4 Civil No. E052730

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 2

Gary Speiginer and Rennae D. Speiginer,

Plaintiffs and Appellants

vs.

Ben Bennett, Inc.,

Defendant and Respondent

On Appeal From The Superior Court of Riverside County
Honorable Gary B. Tranbarger, Mac R. Fisher, Gloria Connor Trask, Craig G. Riemer, Judges and Honorable Gianni Driller (Temporary Judge)
Riverside County Superior Court Case No. RIC444667

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiffs sued defendant, the operator of a skilled nursing facility, for injuries their father Julius Speiginer allegedly suffered. After hearing days of evidence, the jury found that defendant had breached a duty of care, although it also found Speiginer 50% at fault. The jury found defendant not liable either for wrongful death or for violating the Elder Abuse Act. The trial court heard plaintiffs' statutory claims and awarded plaintiffs $5,000 in penalties and $50,000 in attorney fees. Plaintiffs appealed and defendant cross-appealed, but this Court dismissed defendant's cross-appeal pursuant to stipulation.

Plaintiffs' strategy in this case was to inflame the jury by putting the defendant on trial for alleged defects in the care of a relatively few of the facility's many other residents. The trial court properly refused to let plaintiffs accomplish this goal by stymieing plaintiffs' attempts to use Department of Public Health ("DPH") records and testimony based on those records to shift the jury's focus away from defendant's care of plaintiffs' decedent. Plaintiffs' appeal raises a plethora of issues, but plaintiffs' primary complaint is that the court would not allow into evidence the DPH records and testimony based on them.

The court acted correctly in excluding this evidence; had it done otherwise it would have permitted plaintiffs to put on a sideshow aimed at poisoning the jury's minds. The records were inadmissible hearsay compiled from multiple sources and their admission into evidence would have circumvented a statute designed to prevent records of this type from

being used as admissions against skilled nursing facilities. The records were also irrelevant, highly prejudicial and would have required undue consumption of time if admitted. Plaintiffs contended that the records and testimony based on them should have been admitted because another judge deemed them admissible in connection with a motion for summary judgment, but that ruling did not bind the trial court.

The hearsay contained in the records was too unreliable to serve as a basis for plaintiffs' expert's testimony, which would also have been irrelevant and barred by the same statute precluding use of the records as admissions against skilled nursing facilities. For the same reasons, the court properly excluded testimony of defendant's administrator concerning his knowledge of DPH records. Moreover, plaintiffs failed to attempt to show, and in fact could not have shown, that the exclusion of all of this evidence was prejudicial on their elder abuse and wrongful death claims, which went to the jury.

Although plaintiffs primarily complained about the exclusion of the evidence discussed above, plaintiffs make a shotgun attack on various other rulings by the court, often on the ground that the rulings stemmed from the exclusion of the DPH records and related testimony. Plaintiffs challenge: (1) the court's refusal to judicially notice a federal statute, and federal and state regulations; (2) nonsuit grants; (3) the jury instructions; (4) the special verdict form; (5) the court's trying plaintiffs' statutory causes of action; and (6) the court's statement of decision. For reasons discussed below, none of these arguments have merit and the judgment should be affirmed.

STATEMENT OF THE CASE

A. Procedural Fact Summary.

Plaintiffs' Second Amended Complaint was the operative complaint. (Volume 1 Appellant's Appendix ("1 AA") 1-31.) That complaint alleged eight causes of action against three defendants, two of which were dismissed after settlements. (1 AA 1; 8 AA 1952, 1956.) The eighth cause of action, which alleged a violation of Civil Code section 3428, was brought solely against one of the settling defendants. (1 AA 25.)

Ben Bennett, Inc. ("Ben Bennett"), the remaining defendant, subsequently moved for summary adjudication on plaintiffs' causes of action for elder abuse, bystander negligence and unfair business practices, as well as on plaintiffs' claims for punitive damages. (1 AA 43.) In opposing this motion, plaintiffs relied in part on the testimony of their expert K. J. Page and defendant's administrator, Bruce Bennett, as well as on Department of Public Health ("DPH") records. (See, e.g., 3 AA 708-709.) Defendant unsuccessfully objected to the evidence of Page and the DPH records. (5 AA 1116.) Defendant did not object to Bennett's testimony. (4 AA 823-871.) The court, Judge Mac R. Fisher, denied the summary adjudication motion. (5 AA 1111-1117.) Defendant subsequently changed counsel and brought another summary adjudication motion, which was also denied. (8 AA 1963, 1965, 1971-1972.).

The case was transferred to Judge Gary L. Tranbarger for trial. (8 AA 1972.) Plaintiffs moved in limine to judicially notice DPH records and defendant filed opposition, as well as a motion in limine to exclude these

records. (5 AA 1213, 1260, 1303.) Defendant also moved in limine to exclude the testimony of plaintiff's expert K. J. Page relating to those DPH records. (5 AA 1239.) Judge Tranbarger excluded the DPH records from evidence as hearsay not within an exception. (Volume 1 Reporter's Transcript ("1 RT") 14.) After an Evidence Code section 402 ("section 402") hearing, the court ruled Page could not testify unless the defense "open[ed] the door" by eliciting testimony that the "facility is good . . . ." (1 RT 95, 148-8-148-9.) The court refused to judicially notice certain statutes and regulations applying to skilled nursing facilities. (1 RT 64-65.)

Judge Tranbarger bifurcated trial on plaintiffs' sixth and seventh causes of action, which alleged violations of Business and Professions Code section 17200 and Health and Safety Code section 1430, subdivision (b), respectively, ruling that these allegations would be tried to the court after the jury trial. (1 AA 1; 1 RT 78.) A jury was sworn and trial commenced. (8 AA 1980-1981.) Judge Tranbarger precluded Bennett from testifying regarding his knowledge of regulatory violations occurring before Speiginer's admission to defendant's nursing facility. (4 RT 615-626; 6 RT 1276-1281.)

After plaintiffs rested, defendant moved for nonsuits on elder abuse, fiduciary duty and bystander negligence, the first, third and fourth causes of action. (6 RT 1282-1283; 6 AA 1370-1393.) The court granted a partial nonsuit on elder abuse, ruling that defendant did not act with oppression, fraud or malice, but that recklessness was a jury question. (8 RT 1649; 6 AA 1537-1540.) The court granted nonsuits on bystander negligence and fiduciary duty. (7 RT 1299; 6 AA 1541-1544.) The court refused to

instruct the jury on willful misconduct, plaintiffs' second cause of action. (8 RT 1650.)

