision is permitted to stand, it may be cited to impose open-ended liability on healthcare employers and possibly other employers for failing to uncover convictions that, by law, they are precluded from uncovering or considering. This Court should grant review to reject the Court of Appeal's ill-considered rule and to confirm that employers' obligations are as defined by the applicable statutes and regulations.

---

[8] In addition to citing the Labor Code provision, the decision initially stated that "Valencia's conviction was not sealed, expunged, or statutorily eradicated." (Typed opn. 18.) The court later deleted that mistaken conclusion in response to Aurora and Signature's petition for hearing, leaving the Labor Code provision as the only justification for its holding. (Order Modifying Opn. and Denying Petn. for Rehg. 1.)

III. Review should be granted to address the confusion as to when a healthcare provider may be held liable for reckless neglect under the Elder Abuse Act.

A. The Court of Appeal's decision conflicts with decisions recognizing that "neglect" is not the *negligent undertaking* of medical services but the *failure to provide* medical services.

The Elder Abuse Act authorizes enhanced remedies when a plaintiff proves "by clear and convincing evidence that a defendant is liable for physical abuse" or "neglect" (as those terms are defined in the act) and "that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse." (Welf. & Inst. Code, § 15657.)

The Elder Abuse Act defines "neglect" as "The negligent *failure* of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57, subd. (a)(1), emphasis added.) Neglect includes the "Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter," "Failure to provide medical care for physical and mental health needs," and "Failure to protect from health and safety hazards." (*Id.*, § 15610.57, subd. (b)(1)–(3).)

Focusing on the statute's use of the term "failure," this Court has made clear that " 'neglect' . . . covers an area of misconduct *distinct* from 'professional negligence,' " which is governed by MICRA. (*Covenant Care*, *supra*, 32 Cal.4th at p. 783, emphasis added.) "[N]eglect refers not to the *substandard performance of medical services* but, rather, to the '*failure* of those responsible for attending to the *basic needs and comforts* of

elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Ibid.*, emphasis added, quoting *Delaney*, *supra*, 20 Cal.4th at p. 34.) "Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Ibid.*)

In *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406–407 (*Carter*), the Court of Appeal relied on this Court's decisions in *Covenant Care* and *Delaney* to hold that neglect occurs only when the defendant "*denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs*." (Emphasis added [citing examples].) The Court of Appeal here expressly disagreed with *Carter*'s analysis, concluding that the hospital's failure to protect plaintiffs from Valencia through its negligent supervision and training amounted to a failure to protect plaintiffs from a health and safety hazard under the Elder Abuse Act. (Typed opn. 12–13.)

The Court of Appeal's analysis conflicts not only with *Carter* but also with *other* appellate decisions recognizing the distinction between the negligent undertaking of medical services (which is professional negligence) and the failure to provide medical care (which is neglect).[9] Indeed, under the court's

---

[9] See *Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal.App.5th 1034, 1047–1050 (evidence of inadequate staffing, training, and a failure to monitor did not constitute substantial evidence of recklessness under the Elder Abuse Act); *Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331, 338 (allegations that hospital was "chronically understaffed," and that it "did not

analysis, *any* negligent undertaking resulting in harm to a patient would effectively amount to "neglect," thereby erasing the sharp distinction between professional negligence and neglect that this Court established in *Delaney* and *Covenant Care*. This Court should grant review and make clear that liability under the Elder Abuse Act should not be expanded to include conduct that is properly characterized as professional negligence under MICRA.

B. The Court of Appeal's decision that recklessness may be based on a psychiatric hospital's policy of hiring mental health workers rather than certified nursing assistants conflicts with a California regulation permitting the hiring of mental health workers.

After concluding that the conduct at issue constitutes neglect, the Court of Appeal holds that the conduct was reckless because "Aurora and Signature adopted policies that exposed their patients to a high degree of risk of sexual predation." (Typed opn. 13.) Among those policies the court cites is Aurora's decision to "hire unlicensed mental health workers" rather than certified nursing assistants, "who are trained, licensed, and fingerprinted, and subject to unlimited background checks." (Typed opn. 14.)

It is undisputed that a California regulation expressly permits psychiatric hospitals to employ unlicensed mental health

---

adequately train the staff it did have" would "demonstrate [the hospital's] negligence in the undertaking of medical services, not a 'fundamental "[f]ailure to *provide* medical care for physical and mental health needs" ' ").

workers to assist with nursing procedures. (Cal. Code Regs., tit. 22, §§ 71053, subd. (a)(7), 71215, subd. (f).) The court's decision that this lawful conduct constituted *recklessness* under the Elder Abuse Act directly conflicts with this regulation. This Court should grant review to resolve that conflict.

IV. Review should be granted to resolve whether the Elder Abuse Act's noneconomic damages cap applies to all noneconomic damages awarded under the Act or just to noneconomic damages awarded in survival actions.

Civil Code section 3333.2, which was enacted under MICRA, limits the recovery of noneconomic damages to $250,000 "In any action for injury against a health care provider based on professional negligence." (Civ. Code, § 3333.2, subds. (a) & (b).) In enacting the Elder Abuse Act, the Legislature expressly adopted MICRA's $250,000 cap on noneconomic damages awards for neglect claims, providing that "the damages recovered *shall not exceed* the damages permitted to be recovered pursuant to subdivision (b) of [s]ection 3333.2 of the Civil Code." (Welf. & Inst. Code, § 15657, subd. (b), emphasis added.)

Consistent with the Elder Abuse Act's plain language, this Court has stated, without qualification, that the Elder Abuse Act includes "the imposition of a damage cap on pain and suffering damages." (*Delaney*, *supra*, 20 Cal.4th at p. 36.) The Court based its conclusion on the Elder Abuse Act's legislative history, which showed that the California Association of Health Facilities, an association of nursing homes, withdrew its opposition to the bill only after the noneconomic damages cap and other amendments

designed to limit its members' exposure were included in the final legislation. (*Ibid.*)

Here, the Court of Appeal took a different approach, concluding that the damages cap did not apply to living plaintiffs but was limited to damages awarded in survival actions for a decedent's pain and suffering. (Typed opn. 20.) The court did so because the sentence which sets forth the cap begins with the word " 'However' " and follows another sentence that reads " 'The limitations imposed by [s]ection 377.34 of the Code of Civil Procedure [pertaining to survival actions] on the damages recoverable shall not apply.' " (*Ibid.*) The court read the second sentence as a modification of the first, but this was error. The correct and only plausible interpretation in light of the statute's structure is that each sentence addresses a *different aspect* of noneconomic damages awarded under the statute—with the first providing that the limitation in "[s]ection 377.34" does not apply, and the second stating that "the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of [s]ection 3333.2 of the Civil Code." (Welf. & Inst. Code, § 15657, subd. (b).) Indeed, it would be illogical to interpret the statute to limit recovery of noneconomic damages in survival actions but not to apply that same limit to noneconomic damages in other actions.

Whether the Elder Abuse Act's noneconomic damages cap should be limited to noneconomic damage awards in survival actions, or whether it applies to all noneconomic damages awarded for neglect, is an issue of great interest to all those

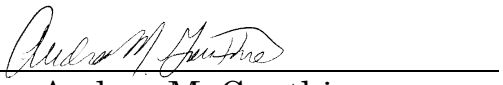
providing custodial services to elder and dependent adults in this state. This Court should grant review to clarify the operation of the damages cap.

CONCLUSION

For the reasons explained above, the petition for review should be granted.

May 13, 2022

HORVITZ & LEVY LLP
ANDREA M. GAUTHIER
BRADLEY S. PAULEY
KENDALL BRILL & KELLY LLP
PATRICK J. SOMERS
BEACH LAW GROUP, LLP
THOMAS E. BEACH
MINDEE J. STEKKINGER
MOLLY M. LOY

By: 
Andrea M. Gauthier

Attorneys for Defendants and Appellants
AURORA VISTA DEL MAR, LLC d/b/a AURORA VISTA DEL MAR HOSPITAL (ERRONEOUSLY SUED AS AURORA VISTA DEL MAR HOSPITAL, LLC) AND SIGNATURE HEALTHCARE SERVICES, LLC

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 7,852 words as counted by the program used to generate the petition.

Dated: May 13, 2022

Andrea M. Gauthier

COURT OF APPEAL OPINION
FOLLOWING REHEARING
B302321 • APRIL 5, 2022

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAMANTHA B. et al., Plaintiffs and Appellants, v. AURORA VISTA DEL MAR, LLC et al., Defendants and Appellants.	2d Civ. No. B302321 (Super. Ct. No. 56-2015-00464635-CU-PO-VTA) (Ventura County) OPINION FOLLOWING REHEARING

Civil Code section 3333.2, known as the Medical Injury Compensation Reform Act of 1975 (MICRA), limits noneconomic damages to $250,000 based on professional negligence. Here we decide this limitation does not apply to plaintiffs' causes of action under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act). (Welf. & Inst., § 15600 et seq.)[1]

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Samantha B. and Danielle W. (Plaintiffs) are former patients at an acute psychiatric hospital.[2] While residing at the hospital, they suffered sexual abuse by a hospital employee. They brought this action against the hospital and its management company, alleging professional negligence and breach of the Elder Abuse Act. The jury found for Plaintiffs and awarded substantial noneconomic damages against both defendants, as well as punitive damages against the management company. Defendants appeal. Plaintiffs appeal the trial court's grant of a motion for nonsuit on their causes of action alleging vicarious liability under respondeat superior and ratification. These causes of action are properly brought before a court or jury.

The matter is reversed and remanded for a new trial on the issue of respondeat superior and ratification. In all other respects, the judgment is affirmed.

