Elder abuse: Mis-uses of *Winn v. Pioneer Medical Group, Inc.*

Doctors may use this defense when sued for neglect of elder patients that live independently at home

By George Kindley

In *Winn v. Pioneer Medical Group*, the California Supreme Court confronted the question of whether a defendant medical group could be held liable for "neglect" under the Elder Abuse Act based upon its care and treatment of a competent elder adult seen intermittently in their medical office. The defendant medical group's ("Pioneer") position was that it could not be held liable for "neglect" under the Elder Abuse Act because it had only treated the elder, Elizabeth Cox, intermittently in its office, that Ms. Cox was otherwise competent and lived at home, and that it never held the role as Ms. Cox's "care custodian." However, plaintiffs maintained the medical group was liable for "neglect" because its failure to refer Ms. Cox to a vascular surgeon over so many years was reckless, caused her suffering, and her untimely death.

On May 19, 2016, the California Supreme Court decided the case in favor of Pioneer, concluding that Pioneer did not have "care and custody" of Ms. Cox and therefore could not be liable for "neglect" under the Elder Abuse Act. Specifically, and in instructing the lower court to sustain the demurrer to plaintiff's elder abuse cause of action, the Supreme Court held that "defendants' allegedly substandard provision of medical treatment, on an outpatient basis, to an elder" without more "does not support the conclusion that neglect occurred under the Elder Abuse Act."

The *Winn* case is significant because it changed pleading and proof requirements in elder abuse cases involving conduct that constitutes "neglect" under Welfare and Institutions Code section 15610.57. Now and in "neglect" cases, the "care and custody" element requires a showing that a defendant assumed significant responsibility for attending to one or more basic needs of an elder or dependent adult that an able bodied or fully competent adult would be capable of

handling without assistance. The case clearly recognizes that defendants attending to elders that reside in a 24-hour care setting (home or institutional) will still be liable for "neglect." Further and of note, *Winn* did not concern, and left the rules relating to "physical abuse" under section 15610.53, unchanged.

Nonetheless, the repercussions of *Winn* are substantial. The first and most obvious is that limits have been placed on the reach of the Elder Abuse Act. This will result in a chilling effect on the prosecution of pure "neglect" cases involving elders that live independently at home and, in many instances, will provide wrongdoing defendants with a free pass. Second, the change penalizes elders and dependent adults that choose to reside in their homes to care for themselves as long as possible. Third and in substantive pretrial motions, defendants are attempting to mis-use the holding of *Winn*, confuse trial courts, and argue that owners, management companies, and parent companies of 24-hour care providers cannot be held responsible for the "neglect" of elders. Finally and also in substantive pretrial motions, defendants are attempting to mis-use the holding of *Winn* to cover conduct that constitutes "physical abuse" (e.g., prolonged deprivation of food and water, unreasonable physical restraints, use of chemical restraints/ drugging, etc.). While there is no requirement of "care and custody" under the "physical abuse" prong of the Elder Abuse Act, this has not stopped defendants from arguing the contrary and claiming that *Winn* supports their position.

Following *Winn*, even more special attention must be given to pleading and discovery in elder abuse cases.

Case background

In *Winn*, the elder adult, Ms. Cox, received intermittent primary care treatment from Pioneer at their offices. She visited her Pioneer physicians at their offices sporadically from 2000-2010. During this time, Ms. Cox lived at home, was competent, and was capable of taking care of her own needs (e.g., hygiene, meals, taking medication, etc.). Ms. Cox was not dependent upon Pioneer for supervising her care while she was at home. Pioneer did not provide Ms. Cox any home health care and did not supervise any home health care providers. And unlike a patient receiving 24-hour care, Ms. Cox was free to select any doctor, present to the hospital, or ask Pioneer for a referral to a specialist.

In 2004, Ms. Cox's Pioneer physician documented limited pulse in her lower legs. In 2007, Ms. Cox's Pioneer physician documented that she had peripheral vascular disease. Despite Pioneer's awareness of this diagnosis, Pioneer did not refer Ms. Cox to a vascular specialist. Intermittently and in 2008-2010, Ms. Cox's Pioneer physicians saw her in their offices and documented that the vascular condition was worsening. Still, Pioneer made no referral to a vascular specialist.

During Ms. Cox's last office visit in 2010, her Pioneer physician documented that she had sustained unusual weight loss. The physician failed to document that her foot was black and gangrenous. Still, Pioneer did not refer her to a vascular specialist and she went home. The next day, Ms. Cox presented to an acute care facility. The hospital physicians diagnosed gangrene and documented that Ms. Cox's right foot was black. At the hospital, emergency surgery was performed on Ms. Cox's foot in a belated attempt to re-establish vascular flow. The surgery was not successful. One month after the surgery, Ms. Cox was re-admitted to the hospital and surgeons amputated her right leg below the knee. Two months later, she returned to the hospital and her surgeons performed an above-the-knee amputation. Seven months after this procedure and in January of 2010, Ms. Cox was re-admitted to the hospital, suffering from complications.
Ms. Cox died at the hospital.

The trial court/plaintiffs' allegations of "neglect"

In February 2010, Ms. Cox's heirs filed a complaint alleging that Pioneer's medical malpractice resulted in Ms. Cox's wrongful death. In February 2011, plaintiffs filed an amended complaint asserting a cause of action for statutory elder abuse. Pioneer filed a demurrer to plaintiffs' elder abuse cause of action, which the trial court sustained. Thereafter, plaintiffs filed an amended pleading. In addition to the facts above, plaintiffs alleged that Pioneer's conduct constituted "neglect" of Ms. Cox as Pioneer had recklessly failed to refer her to a vascular surgeon to address her lower extremity vascular insufficiency. Plaintiffs alleged that Pioneer knew Ms. Cox needed a referral to a vascular surgeon because when they saw her at their offices between 2004 and 2010 Pioneer's documentation noted the deteriorating vascular issues. Pioneer filed a demurrer, which was sustained without leave to amend. The trial court concluded that plaintiffs had failed to allege facts showing that Pioneer denied Ms. Cox necessary care or the requisite facts constituting recklessness. Plaintiffs appealed.