Plaintiffs' claims for wrongful death (fifth cause of action) and elder abuse went to the jury, which returned a special verdict finding that plaintiffs' decedent Julius Speiginer was harmed by defendant's failure to provide reasonable care, that defendant did not cause Speiginer's death and that Speiginer's failure to comply with medical advice was a cause of harm. (6 AA 1535.) The jury found that Speiginer had suffered $25,000 in noneconomic damages and apportioned 50% of the fault to Speiginer and 50% to defendant. (6 AA 1535-1536.) The jury found that defendant's employees did not act with reckless disregard. (6 AA 1536.)

The court then tried causes of action six and seven, the statutory violations. (8 RT 1785.) The court concluded that defendant had violated a regulation requiring reasonable care to prevent and/or heal skin ulcers, and levied a fine of $5,000.00. (6 AA 1611.) The court rejected plaintiffs' request for injunctive relief. (6 AA 1611.) The court subsequently awarded plaintiffs $50,000 in attorney fees. (8 AA 1919.) The court denied plaintiffs' new trial motion. (8 AA 2016.)

The judgment embodying the fine and attorney fee award was filed on July 16, 2010. (8 AA 1918.) On January 11, 2011, plaintiffs filed a notice of appeal from the judgment and the order denying a new trial. (8 AA 1920.) The new trial denial was not appealable. (*Walker v. Los Angeles County Metropolitan Transp. Authority* (2005) 35 Cal.4th 15, 18.)

B. Standards of Review, Fact Presentation and Prejudicial Error.

Plaintiffs contend that "[t]he applicable standard of review is de novo or independent review" and that "the Court must view the allegations and evidence in the light most favorable to Appellants." (Appellants' Opening Brief ["AOB"] 4.) These blanket assertions are incorrect, as defendant will show in discussing standards of review applicable to certain issues. Plaintiffs' "failure to acknowledge the proper scope of review is a concession of a lack of merit." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

The Appellants' Opening Brief must "[p]rovide a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).) Plaintiffs' "Summary Of Significant Facts" is approximately four pages long and refers to neither witness testimony heard by the jury nor to exhibits admitted into evidence. (AOB 4-8.) In fact, plaintiffs' entire brief is virtually devoid of references to evidence heard or viewed by the jury, the only exceptions being two record cites establishing that plaintiffs are Speiginer's adult children. (AOB 1, citing 4 RT 583:18-20 and 688:22-23.)

Unless an error is reversible per se, the appellant has the burden to show prejudice. (*People v. Letner* (2010) 50 Cal.4th 99, 194.) Whether an error was prejudicial can only be determined "after an examination of the entire cause, including the evidence . . . ." (Cal. Const., Art. VI, § 13.) As will be discussed, plaintiffs' failure to refer to evidence heard or viewed by the jury precludes plaintiffs from showing prejudice on several errors they allege.

ARGUMENT

I.

PLAINTIFFS INCORRECTLY CONTEND THAT THE JUDGMENT SHOULD BE REVERSED BECAUSE THE COURT EXCLUDED CERTAIN EVIDENCE.

Plaintiffs advance two rationales for their argument that the court erred in excluding certain documentary and testimonial evidence. (AOB 10-20.) Plaintiffs assert that the judge conducting the trial was compelled to follow the lead of another judge who overruled defendant's objections to some of this evidence at the summary adjudication stage. (AOB 18-20.) This contention will be rebutted in subsection A below. Plaintiffs also assert that the trial court's rulings were erroneous even if it was not compelled to follow the rulings at the summary judgment stage. (AOB 10-18.) These contentions will be refuted in subsection B below. Plaintiffs failed to demonstrate that the rulings were prejudicial, which for reasons that will be explained in subsection C below, renders harmless any alleged evidentiary error on causes of action that went to the jury.

A. The Trial Judge Was Not Required To Follow The Evidentiary Rulings of The Judge Who Decided The Summary Adjudication Motions.

Plaintiffs contend that certain evidentiary rulings made in connection with summary adjudication "conflict" with those made at trial and that the

trial judge was required to follow the earlier rulings. (AOB 18-20.) Plaintiffs are wrong because a trial judge ruling on the admissibility of evidence is not bound by evidentiary determinations made at the summary adjudication stage.

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. . . ." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) The facts pertinent to this issue are undisputed. Plaintiffs' opposition to defendant's first summary adjudication motion relied in part on Department of Public Health ("DPH") records, as well as on the testimony of their expert K. J. Page and defendant's administrator, Bruce Bennett. (See, e.g., 3 AA 708-709.) Defendant unsuccessfully objected to the DPH records and Page's testimony. (5 AA 1116.) Defendant did not object to Bennett's testimony at the summary adjudication stage and Judge Fisher did not rule on its admissibility. (4 AA 823-871; 5 AA 1116.) Judge Tranbarger subsequently excluded all of this evidence pursuant to motions in limine or at trial. (1 RT 14, 95, 148-8-148-9; 4 RT 615-626; 6 RT 1276-1281.)

Plaintiffs' argument does not apply to Bennett's testimony because defendants did not object to this testimony and the court did not rule on its admissibility at the summary adjudication stage. Plaintiffs do not contend that objections must be made to evidence at this stage in order to preserve them for trial. Plaintiffs' failure to make such a contention in their opening brief forfeits the argument. (*Murray Co. v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43, 54, fn.5.) Such a contention would at any rate be meritless because it makes no sense to

require counsel to object to evidence at summary adjudication in order to object to the same evidence at trial, since counsel might not want to put an opponent on notice that evidence is potentially objectionable.

Plaintiffs' argument potentially applies to the DPH records and Page's testimony, but the argument fails because the trial judge was unconstrained by the rulings of the judge who denied summary adjudication. "Generally, pretrial rulings on the admissibility of evidence are not binding on a trial court." (*People v. Hayes* (1990) 52 Cal.3d 577, 616.) Plaintiffs nonetheless contend that the trial judge had to follow the summary adjudication order admitting evidence, asserting that "the same evidentiary rules of admissibility apply for both the MSA and the trial" except for the use of declarations. (AOB 19.) However, plaintiffs cite no case requiring a trial court to blindly follow evidentiary rulings made in connection with summary judgment or adjudication.