FACTS

Aurora Vista Del Mar, LLC (Aurora) is a licensed acute psychiatric hospital. Aurora is wholly owned by Signature Healthcare Services, LLC (Signature). Both entities are wholly owned by Doctor Soon Kim, who owns 11 similar hospitals nationwide.

Signature has a management agreement with Aurora. Among other tasks, Signature agreed to provide "[d]aily operational direction and management" and "[c]linical responsibility for all service programs."

---

[2] Plaintiff C.F. is no longer a party to this action. This court dismissed her appeal pursuant to the stipulation of the parties on October 18, 2021.

Aurora Hires Valencia

In July 2011, Aurora hired Juan Valencia as a mental health worker. The duties of a mental health worker include seeing that patients do not harm themselves or others, keeping patients in a safe environment, and helping patients with daily living activities. Mental health workers are not licensed.

When Valencia was hired, he was given a form in which he was asked whether he had been arrested for a crime requiring registration as a sex offender. He answered no.

In fact, Valencia had been arrested in 1989 for sexual penetration with a foreign object (Pen. Code, § 289, subd. (b)) and unlawful sexual intercourse with a minor (*id.*, § 261.5, subd. (c)). Sexual penetration with a foreign object requires registration, but intercourse with a minor does not. (*Id.*, § 290, subd. (c).) He pled guilty to sexual intercourse with a minor and the other charge was dismissed. The court reduced Valencia's conviction to a misdemeanor and dismissed it in 2008.

Aurora retained an investigative consumer reporting agency to conduct a background check on Valencia. Such agencies are prohibited from reporting an arrest or conviction that antedates the report by more than seven years. (Civ. Code, § 1786.18, subd. (a)(7).) The agency did not report Valencia's 11-year-old arrest or conviction.

Had Aurora hired certified nursing assistants (CNA's), instead of unlicensed mental health workers, it would have had notice of any such prior conviction. CNA's are fingerprinted and licensed.

Training

To be a mental health worker, no license, experience, education, or training is required. As one former Aurora

employee put it, "one day they work at McDonalds, the next day they are mental health workers." Aurora gave Valencia two days of orientation.

The orientation included three to five minutes on countertransference, that is, the tendency of a caregiver to form an emotional bond with a patient. Thereafter, all Valencia needed to do was sign a form on patient and staff interactions and relationships once a year. Staff were not tested to see if they understood patient boundaries.

Plaintiffs' expert testified, "If you read the depositions of multiple staff at the facility, nursing staff, nursing assistants or they call them 'psyche techs' at that facility, it was very clear that they had no idea what transference or countertransference even meant."

Policy on Access to Patients

It is Aurora's policy to allow male mental health workers to be alone with female patients in their rooms for up to 20 minutes as long as the door to the room is open.

Jamie Tallman, an Aurora psychiatric nurse, testified that the charge nurse for the unit spends most of the time at the nursing station. The nurse cannot see into the patients' rooms from the nursing station. One must go into the room to see what is happening there. Walking up and down the hallway is not enough. The charge nurse relies on the mental health workers for information on the patients.

Valencia Sexually Violates Plaintiffs

Plaintiffs were patients at Aurora in 2013 during the time Valencia worked there. Each was suffering from psychosis and did not have the mental capacity to consent to sex. Valencia

engaged in sexual relations with all three individually while they were at Aurora.

Valencia became known among hospital workers as "Rapey Juan." A worker reported the nickname to the supervising nurse. The nurse's response was to roll her eyes and say something like "What are you going to do?"

Bravo Incident

In 2004, an Aurora male employee named Bravo sexually molested a 17-year-old female patient. Theresa Berkin, who was at that time Aurora's director of clinical services, recommended to Aurora's CEO that the hospital increase education to improve therapeutic boundaries. The CEO said that corporate, meaning Signature, would not pay for it. Berkin testified there were other incidents while she was at Aurora in which a staff member interreacted sexually with a patient.

Patient Vulnerability

Patients in an acute psychiatric hospital are vulnerable. Their mental disorders may impair their judgment. Some suffer from cognitive impairments similar to dementia. Some patients receive medications that render them temporarily unconscious. Plaintiffs' expert testified that sexual assaults of mental patients are a known foreseeable risk.

Understaffing

Mark Martinez was a mental health worker at Aurora from 2011 to 2014. He testified that each patient was rated for "acuity" between one and four, with four being the most acute. The entire unit was rated for acuity based on an aggregation of scores of the individual patients. A formula would be applied to the unit's acuity rating to determine the appropriate staffing level. Martinez testified the unit was consistently understaffed.

He said he was on his own with 16 to 24 patients. He complained to the nursing supervisor, the staffing coordinator, and to anyone who would listen, to no avail.

Psychiatric nurse Tallman worked at Aurora from 2010 to 2014. She testified the hospital was frequently understaffed. She complained to the director and assistant director of nursing.

Judy Pittacora, a licensed psychiatric technician, worked at Aurora from 2003 to 2014. She testified the units were more often than not understaffed. She said her supervisors would cross out the acuity number she assigned to a patient and lower it to lower the number of staff needed. Understaffing had an impact on her ability to supervise mental health workers. The workers were often on their own with patients. She complained about understaffing to her supervisors but was told that is how the hospital CEO wanted it. She quit because of understaffing. She was afraid she was going to lose her license.

Failure to Report

Danielle W. was discharged from Aurora on November 29, 2013. The next day a student nurse saw Valencia and the plaintiff together at a party. They appeared to be romantically involved. Aurora suspended Valencia and, after a two-day investigation, terminated him on December 12, 2013.

Aurora's CEO testified that Valencia was terminated only for being with a former patient at a party. The CEO did not suspect there had been any wrongdoing while the patient was hospitalized, even though the patient had been discharged only the day before the party. She did not interview Valencia, the hospital staff, or the former patient to see if any wrongdoing occurred while the former patient was hospitalized. She did not know whether anyone did.

The CEO admitted that about a month after Valencia's termination she learned Valencia's conduct with the former patient at the party was sexual in nature. She also admitted that Aurora had a duty to report such an incident to the California Department of Public Health but did not do so for one year. Aurora only reported Valencia's misconduct after it became public knowledge.

Procedure

Samantha B. was discharged from Aurora on March 6, 2013. She filed the instant action against Aurora and Valencia in February 2015, within two years of her discharge. In June 2015, she added Signature to her complaint. She alleged sexual assault; intentional infliction of emotional distress; and violation of Civil Code section 51.9, sexual harassment in a professional relationship. She also alleged negligence in hiring, supervising, and retaining Valencia and dependent adult abuse under the Elder Abuse Act against Aurora. (§ 15600 et seq.) Danielle W. was discharged from Aurora on November 29, 2013. She filed a similar action within two years, in August 2015.

Verdict and Judgment

The jury found that Aurora and Signature were negligent in hiring, supervising, and retaining Valencia. The jury also found that Signature and Valencia committed acts constituting dependent adult abuse and that they acted with recklessness. The jury found that Signature acted with malice or oppression, but that Aurora did not.

The jury awarded Samantha B. $3.75 million; and Danielle W. $3 million, all in noneconomic damages. The jury allocated 30 percent fault to Signature, 35 percent fault to

Aurora, and 35 percent fault to Valencia. The jury awarded each plaintiff $50,000 in punitive damages.

DISCUSSION

Aurora and Signature's Appeal

I

MICRA's Limitation of Actions

Aurora and Signature contend Plaintiffs' causes of action are time-barred and their damages limited under MICRA.

MICRA is a legislative scheme that is intended to reduce the cost of medical malpractice insurance by, among other matters, limiting the time for plaintiffs to bring their causes of action for professional negligence and limiting the amount of recovery for noneconomic damages. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111.)

Code of Civil Procedure section 340.5, a part of MICRA, provides in part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

A "health care provider" is any person licensed to provide health care services including a health facility. (Code Civ. Proc., § 340.5, subd. (1).) "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." (*Id.*, subd. (2).)

A plaintiff's noneconomic damages are limited under MICRA to $250,000. (Civ. Code, § 3333.2, subd. (b).)

Plaintiffs appear not to contest that if MICRA applies, their action is barred by the time limitations in Code of Civil Procedure section 340.5. They contend, however, that MICRA does not apply. Instead, they claim the Elder Abuse Act applies. Unlike MICRA, the Elder Abuse Act has a two-year statute of limitations (Code Civ. Proc., § 335.1) subject to tolling for "insanity" under Code of Civil Procedure section 352. (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 125-126.)

Elder Abuse Act

Unlike MICRA, which is designed to discourage medical malpractice suits, the Elder Abuse Act enables "interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." (§ 15600, subd. (j).)

Section 15657, subdivision (a) provides, in part: "Where it is proven by clear and convincing evidence that a defendant is liable for . . . neglect as defined in Section 15610.57, or abandonment as defined in Section 15610.05, 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: [¶] (a) The court shall award to the plaintiff reasonable attorney's fees and costs. . . ."

The Legislature has made it clear that professional negligence and the Elder Abuse Act are separate and distinct. Section 15657.2 provides: "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."

In *Delaney v. Baker* (1999) 20 Cal.4th 32, our Supreme Court discussed the relationship between section 15657, establishing a cause of action for elder abuse, and section 15657.2, exempting causes of action for professional negligence from causes of action under section 15657. There plaintiff's 88-year-old mother died in a nursing home due to neglect. Plaintiff sued the nursing home and its administrators alleging negligence and elder abuse. The jury found for plaintiff on both causes of action. In the elder abuse cause of action, the jury found the defendants were reckless. The jury awarded damages and the court awarded attorney fees under the Elder Abuse Act. (§ 15657, subd. (a).)

