



# Appellate Reports

## Appellate Court holds that hospital's substantial impairment of an elderly patient's right to autonomy can constitute actionable "neglect" within the Elder Abuse Act

By JEFFREY I. EHRLICH

### *Stewart v. Superior Court*

(2017) \_\_ Cal.App.5th \_\_ (Fourth Dist., Div. 2)

**Who needs to know about this case?** Lawyers litigating Elder-abuse cases.

**Why it's important:** Holds that a hospital's substantial impairment of an elderly patient's right to autonomy can constitute actionable "neglect" within the Elder Abuse Act.

**Synopsis:** Decedent Anthony Carter, who was 78 years old and experiencing confusion, was admitted to St. Mary Medical Center. He named Maxine Stewart, a registered nurse, as his representative to make health-care decisions under a written durable power of attorney.

The hospital and Carter's doctors planned to perform a surgery on Carter to implant a pacemaker. Stewart refused to consent and canceled the surgery. After this refusal, the doctor asked St. Mary's risk-management department to convene an ethics committee meeting to consider the case. The committee concluded that Stewart's status as Carter's designee could be voided if she refused to consent to life-saving surgery. Neither Carter nor Stewart was informed of the committee meeting, nor of its decision before the surgery. The surgery went forward without prior notice to Stewart. Carter's doctors signed the consent form for the procedure, purportedly on Carter's behalf. During the surgery Carter went into cardiac arrest and suffered a hypoxic event, causing brain damage. He required acute skilled nursing care until his death six weeks later.

Stewart filed suit against the hospital and Carter's doctors. St. Mary moved for summary adjudication of several of the claims alleged. It argued the elder-abuse claim failed because holding an ethics committee meeting about Stewart's power of attorney over Carter could not amount to reckless neglect within the meaning of the Elder Abuse Act. The fraudulent concealment claim, St. Mary contended, failed because a hospital owes no fiduciary duty to a patient, and the medical-battery claim was allegedly insufficient because the hospital itself did not perform the surgery and the doctors who performed the surgery were not hospital employees. The trial court granted the motion in favor of St. Mary on these claims, and Stewart filed a writ petition. Granted.

The trial court erred in concluding that there were no triable issues of fact concerning the elder-abuse claim. Section 15657 of the Welfare and Institutions Code provides heightened remedies to a plaintiff who can prove "by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57," and who can demonstrate that the defendant acted with "recklessness, oppression, fraud, or malice in the commission of this abuse." Section 15610.57, in turn, defines "neglect" in relevant part 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." The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm." But it was not meant to

encompass every course of behavior that fits either legal or colloquial definitions of neglect. Rather, "neglect [under the Act] requires a caretaking or custodial relationship that arises where an elder or dependent adult depends on another for the provision of some or all of his or her fundamental needs."

The Appellate Court held that St. Mary's relationship with Carter was a custodial one. The type of relationship the Act contemplates is "a robust caretaking or custodial relationship – that is, a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." This test was met here.

Moreover, the court noted that Carter's admission to an acute-care facility such as St. Mary, standing alone, would have been sufficient to make him a "dependent adult" who would be entitled to the Act's protections even if he had not also qualified as an "elder" by virtue of his age. (Welf. & Inst. Code, §§ 15610.23, subd. (b) [definition of "dependent adult"], 15610.27 [definition of "elder"]; Health & Saf. Code, § 1250, subd. (a) [definition of "general acute care hospital"].)

St. Mary argued that the court should evaluate the custodial nature of the relationship on a task-by-task view, and that convening the ethics committee to construe Carter's power of attorney was not custodial conduct. The court rejected this approach, noting that St. Mary cited no authority allowing or even encouraging a court to assess care and



custody status on a task-by-task basis, and that the prevailing case law's focus on the extent of dependence by a patient on a health-care provider rather than on the nature of the particular activities that comprised the patient-provider relationship counsels against adopting such an approach.

The court stated that it was "troubled" that labeling this case as one for no more than professional negligence seriously undervalues the interest Carter had in consenting or objecting to the surgery that, in the opinion of Stewart's experts, contributed to his death. It noted that the U.S. Supreme Court has long held that "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Likewise, the California Supreme Court has described the right to consent to medical treatment as "basic and fundamental," and "intensely individual."

There were triable issues of fact concerning whether the defendants violated Carter's right to personal autonomy by authorizing his doctors to sign the consent for the pacemaker on Carter's behalf. This form was signed not only without Carter's consent, but over the objection of his designee. The court stated, "We have difficulty concluding that the deprivation of a right as important as personal autonomy, if in fact St. Mary is found to have deprived Carter of that right, cannot amount to more than professional negligence in the context of this case."

In addition, by proceeding with the surgery without the patient's consent, or the consent of his designee, the hospital was potentially subject to a claim for medical battery under *Cobbs v. Grant* (1972) 8 Cal.3d 229, 239-240 [recognizing battery claim against doctor for performing an operation to which the patient had not consented].

If Stewart proves to a jury that St. Mary failed to "exercise that degree of care that a reasonable person in a like position would exercise" with respect to Carter (Welf. & Inst. Code, § 15610.57, subd. (a)(1)), she will have shown that it engaged in actions that constitute neglect under the Act."

In addition, the court held that a violation of the right to personal autonomy could allow a jury to find that the hospital committed neglect of an elder under two of the specific categories described in the Act: the "[f]ailure to provide medical care for physical and mental health needs" (Welf. & Inst. Code, § 15610.57, subd. (b)(2)) and the "[f]ailure to protect from health and safety hazards" (*Id.*, subd. (b)(3)).