Contrary to plaintiffs' assertion, the use of declarations is not the only difference between evidentiary admissibility at summary adjudication and trial. The failure to comply with Code of Civil Procedure section 2034 bars expert testimony from being admitted at trial, but not at summary judgment. (*Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575, 582 ["Admissibility at trial is not necessarily the same as admissibility at a summary judgment proceeding."].) Additionally, considerations of probativeness and prejudice are of far less concern when a judge, not a jury, evaluates evidence. (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1481 [court trial minimizes danger of probative value being substantially outweighed by undue prejudice or confusion of issues, and eliminates the

possibility of misleading the jury].) Such considerations were at issue here with respect to the DPH records.

There are other significant differences between summary adjudication and trial. The former's purpose is to determine only if there are triable issues of material fact on one or more causes of action, affirmative defenses, issues of duty or damages. (Code Civ. Proc., § 437c, subd. (f)(1); *Advanced-Tech Security Services, Inc. v. Superior Court* (2008) 163 Cal.App.4th 700, 705 ["Summary adjudication is mandatory where no triable issues exist as to a material fact."].) (Internal brackets and quotation marks omitted.) This Court recognized that summary judgment occurs in a "limited context" by holding a case decided at the summary judgment stage inapposite for that reason, as well as for others. (*Fuller v. Department of Transportation* (2001) 89 Cal.App.4th 1109, 1117.)

Not surprisingly, a failure to dispute facts at summary adjudication does not preclude disputing the same facts at trial. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 748-749; *Villano v. Waterman Convalescent Hospital, Inc.* (2010) 181 Cal.App.4th 1189, 1204, fn.6 ["given the different legal standards applicable to summary judgment, the parties likely would have introduced substantially more and different evidence at trial."].) Nor are litigants barred from making different arguments at both stages; defendants did so here. (4 AA 867-870; 5 AA 1213-1222.) All of these differences between summary adjudication and trial render the proceedings sufficiently distinct in nature that it would distort the trial process to automatically apply summary judgment evidentiary rulings.

Just as importantly, the court's evidentiary ruling at the summary adjudication stage was interlocutory. (*Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1082, fn.2 ["An order denying a summary judgment is an interlocutory order . . ."].) It has been long established that a trial court may change its ruling should the court "become satisfied that it was erroneous." (*Lawrence v. Ballou* (1869) 37 Cal. 518, 521 ["The doctrine that a previous ruling has become the law of the case has no application except as to the decisions of appellate Courts."]; *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1578 ["A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors . . ."].) (Internal quotation marks omitted.) Preventing error far outweighs the judicial economy considerations plaintiffs advance. (AOB 19.)

These principles apply to rulings made before as well as during trial. (*De La Beckwith v. Superior Court of Colusa County* (1905) 146 Cal. 496, 499 [trial court had the power to change previous ruling on demurrers].) That different judges made the rulings does not matter. (*Wrightson v. Dougherty* (1936) 5 Cal.2d 257, 265 [motion for judgment on the pleadings was properly granted although a judge in another department had overruled a demurrer]; *In re Marriage of Nicholas, supra*, 186 Cal.App.4th at pp. 1577-1578 ["a trial court retains the authority to alter or amend its own rulings in the same case, whether made by the same judge or by his or her predecessor."].)

Plaintiffs cite *In re Alberto* (2002) 102 Cal.App.4th 421, 428

("*Alberto*") for the proposition that "'an order made in one department during the progress of a cause can neither be ignored nor overlooked in another department.'" (AOB 20.) *Alberto* is inapplicable for two reasons. First, the order in *Alberto* involved the setting of bond, and statute prohibits the alteration of such orders unless there are changed circumstances. (*Alberto*, *supra*, 102 Cal.App.4th at p. 430.) In the present case, the trial court did not alter the evidentiary rulings pertaining to summary adjudication, it simply refused to admit the evidence during trial. Moreover, even if the court's action is somehow considered an alteration of the prior evidentiary rulings, no statute prohibited this "alteration."

Second, *Alberto* refused to countenance a prosecutor's attempt to "'forum shop[]" by asking a judge to increase bail set by another judge, although the first judge could have entertained a motion to alter his bail order. (*Alberto*, *supra*, 102 Cal.App.4th at pp. 427, 430.) *Alberto* recognized that the result would have been different if the previous judge had been unavailable. (*Id.* at p. 430.) In the present case, Judge Fisher could not have entertained a motion regarding his evidentiary rulings because the matter had been transferred to Judge Tranbarger. (8 AA 1972.)

Therefore, *Alberto* is inapplicable and inconsistent rulings are permitted. (*Emerald Bay Community Ass'n v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1086 ["Except in circumstances governed by Code of Civil Procedure section 1008, if an action is transferred from one department to another, the latter may issue a ruling inconsistent with a prior interlocutory order made in the first department."]; *Alvarez v. Superior Court* (2010) 183 Cal.App.4th 969, 982-983 [distinguishing *Alberto*

because inconsistent rulings on preliminary or interlocutory matters are not res judicata and do not cause a "*jurisdictional conflict*" if the case has been transferred from one department to another because the first department is no longer exercising jurisdiction].)

For the above stated reasons, plaintiffs are wrong in contending that Judge Tranbarger erred by not following Judge Fisher's order.

B. The Trial Court's Evidentiary Rulings Were Correct.

1. The court acted within its discretion in excluding the DPH records, which were inadmissible hearsay, excluded by statute, irrelevant, extremely prejudicial and would have required undue consumption of time if admitted.

The trial court refused to admit the DPH records on the ground that they were hearsay not within an exception. (1 RT 14.) Appellate courts "review the trial court's determination as to the admissibility of evidence, including the application of exceptions to the hearsay rule, for an abuse of discretion." (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 168.) This determination "will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Id.* at p. 168.)

The DPH records pertained to defendant's facility, Community Care and Rehabilitation Center ("CCRC") during 2001-2007. (1 AA 174-2AA 428.) Nearly all of these records consisted of pages containing a "summary statement of deficiencies" and a "provider's plan of correction." (See, e.g.,

1 AA 178.) The trial court observed that these records were a "mixture of . . . personal observations of the DPH employee, statements from witnesses taken by – that were interviewed by the DPH employees, and also a review of records of the facility. And the review itself was done by the DPH employee." (1 RT 6.) Both counsel agreed with this description. (1 RT 7.)

The court stated: "I just don't see the hearsay exception that applies. These are reports. These are out-of-court statements. And I don't see how they are being used in any manner other than to assert to the jury the truth of the deficiencies as related in the reports." (1 RT 8.) The court subsequently ruled all of the documents inadmissible hearsay. (1 RT 14.)

a. The DPH records were inadmissible hearsay.