In upholding the award under the Elder Abuse Act, the court rejected the defendant's argument that " 'based on . . . professional negligence,' used in section 15657.2, applies to any actions directly related to the professional services provided by a health care provider." (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 35.) Instead, the court distinguished between professional negligence and reckless neglect. The court stated:

"In 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. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [Citations.]

" 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur (BAJI No. 12.77 [defining 'recklessness' in the context of intentional infliction of emotional distress action]); see also Rest.2d Torts, § 500.) Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker*, *supra*, 20 Cal.4th at pp. 31-32, quoting Rest.2d Torts, § 500, com. (g), p. 590.)

The court concluded that because the jury found reckless neglect, and not merely professional negligence, plaintiff was not bound by the laws applicable to professional negligence but could avail herself of the enhanced remedies of section 15657 of the Elder Abuse Act. (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 35; see also *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 [Code of Civil Procedure section 425.13, applicable to punitive damages in actions based on "professional negligence," not applicable to Elder Abuse Act].)

Here, as in *Delaney*, the jury found both professional negligence and reckless neglect. Under *Delaney*, Plaintiffs are not bound by the laws specifically applicable to professional negligence. That includes MICRA and the one-year limitation of actions contained therein. Although Plaintiffs' cause of action based on professional negligence may be barred by the statute of limitations, their cause of action for elder abuse is not.

II

Substantial Evidence of Elder Abuse

Aurora and Signature contend that as a matter of law Plaintiffs have failed to establish a right of recovery for elder abuse.

Aurora and Signature's contention amounts to nothing more than that the judgment is not supported by substantial evidence. They hope to prevail by presenting a view of the evidence in a light most favorable to themselves. But that is not how we view the evidence.

Because Plaintiffs must prove elder abuse by clear and convincing evidence, the standard is "whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005.) We must affirm if any reasonable trier of fact could have made the required findings. (*Ibid.*) The standard necessarily requires that we give appropriate deference to a view of the evidence most favorable to the judgment and not view the evidence in a light most favorable to the losing party, as Aurora and Signature seem to suggest.

(a) Neglect

Aurora and Signature contend that as a matter of law there is no evidence of neglect. Section 15610.57, subdivision (b)(3) defines "neglect" as including "[f]ailure to protect from health and safety hazards."

It is beyond dispute that Valencia was a hazard to the health and safety of female patients under Aurora and

Signature's care, and that they failed to protect those patients from that hazard.

Aurora and Signature cite *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406-407, for the proposition that neglect occurs only where the defendant "denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs." But to the extent *Carter* can be read as holding that neglect does not include the failure to protect from health and safety hazards, we decline to follow it as directly conflicting with section 15610.57, subdivision (b)(3).

The only question here is whether clear and convincing evidence shows Aurora and Signature were reckless in their failure to protect.

(b) Reckless

"Recklessness" means the deliberate disregard of the high degree of probability that an injury will occur. (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 31.) It rises to the level of a conscious choice of a course of action with knowledge of the serious danger to others. (*Id.*, at pp. 31-32.)

Aurora and Signature were well aware that their female patients were particularly vulnerable to sexual predation by male mental health workers. If they did not know before the Bravo incident, they certainly knew thereafter. Aurora and Signature are sophisticated parties. They are part of an organization that operates 11 psychiatric hospitals nationwide. It is reasonable to conclude that they know how to operate in a manner that protects their patients from sexual predation. Yet Aurora and Signature adopted policies that exposed their patients to a high degree of risk of sexual predation.

One such policy was to hire unlicensed mental health workers. Aurora and Signature knew or should have known that their ability to do background checks on such workers is limited. Instead, they could have hired CNA's who are trained, licensed, and fingerprinted, and subject to unlimited background checks.

Valencia's training was minimal, consisting of a three- to five-minute talk and two days of following another worker around. Aurora employees did not know what countertransference is. Valencia was never tested to see if he knew what it was. After the Bravo incident, Aurora's director of clinical services recommended that the hospital increase education to improve therapeutic boundaries. Aurora's CEO told her that Signature would not pay for it.

Hospital policy allowed a male worker up to 20 minutes alone with a female patient in her room. The charge nurse cannot see inside the rooms from her station. One must enter into the room to see what is happening inside. Even walking down the hallway is not sufficient. The hospital is consistently understaffed. Supervisors change patients' acuity ratings to justify understaffing. A reasonable conclusion is that understaffing prevents workers from noticing what other workers are doing. The situation is perfect for a sexual predator. That male workers were allowed 20 minutes alone with a vulnerable female psychiatric patient in a room secluded from view would by itself support a finding of recklessness.

This is not a case of a momentary failure in an otherwise sufficient system. Valencia was allowed to prey upon three different women. It is reasonable to conclude that had Valencia not been improvident enough to be seen at a private party with a

woman who had been discharged the day before, he would have continued to work at Aurora and claim other victims.

The flaws in Aurora and Signature's policies were so obvious that the jury could conclude that they intentionally turned a blind eye to the high probability of harm. Even when Aurora was informed that Valencia was known as "Rapey Juan," the reaction was a shrug. There is more than ample evidence to support a finding of recklessness under the clear and convincing standard.

III

Instructions

Aurora and Signature challenge several jury instructions.

(a) Duty to Investigate

Regarding Valencia's prior arrest and conviction, the trial court instructed the jury:

"Penal Code section 290 is the Sex Offender Registration Act, which includes a list of sex crimes for which registration as a sex offender is required.

"Those crimes include Penal Code section 289(a) sexual penetration with another person who is under 18 years of age.

"An investigative consumer reporting agency may not make or furnish any investigative consumer report containing records of arrest or conviction of a crime that are more than seven years old. . . .

"An employer that does not use the services of an investigative consumer reporting agency is not limited by how far back they may go in collecting an applicant's criminal history.

"Every person in this state, including limited liability companies, has a fundamental and necessary right to access

public records. Public records include county courthouse criminal history records.

"The Department of Justice maintains criminal history information. State summary criminal history information means the master record of information compiled by the Attorney General pertaining to criminal history of a person, such as dates of arrest."

Aurora and Signature contend that they had no right, and therefore no duty, to search for criminal records more than seven years old.

Aurora and Signature rely on the Investigative Consumer Reporting Agencies Act. (Civ. Code, § 1786 et seq.) The act prohibits an investigative consumer reporting agency from furnishing a report containing a record of arrest or conviction that antedates the report by more than seven years. (*Id.*, § 1786.18, subd. (a)(7).) But the act applies only to investigative consumer reporting agencies. Nothing prevents Aurora or Signature from going beyond seven years to search for arrests and convictions.

In fact, Labor Code section 432.7 recognizes the special need of health care facilities to conduct employment background investigations to protect the safety of their patients. Subdivision (a) of the section prohibits an employer from asking an employee to disclose any arrest that did not result in a conviction or any conviction that has been dismissed or sealed. But subdivision (f)(1)(A) of Labor Code section 432.7 provides, in part: "[T]his section does not prohibit an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from asking an applicant for employment . . . the following: [¶] (A) With regard to an applicant for a position with regular access to

patients, to disclose an arrest under any section specified in Section 290 of the Penal Code." Labor Code section 432.7, subdivision (f)(1)(A) places no time limit on the search.

Nor were Aurora and Signature confined to using investigative consumer reporting agencies. Every person has the right to inspect any public record. (Gov. Code, § 6253, subd. (a).) Records of arrests and convictions are part of the public record. (*Id.*, § 6252, subd. (e); see *Central Valley Ch. 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145, 158 [records of arrests kept by the California Department of Justice for offenses specified in Penal Code section 290 are discoverable by health facility pursuant to Labor Code section 432.7]; see also *Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 749-750 [various documents filed and received by the court represent the official work of the court in which the public has a justifiable interest].)

Aurora and Signature argue that Labor Code section 432.7, subdivision (f)(1)(A) only permits a health facility to inquire; it does not impose a duty to inquire. That is true enough. But a health facility has a duty to keep its patients safe. The trial court's instructions tell the jury it can decide whether Aurora and Signature breached the duty to provide safety by, among other matters, failing to conduct a full investigation as the law permits. The court did not instruct the jury that Aurora and Signature had the duty to inspect the public record; only that they had the right to.

Aurora and Signature argue that the instructions run counter to former California Code of Regulations, title 2, section

7287.4, subdivision (d)(1)(B).[3] That subdivision begins, "Except as otherwise provided by law (e.g., . . . Labor Code Section 432.7)," it is unlawful for an employer to inquire of an applicant regarding any conviction for which the record has been "judicially ordered sealed, expunged or statutorily eradicated." (*Ibid.*)

First, the regulation is expressly subject to Labor Code section 432.7. Even if the regulation had contained no such expression, an administrative regulation could not override the Labor Code.

Second, Valencia's conviction was not sealed, expunged, or statutorily eradicated. It was reduced to a misdemeanor pursuant to Penal Code section 17(b) and dismissed pursuant to Penal Code section 1203.4.

The trial court's instructions were accurate.

(b) Staffing Ratios

Aurora and Signature contend the trial court erred in instructing with a staffing regulation.

The trial court instructed: "The licensed nurse-to-patient ratio in a psychiatric unit shall be 1 to 6 or fewer at all times. For purposes of psychiatric units only, licensed nurse[s] also include psychiatric technicians in addition to licensed vocational nurses and registered nurses."

The instruction is taken verbatim from California Code of Regulations, title 22, section 70217, subdivision (a)(13). Aurora's own expert testified that title 22 regulations apply to Aurora.

---

[3] Former California Code of Regulations, title 2, section 7287.4 was in effect when Valencia was hired. It was renumbered without substantive change on October 3, 2013, as California Code of Regulations, title 2, section 11017.

Aurora argues the instruction is not supported by expert testimony. Aurora points to the testimony of its experts that the regulation applies only to a psychiatric unit and not to a free-standing psychiatric hospital as Aurora.