The court also held that a reasonable jury could find St. Mary "fail[ed] to protect [Carter] from health and safety hazards" (Welf. & Inst. Code, § 15610.57, subd. (b)(3)) by authorizing the surgery in the way it did. Stewart's medical-ethics expert described the process used by the hospital as a "sham," and said that the hospital should have obtained a court order to perform the surgery. The requirement to obtain a court order is designed to prevent the patient from being exposed to the very abuse that occurred in this case.

The court also held that Stewart raised triable issues of fact concerning whether the defendants' conduct could be viewed as reckless. "St. Mary's suggestion that it cannot be punished for listening to the advice of a doctor in good standing at the hospital fails to account for its decision to structure the ethics committee meeting in an entirely one-sided manner."

## Short(er) takes:

**Employment discrimination; adverse action based on race of third party; substantial evidence: theory of the case:**

*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338 (Second District, Div. 1) Plaintiffs, two Hispanic LAPD officers,

were involved in a fatal shooting of an African-American man, who was unarmed and autistic. After the shooting the officers were kept out of the field, and were instead assigned to various jobs that did not require a field certification. They continued to receive their full salaries, but were no longer eligible to receive a 2-3 percent "field bonus." They sued the LAPD for unlawful discrimination under the FEHA and prevailed in a jury trial, with each officer receiving roughly \$2 million. The City appealed. Reversed.

The appellate court held that the evidence was insufficient to support a judgment in favor of the officers for discrimination. The officers' theory at trial was that "the race of Plaintiffs, and the race of the African-American that was shot by Plaintiffs, while performing their duties as police officers, was a substantial motivating reason for causing damages and injuries to Plaintiffs." On appeal, the officers limited their theory to discrimination based solely on their race; not the race of the shooting victim. The court concluded that, "Without considering alleged differences in the Officers' treatment due to the victim's race, the evidence is not sufficient to support the Officers' employment discrimination claim."

The officers' main evidence was a comparison of how they were treated with how two white officers were treated after a similar shooting incident, in which the victim was Hispanic, and not African American. At trial, the officers had argued that the disparate treatment was based, in large part, on the race of the victim.

The court held: "This theory does not support the discrimination claim that the Officers brought. In deciding whether to return the Officers to the field, the City could assess the political implications of doing so without violating employment discrimination laws. Those laws would not permit the City to treat the Officers differently because they are Hispanic, but they did not prohibit the City from assessing the risk management implications of returning officers of any race to the streets of Los Angeles who had been involved in a fatal shooting of an innocent, unarmed



and autistic African-American man. The Officers claimed that African-American officers would have been treated differently, but they did not introduce any competent evidence to support that claim.”

**ERISA; waiver; agency:**

*Salyers v. Metropolitan Life Insurance Company* (9th Cir. 2017) \_\_ F.3d \_\_.

Plaintiff Salyers was a nurse employed by Providence Health. When she first applied for dependent life insurance coverage on her spouse, Gary Wolk, she elected only \$20,000 in coverage. Because of this low amount, no evidence of insurability was required under Providence’s ERISA plan. Although Salyers elected only \$20,000 in coverage, Providence mistakenly entered \$500,000 into its system, and deducted premiums for that amount of coverage for several years. No request of insurability was made by Providence or the plan insurer, MetLife, even though evidence of insurability was required.

In 2014, Salyers increased the coverage on Wolk to \$250,000. Although Salyers did not provide a statement of health or evidence of insurability, as the plan documents said was required, Salyers’s premiums were adjusted to reflect the \$250,000 in coverage. Ten days after the new coverage was effective, Wolk died. MetLife paid only \$30,000 – the maximum amount that the plan documents allowed for coverage

without evidence of insurability. The district court entered judgment in favor of MetLife. Reversed.

The Ninth Circuit adopted a federal common-law rule concerning agency, applicable to ERISA claims, which held that Providence was acting as MetLife’s agent, and therefore information made known to Providence by plan beneficiaries is imputed to MetLife, the principal. The court had no trouble concluding that Providence had apparent authority, and perhaps even implied actual authority, to enforce the evidence-of-insurability requirement on MetLife’s behalf.

A plan participant would have reasonably believed that Providence did not collect evidence of insurability of its own accord but on MetLife’s behalf. Providence’s direct interaction with plan participants, coupled with MetLife’s failure to engage with Salyers about evidence of insurability, suggested that Providence had apparent authority on the collection of evidence of insurability.

Providence knew or should have known that Salyers’s 2014 coverage election required evidence of insurability, because Providence’s system showed \$250,000 in coverage. Despite having not received evidence of insurability from Salyers in 2014 or earlier, Providence began deducting premiums from Salyers’s paycheck every two weeks between September 2013 and February 2014, in

amounts corresponding to \$500,000 in coverage for 2013 and \$250,000 for 2014. Plus, just five days after Gary’s death, having still not received evidence of insurability, Providence sent a letter to Salyers confirming coverage of \$250,000.

The deductions of premiums, MetLife and Providence’s failure to ask for a statement of health over a period of months, and Providence’s representation to Salyers that she had \$250,000 in coverage were collectively “so inconsistent with an intent to enforce” the evidence of insurability requirement as to “induce a reasonable belief that [it] ha[d] been relinquished.” Accordingly, MetLife waived the evidence of insurability requirement, and it cannot contest coverage on that basis.



Ehrlich

*Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*