Plaintiffs devote more than five pages of their opening brief to challenging the court's DPH records ruling. (AOB 10-15.) Page 10 contains a number of factual assertions without citations to the record or legal authorities. Pages 11-13 appear to deal with the records' purported relevance. It is not until page 14 that plaintiffs address the court's finding that the records were inadmissible hearsay, contending that:

> Respondent argued these records are hearsay, and the lower court deemed this objection to be 'dispositive' [1 RT 8:8], but these records were duly authenticated and subject to judicial notice under Evidence Code sections 452(b) and (c). Also, they were not offered to prove the truth of the matter asserted, but rather to prove **notice and knowledge**.

(AOB 14.)

The first of these assertions is irrelevant because judicial notice cannot be taken of the truth of hearsay contained in documents whose existence can be judicially noticed. (*People v. Hernandez* (2011) 51 Cal.4th 733, 741, fn.3 "'[W]hile courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files.'"].)

Only plaintiffs' second contention is relevant to the basis for the court's ruling. However, plaintiffs' providing only a conclusory sentence challenging the basis for the court's ruling forfeits this argument. (*Giorgianni v. Crowley* (2011) 197 Cal.App.4th 1462, 1483 [one sentence argument, "without citation to authority or to the record" was "summarily" rejected because the litigant "failed to develop it in any meaningful way"]; *Sanchez v. State* (2009) 179 Cal.App.4th 467, 490 ["It is not this court's function to serve as Val Verde's backup appellate counsel . . ."].)

Even if this Court does not deem plaintiffs' hearsay argument forfeited, it is meritless. Plaintiffs contend this evidence was relevant because the records purportedly showed there were regulatory violations of which the defendant or its agents had knowledge. (AOB 11-13.) However, only if the jury found that regulations actually were violated would it would have been able to conclude that the defendant was at fault even under plaintiffs' rationale. Thus, plaintiffs sought to use these documents for the truth of the matter asserted in them, i.e. that regulatory violations occurred. Such use is impermissible. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1203-1207 [documents containing out of court

statements reporting prior crimes were inadmissible hearsay because plaintiff sought to use them for the truth of the matter asserted, i.e., that violent acts were being committed at the restaurant, so a murder was foreseeable and the restaurant had a duty to prevent its occurrence].)

In contending these documents are relevant, plaintiffs implicitly concede the documents would be used for the truth of the matter asserted, stating: "[i]t is therefore the **knowledge** of the management that they are being repeatedly notified by the DPH of regulatory violations . . . that they are repeatedly promising on Respondent's behalf to remedy these violations and *that these violations nevertheless continue for years* . . . which becomes a key issue." (AOB 11-12, added emphasis in italics.) In order to find that "these violations nevertheless continue for years," the jury would have had to find that CCRC had committed the violations, which the jury could do only by concluding that the DPH employees' findings were true. Therefore, the trial court correctly found that "the documents themselves could have only the purpose of demonstrating to the jury the truth of the allegations reflected in the documents and that's hearsay and there is no exception." (1 RT 14.)

Before making their two sentence hearsay "argument," plaintiffs cited two cases for the proposition that DPH records are admissible in proceedings such as this. (AOB 14.) However, neither case helps plaintiffs. They cite *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81 ("*Sababin*") which is irrelevant because the Court explicitly refused to opine on whether DPH records would be admissible in connection with summary judgment motions, since no objection had been made to the

records. (*Id.* at p. 89, fn. 8.) "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) Moreover, the DPH records in *Sababin* pertained to the plaintiffs' decedent, not to other residents. (*Sababin v. Superior Court*, 144 Cal.App.4th at pp. 87, 89-90.)

Plaintiffs also cite *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756 ("*Haft*"), but that case actually illustrates why the DPH evidence would have been hearsay for the purpose plaintiffs wanted to use it. The *Haft* plaintiffs sought to use DPH documents only for the purpose of showing that defendant knew of the safety requirements for pools, not for the purpose of showing a pool violated safety requirements. (*Id*. at p. 778.) The latter use would have been hearsay since it would have relied on the truth of the matters asserted in the reports. Unlike the plaintiffs in *Haft*, plaintiffs here sought to use the DPH reports for the truth of the matters asserted, i.e., that actual deficiencies existed. Therefore, the documents were hearsay.

b. Health and Safety Code section 1280, subdivision (f) precluded the DPH records' admission.

Because the trial court ruled the DPH records inadmissible hearsay, it did not rule on whether the records were inadmissible for other reasons. (1 RT 8.) However, the court's ruling can be upheld on other grounds because this Court "review[s] the trial court's ruling, not its rationale." (*Americans for Safe Access v. County of Alameda* (2009) 174 Cal.App.4th 1287, 1294 [evidentiary materials were relevant even if the trial court's

ground for finding so was incorrect].)

Plaintiffs' attempt to skirt the hearsay rule also runs afoul of the legislature's refusal to permit plans of correction to be used as admissions against facilities such as CCRC. Health & Safety Code section 1280, subdivision (f) ("section 1280(f)") prohibits the use of the "act of providing a plan of correction, the content of the plan of correction, or the execution of a plan of correction" as an admission in a legal action against health facilities. The use of the DPH records here to show that defendant was aware of deficiencies, but did not correct them, would have run afoul of all three prohibited uses.

All but 11 pages of the DPH records in the present case include a plan of correction. (1 AA 177-201, 203-280; 2 AA 281-338, 342-379, 387-428.) In arguing for the records' relevance, plaintiffs assert that CCRC repeatedly promised "to remedy these violations and that these violations nevertheless continue for years . . . ." (AOB 11.) Thus, plaintiffs wanted to introduce the content of the plans of correction to show that they were formulated but not adhered to. It is difficult to imagine a clearer violation of section 1280(f).

Plaintiffs contend that section 1280(f) does not apply to plans of correction arising from complaints, but the only authority they cite for this proposition involved Health and Safety Code section 1280, *subdivision (e)*, which involves public inspections of records. (AOB 14, citing *Fox v. Kramer* (2000) 22 Cal.4th 531, 542.) Plaintiffs also contend that the statement of deficiencies is distinct from the plan of correction (AOB 14), despite the fact they are in different columns on the same page, and the

latter would be meaningless without reference to the statement of deficiencies.