But section 70217 of the California Code of Regulations applies by its terms to all hospitals. It makes no distinction between psychiatric units in free-standing psychiatric hospitals and psychiatric units in other types of hospitals. By the plain terms of the regulation, it applies to Aurora. No expert testimony is required to support it.

(c) Refused Remedial Instruction

Aurora and Signature contend the trial court erred in refusing the following proposed instructions: "When considering the question of negligence, you must not consider whether or not Aurora Vista Del Mar or Signature Health made any reports of the events involving Juan Valencia to the Joint Commission (JCAHO), California Department of Public Health (CDPH) or any other law enforcement or licensing agency."

But the obvious purpose of regulations requiring such reports is to protect patient safety. Aurora's failure to make a timely report is simply evidence of a lack of concern for patient safety. It is relevant to show neglect, that is, the failure to protect patients from health and safety hazards. The trial court did not err in refusing the proposed instruction.

IV

Excessive Damages

Aurora and Signature contend the damages are excessive.

Aurora and Signature argue that all the compensatory damages awarded to Plaintiffs are noneconomic damages. Aurora and Signature rely on section 15657, subdivision (b) for

the proposition that Plaintiffs' noneconomic damages are limited to $250,000 each.

Section 15657, subdivision (b) provides: "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."

Civil Code section 3333.2, subdivision (b), part of MICRA, limits noneconomic damages to $250,000. But under the Elder Abuse Act, that limitation does not apply to living Plaintiffs.

Code of Civil Procedure section 377.34[4] prohibits damages for noneconomic loss in actions on behalf of decedents. The first sentence of section 15657, subdivision (b) provides that the limitation of section 377.34 does not apply to actions under the Elder Abuse Act. The second sentence of the subdivision begins with "However." (§ 15657, subd. (b).) It modifies the first sentence. Thus, the second sentence of the subdivision, limiting the amount of noneconomic damages, only applies to the first sentence relating to causes of action brought on behalf of decedents. Because in this action Plaintiffs are alive, the limitation of noneconomic damages in section 15657, subdivision (b) does not apply.

---

[4] Code of Civil Procedure section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."

The Elder Abuse Act provides enhanced remedies for victims. A prevailing plaintiff is entitled to an award of attorney fees. (§ 15657, subd. (a).) A deceased victim's successor is entitled to an award of some noneconomic damages. (*Id.*, subd. (b).) There is no basis for interpreting the Elder Abuse Act as restricting an award of damages for those fortunate enough to have survived the abuse.

V

Fault Allocation

Aurora and Signature contend that they are entitled to a new trial because there is no substantial evidence to support the fault allocation.

We review an apportionment of fault for substantial evidence. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 147.) Aurora and Signature argue that there is no basis in the evidence for allocating only 35 percent fault to Valencia, the person who played the most direct and active role in the injury. Aurora and Signature cite *Scott* for the proposition that an apportionment of fault is not supportable when it overlooks or minimizes the fault of the party who plays the most direct and culpable role in the injury. (Citing *id.*, at p. 148.)

But that is not what *Scott* says. In *Scott*, the county's department of children's services placed a child in the home of her grandmother. The grandmother intentionally scalded the child, causing severe injuries. A jury awarded substantial damages to the child, finding the grandmother 1 percent at fault and the county 99 percent at fault.

Although *Scott* concluded that placing only 1 percent of the fault on the grandmother was unsupported, the court had no problem with placing the great majority of the fault on the county

that failed to protect the child. *Scott* said the circumstances resemble those in *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1238, where the court declined to disturb a jury's apportionment of 25 percent fault to an assailant who deliberately shot plaintiff and 75 percent fault to the employer's private security company who failed to protect him. (*Scott v. County of Los Angeles*, *supra*, 27 Cal.App.4th at p. 148, fn. 16.) *Rosh* expressly rejected the defendant's contention that no reasonable person could conclude a negligent tortfeasor was more responsible for an injury than an intentional tortfeasor. (*Rosh*, at p. 1233.)

Here Aurora and Signature are sophisticated parties who should know how to operate a psychiatric hospital to assure the safety of their patients. Instead, they operated the hospital recklessly and maliciously to make what happened almost inevitable. First, it was Bravo; then it was Valencia. If the perpetrator had not been Valencia, it would have been someone else. The jury correctly attributed 70 percent of the fault to Aurora and Signature.

VI

Punitive Damages

Signature contends the punitive damages award must be struck because there is no clear and convincing evidence of malice or oppression.

Exemplary damages may be awarded where the plaintiff proves by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious

disregard of the rights or safety of others. (*Id.*, subd. (c)(1).) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (*Id.*, subd. (c)(2).)

Signature relies on Civil Code section 3294, subdivision (b). That subdivision provides: "An employer shall not be liable for [exemplary] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was *personally guilty of oppression, fraud, or malice*. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Italics added.)

Here there is clear and convincing evidence that Signature was personally guilty of oppression and malice. Under Signature's management agreement with Aurora, Signature agreed to provide "[d]aily operational direction and management" and "[c]linical responsibility for all service programs." The jury could reasonably conclude that it was Signature that set the policies that made sexual predation of patients almost inevitable, and that in setting those policies, it acted willfully and with a conscious disregard for the safety of others.

Indeed, a single incident illustrates both Signature's control and its willful and conscious disregard for the safety of others. After the Bravo incident, Aurora's then director of clinical services recommended increased education of employees on

clinical boundaries. Aurora's CEO told her that Signature would not pay for it.

Moreover, Doctor Kim owns both Signature and Aurora. The jury could reasonably conclude that the owner was well aware of the policies that resulted in harm to Plaintiffs.

VII

Motion for Nonsuit

The trial court granted Aurora's motion for nonsuit on Plaintiffs' causes of action alleging vicarious liability under the doctrine of respondeat superior and ratification.[5]

A trial court properly grants a motion for nonsuit only if the evidence presented by the plaintiff would not support a verdict in the plaintiff's favor. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) The trial court may not weigh the evidence, but must accept as true the evidence most favorable to the plaintiff and disregard conflicting evidence. (*Ibid.*)

(a) Respondeat Superior

Under the rule of respondeat superior, an employer is vicariously liable for the torts of its employees committed within the scope of employment. (*John R. v. Oakland Unified School*

---

[5] Plaintiffs argue the issue of respondeat superior is important because Civil Code section 1431.2 limits liability for noneconomic damages to several and not joint liability. They point out Valencia was found 35 percent at fault. They claim respondeat superior avoids the limits of Civil Code section 1431.2. Plaintiffs raised Civil Code section 1431.2 for the first time in a petition for rehearing. For the purposes of this appeal only, Plaintiffs waived the issue. (See *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542.) The waiver is without prejudice to raising the issue in an action to enforce the judgment.

Dist. (1989) 48 Cal.3d 438, 447.) An employer may be vicariously liable for willful, malicious, even criminal acts, of an employee that are deemed to be committed within the scope of employment, even though the employer has not authorized such acts. (*Ibid.*) An act is within the scope of employment if the employment predictably creates the risk that employees will commit intentional torts of the type for which liability is sought. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299.)

Courts have generally held that an employer is not liable under the doctrine of respondeat superior for sexual assaults committed by an employee. (3 Witkin Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 201, p. 263; but see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 217 [city liable for assault by a police officer in view of the considerable power and authority a police officer possesses].) But a sexual tort will be considered to be within the scope of employment if "its motivating emotions were fairly attributable to work-related events or conditions." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra* 12 Cal.4th at p. 301.)

Thus, in *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra*, 12 Cal.4th 291, the court held that a hospital is not liable for a sexual assault committed by a technician under the pretense of conducting an ultrasound examination. The motivating emotions were not fairly attributable to work-related conditions. (*Id.* at p. 301.)

But this case is not like *Lisa M.* In that case the employee's interaction with the victim was brief and the employee's duties were technical. The circumstances of

employment were highly unlikely to engender a personal relationship that might result in sexual exploitation.

In contrast, here there is sufficient evidence for a jury to conclude Valencia was acting within the scope of his employment. The duties of a mental health worker include helping patients with daily living activities. The workers are personally involved with the patients over an extended period of time. The patients are vulnerable; they may suffer from impaired judgment or other cognitive impairments. Sexual exploitation of the patients by employees is a foreseeable hazard arising from the circumstances of the job. That hazard was exponentially increased by Aurora's policies, including allowing male workers 20 minutes alone with patients and providing inadequate training on worker-patient boundaries.

In concluding that the ultrasound technician in *Lisa M.* was not acting within the scope of his employment, the court stated, "We deal here not with a physician or therapist who becomes sexually involved with a patient as a result of mishandling the feelings predictably created by the therapeutic relationship." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra*, 12 Cal.4th at p. 303.) Quite the contrary. That is what is happening here. Ample evidence supports a finding that Valencia was acting within the scope of his employment. The trial court erred in granting a judgment of nonsuit on the question.

The remedy requires that we reverse and remand for a new trial on the cause of action for which the trial court granted nonsuit. (See *McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1315.) Plaintiffs request, however, that we simply amend the judgment to include a finding of respondeat superior. Plaintiffs

cite no authority for such a remedy nor are we aware of such authority. Aurora and Signature are entitled to a jury determination on the question whether Valencia was acting within the scope of his employment. We remand for a new trial.