The Court of Appeal's decision

The Court of Appeal reversed the trial court's decision. The Court of Appeal held that claims of "neglect" were not limited to healthcare providers with custodial obligations. The Court further held that whether Pioneer's conduct was reckless rather than merely negligent was a question of fact for the jury. Defendants sought review.

The Supreme Court's decision

The California Supreme Court overturned the decision rendered by the Court of Appeal, and found in favor of Pioneer.

The Supreme Court looked to the intent of the legislature when it enacted the Elder Abuse Act. Pursuant to the Elder Abuse Act, a plaintiff must prove, by clear and convincing evidence, that a defendant is liable for either "physical abuse" under section 15610.63 *or* "neglect" under section 15610.57, and that the defendant committed the misconduct with "recklessness, oppression, fraud, or malice." (See, Welf. & Inst. Code § 15657.) Section 15610.57, in turn, provides two definitions of "neglect." First, "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code § 15610.57, subd. (a)(1).) Second, "[t]he negligent failure of an elder or dependent adult to exercise that degree of self-care that a reasonable person in a like position would exercise." (*Id*., subd. (a)(2).) Since the plaintiffs in *Winn* alleged only "neglect" arising in the context of medical care and not self-care, the Supreme Court determined that section 15610.57's first definition of "neglect" applied.

In this context of "neglect," the Supreme Court determined that the "care or custody" concept requires a custodial relationship where a person has assumed significant responsibility for attending to one or more basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. The Court summarized the meaning of "care or custody," explaining that a doctor might assume the responsibility for attending to an elder's basic needs in a variety of contexts and locations, including beyond the confines of a 24-hour facility including, among others, in-home health. The Supreme Court found it important that the elder in *Winn* lived at home, was competent, was independent and cared for all of her own activities of daily living, and was free to choose to go to another doctor or present to the hospital at any time.

The ruling was based on the fact that Pioneer did not have care or custody of Ms. Cox and was not responsible for providing or supervising at least one basic need to Ms. Cox. Further, the Supreme Court distinguished the case of *Mack v. Soung* (holding elder abuse was appropriate against a primary care doctor who supervised a patient in a 24-hour care setting). The Supreme Court found that *Mack* was different since in *Mack*, the defendant doctor had assumed a caretaking relationship with the reliant, vulnerable elder who relied upon him to visit her at the facility and monitor her care. The Supreme Court recognized that in *Mack*, the doctor prevented his patient from being hospitalized and failed to provide necessary medical care to his vulnerable patient. The Supreme Court found the facts of *Mack* to be different since Ms. Cox was competent, lived at home, was not reliant, and was able to seek a second opinion at any time if she had wanted to.

Conclusion

While *Winn* clearly identifies that a defendant must be a "care custodian" for there to be "neglect" under the Elder Abuse Act, it is important to note that the "physical abuse" prong is not dependent upon any "care custodian" relationship. Further, it is also important to note that defendants that assume responsibility for elder and dependent adults that reside in 24-hour settings (e.g., doctors, hospitals, 24-hour care management companies, nurses, 24-hour care owners, 24-hour care parent companies, physician assistants, in-home health, etc.) meet the definition of a "care custodian" under the Elder Abuse Act and will still be held liable for enhanced remedies applicable to "neglect."

It is very unfortunate that *Winn* opens the door for some practitioners to escape elder abuse liability even for reckless "neglect" where the "care custodian" relationship does not exist. Given the age of many of these victims, traditional negligence remedies will now make litigation unlikely and fruitless. It will allow many defendants to escape liability for their reckless failures. Now and in the situation where a competent elderly person decides to stay at home and care for themselves as long as possible as Ms. Cox did, they will no longer be afforded the enhanced remedies provided under the Elder Abuse Act. This will result in disparate treatment simply based upon the elder's decision on where and how to live.

At the end of the day, *Winn* appears to be a situation where bad facts made unfortunate new law. However, and in the 24-hour-care setting (institutionally and at home), the courts still recognize that the elder and dependent adult patients are reliant and vulnerable and, as such, in these settings defendants will be found to be "care custodians" and liable for statutory elder abuse. Further, providers like Pioneer will still be held liable for statutory elder abuse of a competent elderly patient that lives independently where the facts support a finding of "physical abuse." And while the conduct that constitutes "physical abuse" is more restricted than what conduct constitutes "neglect," at least not all is lost.

Now more than ever, practitioners must be vigilant in prosecuting elder abuse cases. It is important to understand the differences between the statutory definitions of "neglect" and "physical abuse." And in all cases where defendants cite *Winn*, it is critical for practitioners to highlight for their trial judges the narrow facts involved in *Winn*, and that it recognized "neglect" still applied where elderly or dependent adults do not live independently and depend upon others for assistance with their activities of daily living.

When confronted with a demurrer or motion for summary judgment,

counsel must know the facts involved in *Winn* and the litany of controlling cases before it. Defendants will try to convince trial judges that *Winn* applies in just about every circumstance. Be ready with the body of controlling law that holds doctors, management companies, owners, and other persons responsible for statutory elder abuse in 24-hour care settings.


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