The legislature enacted section 1280(f) in reaction to the use of a DPH predecessor agency's records in an action against a skilled nursing facilities' operator. (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 522, fn.4 ("*Casa Blanca*"), disapproved on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-185.) The *Casa Blanca* court deemed the records admissible as admissions under the law existing at the time of trial, but noted that after section 1280's enactment, "the admission of statements of deficiencies as evidence was prohibited in an action such as the case at bench." (*Casa Blanca*, *supra*, 159 Cal.App.3d at p. 533.) There can be no doubt that but for section 1280(f), plaintiffs would be overtly (instead of covertly) attempting to use these records as admissions, as was done in *Casa Blanca*. Plaintiffs should not be permitted to do what the legislature prohibited.

c. The DPH records were irrelevant, extremely prejudicial and lacking in probativeness, and would have required undue consumption of time if admitted.

The DPH records were irrelevant, were extremely prejudicial and lacking in probativeness, and mini-trials would have had to have been held on any records that were admitted.

None of the DPH records in question involved Speiginer. (1 RT 97-

98.) Plaintiffs contend that these records were nonetheless relevant because they purportedly show a pattern of elder abuse known to management. (See AOB 11-13.) Plaintiffs are wrong for two independent reasons.

First, as the trial court stated without counsel disagreeing, the notice of deficiency process "is forward looking, not backward looking. It's not a time or process engaged in determining the full accuracy of the alleged deficiency . . . ." (1 RT 2-3.) The facility must submit a written response stating what they will do to make sure the alleged deficiency does not repeat itself. (1 RT 3.) The court also noted that CCRC's responses denied these deficiencies occurred, but set out the steps that would be taken to prevent the alleged deficiency from occurring again. (1 RT 3; see, e.g., 1 AA 222.) Even assuming for purposes of this paragraph that all of these records involved the same subject matter as plaintiffs' allegations in the present case, the records do not represent CCRC's recognition that problems had occurred, but only its willingness to attempt to minimize the likelihood that the alleged problems would occur in the future.

Second, showing a pattern or practice requires demonstrating similarity between the incidents alleged to constitute that pattern or practice. (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 927-928 [evidence of dissimilar incidents irrelevant to punitive damages determination].) The records here do not meet that requirement. More than 50 pages of these records are unquestionably irrelevant because they postdated Speiginer's March 2005 stay at CCRC. (1 AA 279-280; 2 AA 281-336; 5 RT 937.) Obviously, CCRC's management could not have known of these alleged violations at the time Speiginer was a resident.

(*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1549 [excluding testimony of patient treated after plaintiff because that patient's satisfaction with the procedure could not have been relevant to defendants' state of mind when alleged misrepresentations regarding the treatment were made to the plaintiff].)

The remainder of the records involved a "great variety of issues" pertaining to alleged deficiencies. (1 RT 7-8; see, e.g., 1 AA 178-192 [alleging deficiencies in nursing hours per patient, timely providing a written report of an examination, assessing changes in condition, reporting changes in condition to physicians, authenticating medication orders, administering medication].) Some of these alleged deficiencies were different than those plaintiff argues occurred here. (See AOB 11.) Moreover, these documents involve different patients, different caregivers and different circumstances: none of these records pertained to Speiginer's care. The DPH documents, taken as a group –which is how plaintiffs wanted them admitted–involved behavior that is simply too disparate to constitute the pattern of conduct plaintiffs allege. Therefore, the documents were irrelevant.

The documents were also highly prejudicial and lacked probativeness, and therefore should have been excluded under Evidence Code section 352 ("section 352.") "Prejudice for purposes of section 352 refers to evidence that tends to evoke an emotional bias against the defendant." (*People v. Crew* (2003) 31 Cal.4th 822, 840.) "[T]he statute uses the word in its etymological sense of prejudging a person or cause on the basis of extraneous factors." (*People v. Zapien* (1993) 4 Cal.4th 929,

958, internal quotation marks omitted.) It would beggar belief that a jury, given approximately 250 pages containing government findings of purported deficiencies, would simply disregard them and not begin with the mindset that CCRC was a bad actor deserving punishment. (*Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 338 [newspaper article containing unsubstantiated innuendos and referring to verdicts in other cases was properly excluded under section 352 because its prejudicial effect outweighed its probative value].)

In contrast, the documents were too unreliable to have had any real probativeness. The court noted these were "brief summary" reports based in part on second hand information garnered by often unidentified state employees, and counsel agreed. (1 RT 6-7.) Plaintiffs' expert K.J. Page testified in the section 402 hearing that these evaluations were subjective in part and might vary depending on the surveyor's "mood." (1 RT 129.) In fact, Page stated that "there have been surveyors that were more dependent on their mood than anything else." (1 RT 129.) Page is familiar with "numerous peer-reviewed studies which discuss the unreliability of the survey process due to the surveyor's subjectivity . . . ." (1 RT 130.) Page did not assume that the events recorded were described accurately, and her experience was that sometimes DPH records were not accurate. (1 RT 98, 100.)

Given the highly prejudicial nature of the DPH records and their lack of probativeness, they should have been excluded pursuant to Evidence Code section 352. The documents also should have been excluded under that section because their admission would have consumed an undue

amount of time, as a mini-trial on each alleged deficiency would have been necessary. (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926-927 [trial court abused its discretion in admitting evidence regarding dentist's allegedly "inappropriate treatment" of 9 prior patients, in part because it "led to a series of mini-trials" and "tended to evoke an emotional bias against defendant that clouded the relevant issues in the case."].)

For all of the above reasons, the trial court correctly excluded the DPH records.

2. The court acted within its discretion in excluding K. J. Page's testimony because its admission would have contravened section 1280(f), it was based on unreliable hearsay and it was irrelevant.

Plaintiffs proffered the testimony of K. J. Page, a nursing home administrator (1 RT 15, 102), stating she would testify:

> That she has examined the DPH records and that she has ascertained that there are patterns and practices of deficiencies at this nursing home, that because of their repeatedly [sic] nature, it indicates that there is a culture - - a deliberate culture at this nursing home based on their repeated promises not to do something and yet doing it again and again and again.

(1 RT 16.)

After a section 402 hearing, the court precluded Page from testifying unless defendant "open[ed] the door." (1 RT 95-145, 148-9].) This

determination, like all evidentiary rulings, is reviewed for abuse of discretion. (*Thompson v. County of Los Angeles*, *supra*, 142 Cal.App.4th at p. 168.) "It is settled that a trial court has wide discretion to exclude expert testimony, including hearsay testimony, that is unreliable." (*People v. McWhorter* (2009) 47 Cal.4th 318, 362.)

This ruling was correct on several grounds. As a threshold matter, plaintiffs' proffer shows that Page intended to use the DPH records as a basis for testimony that the same deficiencies kept occurring, which amounts to stating that plans of correction were not properly executed. Such testimony would violate section 1280(f)'s prohibition against using the execution of plans of correction as admissions against nursing homes.