(b) Ratification

As an alternative to respondeat superior, an employee may be liable for an employee's act where the employer subsequently ratifies the originally unauthorized tort. (*C.R. v. Tenent Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110.) The failure to investigate or respond to charges that an employee has committed an intentional tort or the failure to discharge the employee may be evidence of ratification. (*Ibid.*) Generally, ratification is a question of fact. (*Ibid.*)

Here an Aurora employee informed a supervisor that Valencia's reputation among other employees was so bad he had earned the nickname "Rapey Juan." Aurora failed to undertake any investigation. Instead, Aurora continued to allow Valencia up to 20 minutes alone with vulnerable female patients in rooms that could not be observed from outside of the room. It is true that Aurora terminated Valencia soon after it learned that he was at a party with a recently discharged patient. But a jury could reasonably determine that Aurora should have acted to investigate sooner, when it first learned of Valencia's reputation as "Rapey Juan." An employer is not relieved of liability for ratification simply because it eventually terminates the employee.

There is substantial evidence from which a jury could have determined that Aurora ratified Valencia's acts.

VIII

Punitive Damages and Civil Code Section 1431.2

For the first time in a petition for rehearing, Plaintiffs contend the award of punitive damages allows them to escape the limitation on joint and several liability in Civil Code section 1431.2, subdivision (a).[6] Matters raised for the first time in a petition for rehearing are deemed waived. (See *CAMSI IV v. Hunter Technology Corp.*, *supra*, 230 Cal.App.3d at p. 1542.) The waiver, however, is without prejudice to raising the issue in an action to enforce the judgment.

DISPOSITION

The matter is reversed and remanded for a new trial on the issue of respondeat superior and ratification. In all other respects, the judgment is affirmed. Costs on appeal are awarded to Plaintiffs.

CERTIFIED FOR PUBLICATION.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

---

[6] Civil Code section 1431.2, subdivision (a) provides, in part: "In any action for personal injury, . . . based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint."

Kevin G. DeNoce, Judge

Superior Court County of Ventura

Law Office of David Feldman and David Feldman for Plaintiffs and Appellants.

Horvitz & Levy, Andrea M. Gauthier, Bradley S. Pauley; Kendall Brill & Kelly, Nicholas F. Daum; Beach Law Group, Thomas E. Beach, Mindee J. Stekkinger and Molly M. Loy for Defendants and Appellants.

Cole Pedroza, Curtis A. Cole and Cassidy C. Davenport for California Medical Association, California Dental Association, and California Hospital Association as Amici Curiae on behalf of Defendants and Appellants.

COURT OF APPEAL ORDER
MODIFYING OPINION
AND DENYING REHEARING
B302321 • APRIL 26, 2022

Filed 4/26/22 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAMANTHA B. et al., Plaintiffs and Appellants, v. AURORA VISTA DEL MAR, LLC et al., Defendants and Appellants.	2d Civ. No. B302321 (Super. Ct. No. 56-2015-00464635-CU-PO-VTA) (Ventura County) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 5, 2022, be modified as follows:

1. On page 18, the word "First," which begins the first full paragraph, is deleted, so the sentence begins, "The regulation is expressly subject to …."

2. On page 18, the second full paragraph, which begins, "Second, Valencia's conviction was not sealed …." is deleted.

3. On page 22, the words in the last sentence of the first full paragraph "70 percent" are changed to "65 percent," so the sentence reads: "The jury correctly attributed 65 percent of the fault to Aurora and Signature."

Defendants and Appellants' petition for rehearing is denied. There is no change in the judgment.

Filed 4/5/22; on rehearing (unmodified opn.)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAMANTHA B. et al., Plaintiffs and Appellants, v. AURORA VISTA DEL MAR, LLC et al., Defendants and Appellants.	2d Civ. No. B302321 (Super. Ct. No. 56-2015-00464635-CU-PO-VTA) (Ventura County) OPINION FOLLOWING REHEARING

Civil Code section 3333.2, known as the Medical Injury Compensation Reform Act of 1975 (MICRA), limits noneconomic damages to $250,000 based on professional negligence. Here we decide this limitation does not apply to plaintiffs' causes of action under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act). (Welf. & Inst., § 15600 et seq.)[1]

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Samantha B. and Danielle W. (Plaintiffs) are former patients at an acute psychiatric hospital.[2] While residing at the hospital, they suffered sexual abuse by a hospital employee. They brought this action against the hospital and its management company, alleging professional negligence and breach of the Elder Abuse Act. The jury found for Plaintiffs and awarded substantial noneconomic damages against both defendants, as well as punitive damages against the management company. Defendants appeal. Plaintiffs appeal the trial court's grant of a motion for nonsuit on their causes of action alleging vicarious liability under respondeat superior and ratification. These causes of action are properly brought before a court or jury.

The matter is reversed and remanded for a new trial on the issue of respondeat superior and ratification. In all other respects, the judgment is affirmed.

FACTS

Aurora Vista Del Mar, LLC (Aurora) is a licensed acute psychiatric hospital. Aurora is wholly owned by Signature Healthcare Services, LLC (Signature). Both entities are wholly owned by Doctor Soon Kim, who owns 11 similar hospitals nationwide.

Signature has a management agreement with Aurora. Among other tasks, Signature agreed to provide "[d]aily operational direction and management" and "[c]linical responsibility for all service programs."

---

[2] Plaintiff C.F. is no longer a party to this action. This court dismissed her appeal pursuant to the stipulation of the parties on October 18, 2021.

Aurora Hires Valencia

In July 2011, Aurora hired Juan Valencia as a mental health worker. The duties of a mental health worker include seeing that patients do not harm themselves or others, keeping patients in a safe environment, and helping patients with daily living activities. Mental health workers are not licensed.

When Valencia was hired, he was given a form in which he was asked whether he had been arrested for a crime requiring registration as a sex offender. He answered no.

In fact, Valencia had been arrested in 1989 for sexual penetration with a foreign object (Pen. Code, § 289, subd. (b)) and unlawful sexual intercourse with a minor (*id.*, § 261.5, subd. (c)). Sexual penetration with a foreign object requires registration, but intercourse with a minor does not. (*Id.*, § 290, subd. (c).) He pled guilty to sexual intercourse with a minor and the other charge was dismissed. The court reduced Valencia's conviction to a misdemeanor and dismissed it in 2008.

Aurora retained an investigative consumer reporting agency to conduct a background check on Valencia. Such agencies are prohibited from reporting an arrest or conviction that antedates the report by more than seven years. (Civ. Code, § 1786.18, subd. (a)(7).) The agency did not report Valencia's 11-year-old arrest or conviction.

Had Aurora hired certified nursing assistants (CNA's), instead of unlicensed mental health workers, it would have had notice of any such prior conviction. CNA's are fingerprinted and licensed.

Training

To be a mental health worker, no license, experience, education, or training is required. As one former Aurora

employee put it, "one day they work at McDonalds, the next day they are mental health workers." Aurora gave Valencia two days of orientation.

The orientation included three to five minutes on countertransference, that is, the tendency of a caregiver to form an emotional bond with a patient. Thereafter, all Valencia needed to do was sign a form on patient and staff interactions and relationships once a year. Staff were not tested to see if they understood patient boundaries.

Plaintiffs' expert testified, "If you read the depositions of multiple staff at the facility, nursing staff, nursing assistants or they call them 'psyche techs' at that facility, it was very clear that they had no idea what transference or countertransference even meant."

Policy on Access to Patients

It is Aurora's policy to allow male mental health workers to be alone with female patients in their rooms for up to 20 minutes as long as the door to the room is open.

Jamie Tallman, an Aurora psychiatric nurse, testified that the charge nurse for the unit spends most of the time at the nursing station. The nurse cannot see into the patients' rooms from the nursing station. One must go into the room to see what is happening there. Walking up and down the hallway is not enough. The charge nurse relies on the mental health workers for information on the patients.

Valencia Sexually Violates Plaintiffs

Plaintiffs were patients at Aurora in 2013 during the time Valencia worked there. Each was suffering from psychosis and did not have the mental capacity to consent to sex. Valencia

engaged in sexual relations with all three individually while they were at Aurora.

Valencia became known among hospital workers as "Rapey Juan." A worker reported the nickname to the supervising nurse. The nurse's response was to roll her eyes and say something like "What are you going to do?"

Bravo Incident

In 2004, an Aurora male employee named Bravo sexually molested a 17-year-old female patient. Theresa Berkin, who was at that time Aurora's director of clinical services, recommended to Aurora's CEO that the hospital increase education to improve therapeutic boundaries. The CEO said that corporate, meaning Signature, would not pay for it. Berkin testified there were other incidents while she was at Aurora in which a staff member interreacted sexually with a patient.

Patient Vulnerability

Patients in an acute psychiatric hospital are vulnerable. Their mental disorders may impair their judgment. Some suffer from cognitive impairments similar to dementia. Some patients receive medications that render them temporarily unconscious. Plaintiffs' expert testified that sexual assaults of mental patients are a known foreseeable risk.

Understaffing

Mark Martinez was a mental health worker at Aurora from 2011 to 2014. He testified that each patient was rated for "acuity" between one and four, with four being the most acute. The entire unit was rated for acuity based on an aggregation of scores of the individual patients. A formula would be applied to the unit's acuity rating to determine the appropriate staffing level. Martinez testified the unit was consistently understaffed.

He said he was on his own with 16 to 24 patients. He complained to the nursing supervisor, the staffing coordinator, and to anyone who would listen, to no avail.

Psychiatric nurse Tallman worked at Aurora from 2010 to 2014. She testified the hospital was frequently understaffed. She complained to the director and assistant director of nursing.

Judy Pittacora, a licensed psychiatric technician, worked at Aurora from 2003 to 2014. She testified the units were more often than not understaffed. She said her supervisors would cross out the acuity number she assigned to a patient and lower it to lower the number of staff needed. Understaffing had an impact on her ability to supervise mental health workers. The workers were often on their own with patients. She complained about understaffing to her supervisors but was told that is how the hospital CEO wanted it. She quit because of understaffing. She was afraid she was going to lose her license.