Additionally the DPH records were unreliable hearsay. As discussed in Argument IB1a above, the records were hearsay and as discussed in Argument IB1c above, the records were unreliable. Page did not do a follow up investigation on any of the incidents reflected in the records. (1 RT 98.) She did not question or interview any of the people mentioned in the records. (1RT 98.)

Only reliable hearsay can serve as a basis for expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'"].) It is not enough that the hearsay is "of the type reasonably relied on by experts in the particular field;" it must be "reliable" as well. (*Id*. at p. 618.) The DPH documents were too unreliable to form the basis for an expert's opinion. (*People v. McWhorter, supra,* 47 Cal.4th at pp. 361-362 [expert's opinion was properly excluded, in part because his conclusion was

based on unsubstantiated hearsay in a defense investigator's report]; *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 42-44 [expert should not have been permitted to base his opinion that repair charges were reasonable on inadmissible invoices]; *Ribble v. Cook* (1952) 111 Cal.App.2d 903, 906 [traffic officer's opinion as to point of impact of collision, based on what witnesses told him, would not have been admissible if objected to].)

The trial court made its concerns with reliability clear, stating that "[m]y other problem with Ms. Page is she's asked to do something in this case which she does not do in her non-forensic life. She's asked to evaluate other institutions based on notices of deficiencies. She has no non-forensic experience doing that." (1 RT 148-5.) The court explained that Page, acting as an administrator, did not accept the accuracy of the notices of deficiency, but merely used them as "starting points for her own investigation," and had not conducted any follow-up investigation here. (1 RT 148-5–148-6.) Indeed, this was what Page had testified. (1 RT 98-100.) The court was clearly within its discretion in concluding that the DPH records were unreliable in the absence of a confirming investigation.

Moreover, Page's failure to follow her normal method of evaluating deficiency notices severely undermined the adequacy of her observations and her testimony could have been excluded on this ground alone. (*Snyder v. Hollingbery* (1956) 141 Cal.App.2d 520, 525, superceded by statute on other grounds *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 780 ["Plaintiffs failed to convince the trial court that their proposed witness had made sufficiently adequate observations to

enable him to speak as an expert on this subject . . . "].)

The court also rejected Page's testimony on relevance grounds. (1 RT 148-4.) The court noted that plaintiffs were seeking to admit Page's testimony "to try and meet the evidentiary requirement of ratification," and plaintiffs' offer of proof was that Page "was going to testify to an opinion that there was a culture at this particular facility which was tolerant of bad care. And that's not what she testified to." (1 RT 148-4.) The court observed that Page "did not say that she had an opinion that the management of this facility approved of bad care, tolerated bad care, was reckless as to bad care" and that Page did not attribute any failure to correct alleged deficiencies to "an approval of management of bad care or tolerance of bad care, or recklessness as to bad care . . . ." (1 RT 148-4.) For this reason, the court found that "her proposed testimony is not relevant to the issue before the trier of fact." (1 RT 148-4.)

The court correctly found Page's testimony irrelevant. Page testified that after examining the records, she concluded that "the managers at CCRC did not manage the facility in a way that was providing the care and services necessary for the people that lived there . . . ." (1 RT 113.) She also testified "there were things that weren't done that could have been done or should have been done that weren't done. The same deficiencies occurring time and time again is a concern to me as an administrator." (1 RT 114.) However, Page testified that she did not know why these problems were not corrected, that it was not possible to obtain this knowledge just by looking at the DPH records and that she "would probably need to talk to the administrator and director and perhaps even go in, look at the facility, spend

some time evaluating the systems." (1 RT 114-115.) Page answered "No" when asked: "From your point of view, it's like the management is writing out the plan of correction and then ignoring it; is that correct?" (1 RT 137.)

This testimony clearly failed to show what plaintiffs proffered: "that there is a culture - - a deliberate culture at this nursing home of not following these regulations based on their repeated promises not to do something and yet doing it again and again and again." (1 RT 16.) The most Page's testimony showed was that certain alleged deficiencies were not always corrected, which falls far short of demonstrating "a deliberate culture" of failing to correct these alleged deficiencies. If anything, Page's denial that management was ignoring plans of correction evidenced that such a culture did not exist. Even if the alleged culture's existence would have been relevant to issues such as recklessness and ratification, Page's testimony would not have helped establish that existence.

Moreover, Page based her opinions on records from 2001-2009. (1 RT 113.) As discussed in argument IB1c above, the records after Speiginer's stay were utterly irrelevant to CCRC's knowledge of alleged problems before or during that stay. Because approximately half the records Page reviewed post-dated Speiginer's March 2005 stay, her testimony was based on far too much irrelevant material to be probative even if she had testified in accordance with plaintiffs' proffer.

For these reasons, the court was correct in excluding Page's testimony. Plaintiffs assert that "the trial court concluded Ms. Page's testimony would be treated as inadmissible character evidence . . . ." (AOB 17), but the above discussion demonstrates that the court properly excluded

Page's testimony on hearsay and relevance grounds, and could have excluded it as violating section 1280(f) as well.

3. The court acted within its discretion in precluding Bruce Bennett from testifying concerning his knowledge of the DPH records' contents.

Plaintiffs contend the trial court erred in precluding CCRC administrator Bruce Bennett from testifying "concerning his knowledge of the contents of the DPH records." (AOB 15.) Plaintiffs are wrong.

Plaintiffs wanted to use the DPH records to demonstrate that Bennett "'knew about a pattern of workplace abuse at this nursing home . . . .'" (AOB 16.) Plaintiffs could not have had Bennett simply parrot the DPH findings, as such a use would be for the truth of the matter asserted in the records, i.e. that regulatory violations occurred. Even an expert permitted to form an opinion based on hearsay cannot recite the details of that hearsay. (*People v. Coleman* (1985) 38 Cal.3d 69, 92 ["'While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible.'"].) A non-expert witness such as Bennett is of course also prohibited from repeating the hearsay. (*Greve v. Echo Oil Co.* (1908) 8 Cal.App. 275, 282 ["answer on direct examination that A. M. Kinney intended to assign to H. J. Greve was based on the statement of A. M. Kinney to the witness, and was therefore hearsay, and should have been stricken out"].)