Failure to Report

Danielle W. was discharged from Aurora on November 29, 2013. The next day a student nurse saw Valencia and the plaintiff together at a party. They appeared to be romantically involved. Aurora suspended Valencia and, after a two-day investigation, terminated him on December 12, 2013.

Aurora's CEO testified that Valencia was terminated only for being with a former patient at a party. The CEO did not suspect there had been any wrongdoing while the patient was hospitalized, even though the patient had been discharged only the day before the party. She did not interview Valencia, the hospital staff, or the former patient to see if any wrongdoing occurred while the former patient was hospitalized. She did not know whether anyone did.

The CEO admitted that about a month after Valencia's termination she learned Valencia's conduct with the former patient at the party was sexual in nature. She also admitted that Aurora had a duty to report such an incident to the California Department of Public Health but did not do so for one year. Aurora only reported Valencia's misconduct after it became public knowledge.

Procedure

Samantha B. was discharged from Aurora on March 6, 2013. She filed the instant action against Aurora and Valencia in February 2015, within two years of her discharge. In June 2015, she added Signature to her complaint. She alleged sexual assault; intentional infliction of emotional distress; and violation of Civil Code section 51.9, sexual harassment in a professional relationship. She also alleged negligence in hiring, supervising, and retaining Valencia and dependent adult abuse under the Elder Abuse Act against Aurora. (§ 15600 et seq.) Danielle W. was discharged from Aurora on November 29, 2013. She filed a similar action within two years, in August 2015.

Verdict and Judgment

The jury found that Aurora and Signature were negligent in hiring, supervising, and retaining Valencia. The jury also found that Signature and Valencia committed acts constituting dependent adult abuse and that they acted with recklessness. The jury found that Signature acted with malice or oppression, but that Aurora did not.

The jury awarded Samantha B. $3.75 million; and Danielle W. $3 million, all in noneconomic damages. The jury allocated 30 percent fault to Signature, 35 percent fault to

Aurora, and 35 percent fault to Valencia. The jury awarded each plaintiff $50,000 in punitive damages.

DISCUSSION

Aurora and Signature's Appeal

I

MICRA's Limitation of Actions

Aurora and Signature contend Plaintiffs' causes of action are time-barred and their damages limited under MICRA.

MICRA is a legislative scheme that is intended to reduce the cost of medical malpractice insurance by, among other matters, limiting the time for plaintiffs to bring their causes of action for professional negligence and limiting the amount of recovery for noneconomic damages. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111.)

Code of Civil Procedure section 340.5, a part of MICRA, provides in part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

A "health care provider" is any person licensed to provide health care services including a health facility. (Code Civ. Proc., § 340.5, subd. (1).) "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." (*Id.*, subd. (2).)

A plaintiff's noneconomic damages are limited under MICRA to $250,000. (Civ. Code, § 3333.2, subd. (b).)

Plaintiffs appear not to contest that if MICRA applies, their action is barred by the time limitations in Code of Civil Procedure section 340.5. They contend, however, that MICRA does not apply. Instead, they claim the Elder Abuse Act applies. Unlike MICRA, the Elder Abuse Act has a two-year statute of limitations (Code Civ. Proc., § 335.1) subject to tolling for "insanity" under Code of Civil Procedure section 352. (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 125-126.)

Elder Abuse Act

Unlike MICRA, which is designed to discourage medical malpractice suits, the Elder Abuse Act enables "interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." (§ 15600, subd. (j).)

Section 15657, subdivision (a) provides, in part: "Where it is proven by clear and convincing evidence that a defendant is liable for . . . neglect as defined in Section 15610.57, or abandonment as defined in Section 15610.05, 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: [¶] (a) The court shall award to the plaintiff reasonable attorney's fees and costs. . . ."

The Legislature has made it clear that professional negligence and the Elder Abuse Act are separate and distinct. Section 15657.2 provides: "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."

In *Delaney v. Baker* (1999) 20 Cal.4th 32, our Supreme Court discussed the relationship between section 15657, establishing a cause of action for elder abuse, and section 15657.2, exempting causes of action for professional negligence from causes of action under section 15657. There plaintiff's 88-year-old mother died in a nursing home due to neglect. Plaintiff sued the nursing home and its administrators alleging negligence and elder abuse. The jury found for plaintiff on both causes of action. In the elder abuse cause of action, the jury found the defendants were reckless. The jury awarded damages and the court awarded attorney fees under the Elder Abuse Act. (§ 15657, subd. (a).)

In upholding the award under the Elder Abuse Act, the court rejected the defendant's argument that " 'based on . . . professional negligence,' used in section 15657.2, applies to any actions directly related to the professional services provided by a health care provider." (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 35.) Instead, the court distinguished between professional negligence and reckless neglect. The court stated:

"In 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. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [Citations.]

" 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur (BAJI No. 12.77 [defining 'recklessness' in the context of intentional infliction of emotional distress action]); see also Rest.2d Torts, § 500.) Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker*, *supra*, 20 Cal.4th at pp. 31-32, quoting Rest.2d Torts, § 500, com. (g), p. 590.)

The court concluded that because the jury found reckless neglect, and not merely professional negligence, plaintiff was not bound by the laws applicable to professional negligence but could avail herself of the enhanced remedies of section 15657 of the Elder Abuse Act. (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 35; see also *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 [Code of Civil Procedure section 425.13, applicable to punitive damages in actions based on "professional negligence," not applicable to Elder Abuse Act].)

Here, as in *Delaney*, the jury found both professional negligence and reckless neglect. Under *Delaney*, Plaintiffs are not bound by the laws specifically applicable to professional negligence. That includes MICRA and the one-year limitation of actions contained therein. Although Plaintiffs' cause of action based on professional negligence may be barred by the statute of limitations, their cause of action for elder abuse is not.

II

Substantial Evidence of Elder Abuse

Aurora and Signature contend that as a matter of law Plaintiffs have failed to establish a right of recovery for elder abuse.

Aurora and Signature's contention amounts to nothing more than that the judgment is not supported by substantial evidence. They hope to prevail by presenting a view of the evidence in a light most favorable to themselves. But that is not how we view the evidence.

Because Plaintiffs must prove elder abuse by clear and convincing evidence, the standard is "whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005.) We must affirm if any reasonable trier of fact could have made the required findings. (*Ibid.*) The standard necessarily requires that we give appropriate deference to a view of the evidence most favorable to the judgment and not view the evidence in a light most favorable to the losing party, as Aurora and Signature seem to suggest.

(a) Neglect

Aurora and Signature contend that as a matter of law there is no evidence of neglect. Section 15610.57, subdivision (b)(3) defines "neglect" as including "[f]ailure to protect from health and safety hazards."

It is beyond dispute that Valencia was a hazard to the health and safety of female patients under Aurora and

Signature's care, and that they failed to protect those patients from that hazard.

Aurora and Signature cite *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406-407, for the proposition that neglect occurs only where the defendant "denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs." But to the extent *Carter* can be read as holding that neglect does not include the failure to protect from health and safety hazards, we decline to follow it as directly conflicting with section 15610.57, subdivision (b)(3).

The only question here is whether clear and convincing evidence shows Aurora and Signature were reckless in their failure to protect.

(b) Reckless

"Recklessness" means the deliberate disregard of the high degree of probability that an injury will occur. (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 31.) It rises to the level of a conscious choice of a course of action with knowledge of the serious danger to others. (*Id.*, at pp. 31-32.)

Aurora and Signature were well aware that their female patients were particularly vulnerable to sexual predation by male mental health workers. If they did not know before the Bravo incident, they certainly knew thereafter. Aurora and Signature are sophisticated parties. They are part of an organization that operates 11 psychiatric hospitals nationwide. It is reasonable to conclude that they know how to operate in a manner that protects their patients from sexual predation. Yet Aurora and Signature adopted policies that exposed their patients to a high degree of risk of sexual predation.

One such policy was to hire unlicensed mental health workers. Aurora and Signature knew or should have known that their ability to do background checks on such workers is limited. Instead, they could have hired CNA's who are trained, licensed, and fingerprinted, and subject to unlimited background checks.

Valencia's training was minimal, consisting of a three- to five-minute talk and two days of following another worker around. Aurora employees did not know what countertransference is. Valencia was never tested to see if he knew what it was. After the Bravo incident, Aurora's director of clinical services recommended that the hospital increase education to improve therapeutic boundaries. Aurora's CEO told her that Signature would not pay for it.

Hospital policy allowed a male worker up to 20 minutes alone with a female patient in her room. The charge nurse cannot see inside the rooms from her station. One must enter into the room to see what is happening inside. Even walking down the hallway is not sufficient. The hospital is consistently understaffed. Supervisors change patients' acuity ratings to justify understaffing. A reasonable conclusion is that understaffing prevents workers from noticing what other workers are doing. The situation is perfect for a sexual predator. That male workers were allowed 20 minutes alone with a vulnerable female psychiatric patient in a room secluded from view would by itself support a finding of recklessness.

This is not a case of a momentary failure in an otherwise sufficient system. Valencia was allowed to prey upon three different women. It is reasonable to conclude that had Valencia not been improvident enough to be seen at a private party with a

woman who had been discharged the day before, he would have continued to work at Aurora and claim other victims.

The flaws in Aurora and Signature's policies were so obvious that the jury could conclude that they intentionally turned a blind eye to the high probability of harm. Even when Aurora was informed that Valencia was known as "Rapey Juan," the reaction was a shrug. There is more than ample evidence to support a finding of recklessness under the clear and convincing standard.

III

Instructions

Aurora and Signature challenge several jury instructions.

(a) Duty to Investigate

Regarding Valencia's prior arrest and conviction, the trial court instructed the jury:

"Penal Code section 290 is the Sex Offender Registration Act, which includes a list of sex crimes for which registration as a sex offender is required.