Plaintiffs appear to assert that they could have shown through

Bennett's testimony that he knew the violations alleged in the DPH records occurred. (AOB 15-16.) As a threshold matter, the use of this testimony would have violated section 1280(f), which prohibits the use of the "act of providing a plan of correction, the content of the plan of correction, or the execution of a plan of correction" as an admission against health facilities. Bennett "look[ed] into" alleged deficiencies of care "as they came up at CCRC between 2001 and 2005." (4 RT 514.) In reviewing Bennett's deposition, the court found that "he testified to a habit and custom and practice of conducting an informal investigation into the accuracy of any notice of deficiency, either directly himself and/or through management staff. [¶] And that the plan or correction was formed and written and executed to every notice of deficiency, whether it was true or not true." (4 RT 615-616.) Under these circumstances, knowledge that Bennett acquired of the alleged deficiencies would be part of the act of providing a plan of correction, and therefore inadmissible under section 1280(f).

Additionally, the court, which reviewed Bennett's deposition testimony except for 100 pages plaintiffs' counsel characterized as "a waste of paper" (4 RT 615), found that Bennett remembered very few of the deficiency investigations' results. The court initially stated that Bennett did not remember the results of the investigations into the DPH violations except on two occasions. (4 RT 621.) The first of these investigations concerned an alleged violation due to the lack of a wound care nurse on the weekend. (4 RT 616.) The second involved two deficiencies in documenting a resident's medicine allergy. (4 RT 616, 619.) After colloquy with plaintiff's counsel, the court stated "[t]here may be three

exceptions." (4 RT 625.)

It should be obvious that Bennett's testimony regarding the results of investigations into three violations found by the DPH over a number of years sheds no light whatsoever on whether there was a pattern of workplace abuse pertinent to the allegations in this case. Therefore it had no probative worth and was irrelevant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681 ["'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.'"].) Plaintiffs claim *Haft* is "the closest case on point" (AOB 15), but *Haft* involved a defendant's knowledge of regulations, not of alleged violations. (*Haft*, *supra*, 3 Cal.3d at p. 778.)

For these reasons, the court did not abuse its discretion in refusing to let Bennett testify regarding the DPH records.

C. Plaintiffs Failed To Demonstrate That The Evidentiary Rulings Caused Prejudicial Error Affecting Their Claims That Went To The Jury, And In Fact, Could Not Have Done So.

Even if the court erred in its evidentiary rulings, such error was not reversible unless prejudicial. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783 ["An evidentiary ruling, even if erroneous, is not reversible absent a miscarriage of justice."].) Unless excluding evidence completely forecloses an "essential theory of liability," that exclusion will not be considered reversible per se. (*Tudor Ranches, Inc. v. State Comp. Ins.*

Fund (1998) 65 Cal.App.4th 1422, 1432-1433.)

Instead of demonstrating prejudicial error, plaintiffs assumed it, stating "[t]here can be no doubt of the prejudice to Appellants." (AOB 20.) Plaintiffs' assumption is impermissible regarding their claims for wrongful death and elder abuse, which went to the jury. (6 AA 1535.) Plaintiffs have the burden of showing that any evidentiary error prejudicially affected the outcome of these claims and utterly failed to do so, as their "argument" regarding the effect that the exclusion of evidence had on these claims consisted of the following conclusory assertions:

- "Once again, this order [precluding Bennett from testifying regarding the DPH records] excluded crucial evidence of recklessness and ratification, and the jury so found." (AOB 16.) This sentence is no more than a general conclusory assertion and its last 5 words – "and the jury so found" – are inexplicable because the jury found nothing of the sort (8 RT 1771-1772), nor could it have because juries do not rule on whether they have been deprived of allegedly crucial evidence.

- "Little wonder that, ignorant of the testimony of Mr. Bennett concerning his knowledge of these regulatory violations, the jury found no recklessness and never reached the issue of ratification. It could hardly have done otherwise." (AOB 16.) Plaintiffs do not even attempt to explain, much less show, why the jury "could have hardly done otherwise."

- "Nevertheless, the trial court prohibited Ms. Page from testifying at all before the jury and thereby insulated the jury from any knowledge of the 'special rules' (i.e., the applicable federal and state regulations) which establish the standard of care for Respondent's nursing

home [citation] and the knowing violation of which proves Respondent's recklessness and ratification of abuse." (AOB 18.) Plaintiffs do not attempt to explain, much less demonstrate, why knowing the regulations would have led the jury to find that defendant was reckless or ratified abuse.

Moreover, this assertion of prejudice fails because the court barred plaintiffs from bringing these regulations to the jury's attention by denying plaintiffs' motion in limine Number 3, which requested the court judicially notice these regulations. (5 AA 1122-1157; 1 RT 64-65; see also AOB 20 ["The trial court forbade all counsel from making any mention or reference in the jury's presence of or to the various federal and state regulations establishing the standard of care for Respondent's nursing home . . . "].) Thus, even if Page had testified, she could not have discussed these regulations.

- "The trial court's refusal to follow the prior Order deprived appellants of crucial evidence of recklessness and ratification and the jury so found." (AOB 20.) Like the similar allegation of prejudice cited above, this sentence is conclusory and its last 5 words – "and the jury so found" – make no sense. Moreover, plaintiffs do not even attempt to explain, much less show, why this evidence was purportedly "crucial."

If the above-cited assertions, to the extent they are even correct, are sufficient to show prejudice, the requirement would cease to have meaning. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice."].) Not only are these assertions conclusory, but plaintiffs fail to cite any evidence that was before the jury

except for the fact that plaintiffs are Speiginer's adult children. (AOB 1, citing 4 RT 583:18-20 and 688:22-23.)

Plaintiffs' failure to cite such evidence leaves this Court in the dark regarding whether the admission of the excluded evidence would have made a difference on their claims that went to the jury. It is too late for plaintiffs to shed light on the subject, as arguments cannot be made for the first time in a reply brief. Plaintiffs' failure to cite evidence the jury heard or saw leaves them in a position equivalent to appellants in cases where a stipulated dismissal after pre-trial evidentiary rulings resulted in there being no trial record, with the result that appellants were unable to prove prejudice. (*Villano v. Waterman Convalescent Hosp., Inc., supra*, 181 Cal.App.4th at p. 1192.)

Not only have plaintiffs failed to show that the excluded evidence was prejudicial on their wrongful death and elder abuse claims, plaintiffs could not have done so. The excluded evidence had nothing whatsoever to do with plaintiffs' wrongful death claim, which was dependent upon the jury finding that defendant failed to provide reasonable care to Speiginer and that this failure caused his death. The evidence, which allegedly showed that defendant's management permitted patterns of abuse over a period of time, was also irrelevant to the recklessness component of plaintiffs' elder abuse claim, which involved whether defendant's employees acted with reckless disregard in their care of Speiginer. (6 AA 1536.) Assuming for the purpose of this paragraph only that the excluded evidence was relevant to ratification, that issue was rendered irrelevant by the jury's failure to find reckless disregard. (6 AA 1536.) Therefore, even

if this evidence was improperly excluded, there was no prejudice to plaintiff's wrongful death and elder abuse claims.