"Those crimes include Penal Code section 289(a) sexual penetration with another person who is under 18 years of age.

"An investigative consumer reporting agency may not make or furnish any investigative consumer report containing records of arrest or conviction of a crime that are more than seven years old. . . .

"An employer that does not use the services of an investigative consumer reporting agency is not limited by how far back they may go in collecting an applicant's criminal history.

"Every person in this state, including limited liability companies, has a fundamental and necessary right to access

public records. Public records include county courthouse criminal history records.

"The Department of Justice maintains criminal history information. State summary criminal history information means the master record of information compiled by the Attorney General pertaining to criminal history of a person, such as dates of arrest."

Aurora and Signature contend that they had no right, and therefore no duty, to search for criminal records more than seven years old.

Aurora and Signature rely on the Investigative Consumer Reporting Agencies Act. (Civ. Code, § 1786 et seq.) The act prohibits an investigative consumer reporting agency from furnishing a report containing a record of arrest or conviction that antedates the report by more than seven years. (*Id.*, § 1786.18, subd. (a)(7).) But the act applies only to investigative consumer reporting agencies. Nothing prevents Aurora or Signature from going beyond seven years to search for arrests and convictions.

In fact, Labor Code section 432.7 recognizes the special need of health care facilities to conduct employment background investigations to protect the safety of their patients. Subdivision (a) of the section prohibits an employer from asking an employee to disclose any arrest that did not result in a conviction or any conviction that has been dismissed or sealed. But subdivision (f)(1)(A) of Labor Code section 432.7 provides, in part: "[T]his section does not prohibit an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from asking an applicant for employment . . . the following: [¶] (A) With regard to an applicant for a position with regular access to

patients, to disclose an arrest under any section specified in Section 290 of the Penal Code." Labor Code section 432.7, subdivision (f)(1)(A) places no time limit on the search.

Nor were Aurora and Signature confined to using investigative consumer reporting agencies. Every person has the right to inspect any public record. (Gov. Code, § 6253, subd. (a).) Records of arrests and convictions are part of the public record. (*Id.*, § 6252, subd. (e); see *Central Valley Ch. 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145, 158 [records of arrests kept by the California Department of Justice for offenses specified in Penal Code section 290 are discoverable by health facility pursuant to Labor Code section 432.7]; see also *Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 749-750 [various documents filed and received by the court represent the official work of the court in which the public has a justifiable interest].)

Aurora and Signature argue that Labor Code section 432.7, subdivision (f)(1)(A) only permits a health facility to inquire; it does not impose a duty to inquire. That is true enough. But a health facility has a duty to keep its patients safe. The trial court's instructions tell the jury it can decide whether Aurora and Signature breached the duty to provide safety by, among other matters, failing to conduct a full investigation as the law permits. The court did not instruct the jury that Aurora and Signature had the duty to inspect the public record; only that they had the right to.

Aurora and Signature argue that the instructions run counter to former California Code of Regulations, title 2, section

7287.4, subdivision (d)(1)(B).[3] That subdivision begins, "Except as otherwise provided by law (e.g., . . . Labor Code Section 432.7)," it is unlawful for an employer to inquire of an applicant regarding any conviction for which the record has been "judicially ordered sealed, expunged or statutorily eradicated." (*Ibid.*)

First, the regulation is expressly subject to Labor Code section 432.7. Even if the regulation had contained no such expression, an administrative regulation could not override the Labor Code.

Second, Valencia's conviction was not sealed, expunged, or statutorily eradicated. It was reduced to a misdemeanor pursuant to Penal Code section 17(b) and dismissed pursuant to Penal Code section 1203.4.

The trial court's instructions were accurate.

(b) Staffing Ratios

Aurora and Signature contend the trial court erred in instructing with a staffing regulation.

The trial court instructed: "The licensed nurse-to-patient ratio in a psychiatric unit shall be 1 to 6 or fewer at all times. For purposes of psychiatric units only, licensed nurse[s] also include psychiatric technicians in addition to licensed vocational nurses and registered nurses."

The instruction is taken verbatim from California Code of Regulations, title 22, section 70217, subdivision (a)(13). Aurora's own expert testified that title 22 regulations apply to Aurora.

---

[3] Former California Code of Regulations, title 2, section 7287.4 was in effect when Valencia was hired. It was renumbered without substantive change on October 3, 2013, as California Code of Regulations, title 2, section 11017.

Aurora argues the instruction is not supported by expert testimony. Aurora points to the testimony of its experts that the regulation applies only to a psychiatric unit and not to a free-standing psychiatric hospital as Aurora.

But section 70217 of the California Code of Regulations applies by its terms to all hospitals. It makes no distinction between psychiatric units in free-standing psychiatric hospitals and psychiatric units in other types of hospitals. By the plain terms of the regulation, it applies to Aurora. No expert testimony is required to support it.

(c) Refused Remedial Instruction

Aurora and Signature contend the trial court erred in refusing the following proposed instructions: "When considering the question of negligence, you must not consider whether or not Aurora Vista Del Mar or Signature Health made any reports of the events involving Juan Valencia to the Joint Commission (JCAHO), California Department of Public Health (CDPH) or any other law enforcement or licensing agency."

But the obvious purpose of regulations requiring such reports is to protect patient safety. Aurora's failure to make a timely report is simply evidence of a lack of concern for patient safety. It is relevant to show neglect, that is, the failure to protect patients from health and safety hazards. The trial court did not err in refusing the proposed instruction.

IV

Excessive Damages

Aurora and Signature contend the damages are excessive.

Aurora and Signature argue that all the compensatory damages awarded to Plaintiffs are noneconomic damages. Aurora and Signature rely on section 15657, subdivision (b) for

the proposition that Plaintiffs' noneconomic damages are limited to $250,000 each.

Section 15657, subdivision (b) provides: "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."

Civil Code section 3333.2, subdivision (b), part of MICRA, limits noneconomic damages to $250,000. But under the Elder Abuse Act, that limitation does not apply to living Plaintiffs.

Code of Civil Procedure section 377.34[4] prohibits damages for noneconomic loss in actions on behalf of decedents. The first sentence of section 15657, subdivision (b) provides that the limitation of section 377.34 does not apply to actions under the Elder Abuse Act. The second sentence of the subdivision begins with "However." (§ 15657, subd. (b).) It modifies the first sentence. Thus, the second sentence of the subdivision, limiting the amount of noneconomic damages, only applies to the first sentence relating to causes of action brought on behalf of decedents. Because in this action Plaintiffs are alive, the limitation of noneconomic damages in section 15657, subdivision (b) does not apply.

---

[4] Code of Civil Procedure section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."

The Elder Abuse Act provides enhanced remedies for victims. A prevailing plaintiff is entitled to an award of attorney fees. (§ 15657, subd. (a).) A deceased victim's successor is entitled to an award of some noneconomic damages. (*Id.*, subd. (b).) There is no basis for interpreting the Elder Abuse Act as restricting an award of damages for those fortunate enough to have survived the abuse.

V

Fault Allocation

Aurora and Signature contend that they are entitled to a new trial because there is no substantial evidence to support the fault allocation.

We review an apportionment of fault for substantial evidence. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 147.) Aurora and Signature argue that there is no basis in the evidence for allocating only 35 percent fault to Valencia, the person who played the most direct and active role in the injury. Aurora and Signature cite *Scott* for the proposition that an apportionment of fault is not supportable when it overlooks or minimizes the fault of the party who plays the most direct and culpable role in the injury. (Citing *id.*, at p. 148.)

But that is not what *Scott* says. In *Scott*, the county's department of children's services placed a child in the home of her grandmother. The grandmother intentionally scalded the child, causing severe injuries. A jury awarded substantial damages to the child, finding the grandmother 1 percent at fault and the county 99 percent at fault.

Although *Scott* concluded that placing only 1 percent of the fault on the grandmother was unsupported, the court had no problem with placing the great majority of the fault on the county

that failed to protect the child. *Scott* said the circumstances resemble those in *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1238, where the court declined to disturb a jury's apportionment of 25 percent fault to an assailant who deliberately shot plaintiff and 75 percent fault to the employer's private security company who failed to protect him. (*Scott v. County of Los Angeles*, *supra*, 27 Cal.App.4th at p. 148, fn. 16.) *Rosh* expressly rejected the defendant's contention that no reasonable person could conclude a negligent tortfeasor was more responsible for an injury than an intentional tortfeasor. (*Rosh*, at p. 1233.)

Here Aurora and Signature are sophisticated parties who should know how to operate a psychiatric hospital to assure the safety of their patients. Instead, they operated the hospital recklessly and maliciously to make what happened almost inevitable. First, it was Bravo; then it was Valencia. If the perpetrator had not been Valencia, it would have been someone else. The jury correctly attributed 70 percent of the fault to Aurora and Signature.

VI

Punitive Damages

Signature contends the punitive damages award must be struck because there is no clear and convincing evidence of malice or oppression.

Exemplary damages may be awarded where the plaintiff proves by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious

disregard of the rights or safety of others. (*Id.*, subd. (c)(1).) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (*Id.*, subd. (c)(2).)

Signature relies on Civil Code section 3294, subdivision (b). That subdivision provides: "An employer shall not be liable for [exemplary] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was *personally guilty of oppression, fraud, or malice*. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Italics added.)

Here there is clear and convincing evidence that Signature was personally guilty of oppression and malice. Under Signature's management agreement with Aurora, Signature agreed to provide "[d]aily operational direction and management" and "[c]linical responsibility for all service programs." The jury could reasonably conclude that it was Signature that set the policies that made sexual predation of patients almost inevitable, and that in setting those policies, it acted willfully and with a conscious disregard for the safety of others.

Indeed, a single incident illustrates both Signature's control and its willful and conscious disregard for the safety of others. After the Bravo incident, Aurora's then director of clinical services recommended increased education of employees on

clinical boundaries. Aurora's CEO told her that Signature would not pay for it.

Moreover, Doctor Kim owns both Signature and Aurora. The jury could reasonably conclude that the owner was well aware of the policies that resulted in harm to Plaintiffs.

VII

Motion for Nonsuit

The trial court granted Aurora's motion for nonsuit on Plaintiffs' causes of action alleging vicarious liability under the doctrine of respondeat superior and ratification.[5]

A trial court properly grants a motion for nonsuit only if the evidence presented by the plaintiff would not support a verdict in the plaintiff's favor. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) The trial court may not weigh the evidence, but must accept as true the evidence most favorable to the plaintiff and disregard conflicting evidence. (*Ibid.*)

(a) Respondeat Superior

Under the rule of respondeat superior, an employer is vicariously liable for the torts of its employees committed within the scope of employment. (*John R. v. Oakland Unified School*

---

[5] Plaintiffs argue the issue of respondeat superior is important because Civil Code section 1431.2 limits liability for noneconomic damages to several and not joint liability. They point out Valencia was found 35 percent at fault. They claim respondeat superior avoids the limits of Civil Code section 1431.2. Plaintiffs raised Civil Code section 1431.2 for the first time in a petition for rehearing. For the purposes of this appeal only, Plaintiffs waived the issue. (See *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542.) The waiver is without prejudice to raising the issue in an action to enforce the judgment.

Dist. (1989) 48 Cal.3d 438, 447.) An employer may be vicariously liable for willful, malicious, even criminal acts, of an employee that are deemed to be committed within the scope of employment, even though the employer has not authorized such acts. (*Ibid.*) An act is within the scope of employment if the employment predictably creates the risk that employees will commit intentional torts of the type for which liability is sought. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299.)

Courts have generally held that an employer is not liable under the doctrine of respondeat superior for sexual assaults committed by an employee. (3 Witkin Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 201, p. 263; but see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 217 [city liable for assault by a police officer in view of the considerable power and authority a police officer possesses].) But a sexual tort will be considered to be within the scope of employment if "its motivating emotions were fairly attributable to work-related events or conditions." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra* 12 Cal.4th at p. 301.)

Thus, in *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra*, 12 Cal.4th 291, the court held that a hospital is not liable for a sexual assault committed by a technician under the pretense of conducting an ultrasound examination. The motivating emotions were not fairly attributable to work-related conditions. (*Id.* at p. 301.)

But this case is not like *Lisa M.* In that case the employee's interaction with the victim was brief and the employee's duties were technical. The circumstances of

employment were highly unlikely to engender a personal relationship that might result in sexual exploitation.

In contrast, here there is sufficient evidence for a jury to conclude Valencia was acting within the scope of his employment. The duties of a mental health worker include helping patients with daily living activities. The workers are personally involved with the patients over an extended period of time. The patients are vulnerable; they may suffer from impaired judgment or other cognitive impairments. Sexual exploitation of the patients by employees is a foreseeable hazard arising from the circumstances of the job. That hazard was exponentially increased by Aurora's policies, including allowing male workers 20 minutes alone with patients and providing inadequate training on worker-patient boundaries.

In concluding that the ultrasound technician in *Lisa M.* was not acting within the scope of his employment, the court stated, "We deal here not with a physician or therapist who becomes sexually involved with a patient as a result of mishandling the feelings predictably created by the therapeutic relationship." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra*, 12 Cal.4th at p. 303.) Quite the contrary. That is what is happening here. Ample evidence supports a finding that Valencia was acting within the scope of his employment. The trial court erred in granting a judgment of nonsuit on the question.

The remedy requires that we reverse and remand for a new trial on the cause of action for which the trial court granted nonsuit. (See *McNall v. Summers* (1994) 25 Cal.App.4th 1300, 1315.) Plaintiffs request, however, that we simply amend the judgment to include a finding of respondeat superior. Plaintiffs

cite no authority for such a remedy nor are we aware of such authority. Aurora and Signature are entitled to a jury determination on the question whether Valencia was acting within the scope of his employment. We remand for a new trial.

(b) Ratification

As an alternative to respondeat superior, an employee may be liable for an employee's act where the employer subsequently ratifies the originally unauthorized tort. (*C.R. v. Tenent Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1110.) The failure to investigate or respond to charges that an employee has committed an intentional tort or the failure to discharge the employee may be evidence of ratification. (*Ibid.*) Generally, ratification is a question of fact. (*Ibid.*)

Here an Aurora employee informed a supervisor that Valencia's reputation among other employees was so bad he had earned the nickname "Rapey Juan." Aurora failed to undertake any investigation. Instead, Aurora continued to allow Valencia up to 20 minutes alone with vulnerable female patients in rooms that could not be observed from outside of the room. It is true that Aurora terminated Valencia soon after it learned that he was at a party with a recently discharged patient. But a jury could reasonably determine that Aurora should have acted to investigate sooner, when it first learned of Valencia's reputation as "Rapey Juan." An employer is not relieved of liability for ratification simply because it eventually terminates the employee.

There is substantial evidence from which a jury could have determined that Aurora ratified Valencia's acts.

VIII

Punitive Damages and Civil Code Section 1431.2

For the first time in a petition for rehearing, Plaintiffs contend the award of punitive damages allows them to escape the limitation on joint and several liability in Civil Code section 1431.2, subdivision (a).[6] Matters raised for the first time in a petition for rehearing are deemed waived. (See *CAMSI IV v. Hunter Technology Corp.*, *supra*, 230 Cal.App.3d at p. 1542.) The waiver, however, is without prejudice to raising the issue in an action to enforce the judgment.

DISPOSITION

The matter is reversed and remanded for a new trial on the issue of respondeat superior and ratification. In all other respects, the judgment is affirmed. Costs on appeal are awarded to Plaintiffs.

CERTIFIED FOR PUBLICATION.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

---

[6] Civil Code section 1431.2, subdivision (a) provides, in part: "In any action for personal injury, . . . based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint."

Kevin G. DeNoce, Judge

Superior Court County of Ventura

Law Office of David Feldman and David Feldman for Plaintiffs and Appellants.

Horvitz & Levy, Andrea M. Gauthier, Bradley S. Pauley; Kendall Brill & Kelly, Nicholas F. Daum; Beach Law Group, Thomas E. Beach, Mindee J. Stekkinger and Molly M. Loy for Defendants and Appellants.

Cole Pedroza, Curtis A. Cole and Cassidy C. Davenport for California Medical Association, California Dental Association, and California Hospital Association as Amici Curiae on behalf of Defendants and Appellants.

PROOF OF SERVICE

Samantha B. et al. v. Aurora Vista Del Mar, LLC, et al.
Court of Appeal Case No. B302321
Supreme Court Case No. S_____

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On May 13, 2022, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

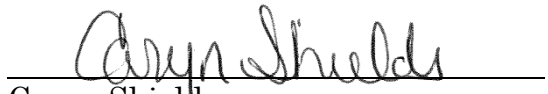
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 13, 2022, at Burbank, California.



Caryn Shields

SERVICE LIST
Samantha B. et al. v. Aurora Vista Del Mar, LLC, et al.
Court of Appeal Case No. B302321
Supreme Court Case No. S_____

David Feldman (SBN 179679) Law Offices of David Feldman 100 Wilshire Boulevard, Suite 700 Santa Monica, CA 90401 (310) 578-7171 • Fax: (310) 578-7731 Email: feldman.lawyer@gmail.com	Attorneys for Plaintiffs and Appellants SAMANTHA B. and DANIELLE W. ***Via TrueFiling***
Patrick J. Somers (SBN 318766) Kendall Brill & Kelly LLP 10100 Santa Monica Boulevard, Suite 1725 Los Angeles, CA 90067 (310) 556-2700 • Fax: (310) 556-2705 E-mail: psomers@kbkfirm.com	Attorneys for Defendants and Appellants AURORA VISTA DEL MAR, LLC d/b/a AURORA VISTA DEL MAR HOSPITAL and SIGNATURE HEALTHCARE SERVICES, LLC ***Via TrueFiling***
Thomas E. Beach (SBN 096321) Mindee J. Stekkinger (SBN 146698) Molly M. Loy (SBN 274703) Beach Law Group, LLP 500 East Esplanade Drive, Suite 1400 Oxnard, CA 93036 (805) 388-3100 • Fax: (805) 388-3414 Email: tbeach@beachlawgroup.com Email: mstekkinger@beachlawgroup.com Email: mloy@beachlawgroup.com	Attorneys for Defendants and Appellants AURORA VISTA DEL MAR, LLC d/b/a AURORA VISTA DEL MAR HOSPITAL and SIGNATURE HEALTHCARE SERVICES, LLC ***Via TrueFiling***
Juan Pablo Valencia 8458 Neath Street Ventura, CA 93004	Defendant in pro per ***Via U.S. Mail***
Consumer Law Section Office of the Attorney General-Appellate Coordinator 300 South Spring Street North Tower, 5th Floor Los Angeles, CA 90013	***Electronic service preferred*** https://oag.ca.gov/services-info/17209-brief/add

Honorable Kevin G. DeNoce
Ventura County Superior Court
800 South Victoria Avenue, Dept. 43
Ventura, CA 93009

Case No. 56-2015-00464635
c/w 56-2015-00468326; and 56-2015-00471717

Via U.S. Mail

Clerk of the Court
California Court of Appeal
Second Appellate District, Division Six
200 East Santa Clara Street
Ventura, CA 93001

Via TrueFiling