II.

THE COURT ACTED WITHIN ITS DISCRETION IN PRECLUDING REFERENCES TO FEDERAL AND STATE REGULATIONS; MOREOVER, PLAINTIFFS FAILED TO DEMONSTRATE ANY PREJUDICE STEMMING FROM THE COURT'S ACTION.

Plaintiffs moved in limine to request the court take judicial notice of a federal statute, as well as federal and state regulations. (5 AA 1122-1156.) Plaintiffs contended these enactments set a minimum standard of care and that plaintiffs "should be permitted to both address the jury in Opening Statement on this issue and to present evidence at trial as to Defendant's violations of this minimum standard of care." (5 AA 1127.) Defendant moved in limine to preclude plaintiffs from arguing or adducing evidence that "federal or state statutes or regulations establish a duty on the part of the defendants, or any standard of care." (5 AA 1278.) The court denied plaintiffs' motion. (1 RT 64-65, 78; 2 RT 149; 5 RT 778.)

Judicial notice rulings are reviewed for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264.) The court did not abuse its discretion by denying plaintiffs' judicial notice request; moreover, plaintiffs failed to show that any error was prejudicial.

A. The Court Did Not Abuse Its Discretion By Denying Plaintiffs' Judicial Notice Request.

The trial court denied plaintiff's judicial notice request out of a justifiable concern that expert testimony regarding the statute and regulations would usurp the court's role of informing the jury of the applicable law. (1 RT 58-59, 64-65; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1160 ["expert testimony on issues of law is not admissible since it the judge's responsibility to instruct the jurors on the law-not that of the witness."].)

Plaintiffs' counsel acknowledged the legitimacy of this concern, stating "I'm not going to present anyone to say they violated this regulation or that regulation and this regulation Your Honor" and that regulatory violations would be proven "by the conduct that will be testified to." (1 RT 59.) Plaintiffs' counsel also agreed with the court's statement that "the jury is not going to hear from any witness about what the law is." (1 RT 64.) When plaintiffs' counsel stated that the regulations might come up when he cross-examined defense experts, the court replied that these experts would testify based on "their medical knowledge, not regulatory knowledge" and plaintiffs' counsel said "I understand." (1 RT 65.)

Because experts are not permitted to testify regarding what the law is, taking judicial notice of these enactments during the evidentiary phase of the trial would have served no legitimate purpose, especially since plaintiffs' counsel disclaimed the intention to examine witnesses about alleged violations of the statute and regulations in question.

Plaintiffs' judicial notice request also asked that plaintiffs' counsel

be permitted to refer to the statute and regulations in opening statement. (5 AA 1127.) However, the opening statement's purpose is to "prepare the jurors to follow the evidence . . . ." (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) Given the above-cited statements by plaintiffs' counsel disclaiming the intent to question witnesses about the statute and regulations, there would have been no point whatsoever in referring to them in plaintiffs' opening statement. Moreover, even if plaintiffs had intended to attempt to introduce these enactments into evidence, the court could still have barred references to them in opening statements. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund*, *supra*, 65 Cal.App.4th at p. 1433, fn.3 ["But it is neither uncommon nor unreasonable for a court to exclude evidence from an opening statement where its ultimate admissibility is uncertain."].)

Plaintiffs' appellate contentions concerning their judicial notice request appear to boil down to the proposition that because the jury (purportedly) should have been instructed regarding the statute and regulations, the jury needed to hear about these enactments in opening statement "in order to understand the evidence they would hear at trial." (AOB 21-22.) Plaintiffs fail to explain why the jury needed to know about the statutes and regulations in order to understand the evidence. Even if these enactments did set standards of care, the jury did not have to be instructed on them before hearing evidence. (*People v. Smith* (2008) 168 Cal.App.4th 7, 15 [practice of preinstructing juries is discretionary].) If plaintiffs were correct, preinstructions on the law would be mandatory. Moreover, providing the instructions would have been the court's role, not counsel's. "'[T]he opening statement is not for the purpose of discussing

questions of law.'" (*Williams v. Goodman* (1963) 214 Cal.App.2d 856, 869 ["trial court did not err in restricting plaintiff in her attempt to discuss the law during her opening statement"].)

For these reasons, the court did not err in denying plaintiffs' judicial notice request.

B. Plaintiffs Failed To Demonstrate Any Prejudice Stemming From The Court's Action.

Plaintiffs contend that the court's refusal to admit evidence of the statute and regulations, coupled with a refusal to instruct on the regulations, was "**tantamount to excluding the standard of care entirely** . . . ." (AOB 23.) However, the jury clearly did not need this evidence to find that defendant violated the standard of care, since the jury found for plaintiff on this issue in relation to one or more of the alleged breaches for which there was evidence. (6 AA 1535.)

Plaintiffs also contend that the refusal to admit this evidence, coupled with a "later refusal to instruct the jury on these regulations," "virtually guaranteed a jury finding of no recklessness, and that is precisely what occurred." (AOB 20.) However, conduct does not become reckless simply because it violates a statutory or regulatory standard of care as well as a common law standard. (*Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd.* (2010) 188 Cal.App.4th 1330, 1349 ["The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence."].) (Internal quotation marks omitted.)

The jury found that defendant's employees did not act with reckless

disregard toward Speiginer. (6 AA 1536.) Reversal would be proper only if plaintiffs show "a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1480.) Whether an error was prejudicial can only be determined "after an examination of the entire cause, including the evidence . . . ." (Cal. Const., Art. VI, § 13.) Because plaintiffs failed to discuss the evidence before the jury relevant to their recklessness claim, they cannot show prejudice.

III.

THE COURT'S NONSUIT RULINGS WERE PROPER, AND THE NON-SUITED CAUSES OF ACTION WOULD HAVE FAILED AS A MATTER OF LAW EVEN IF THE EXCLUDED EVIDENCE HAD BEEN ADMITTED.

The court granted a partial nonsuit on plaintiffs' cause of action for elder abuse, ruling that defendant did not act with oppression, fraud or malice, but that recklessness was a jury question. (8 RT 1649.) The court also granted nonsuits on plaintiffs' cause of action for fiduciary duty and bystander negligence. (7 RT 1299.) On appeal, plaintiffs do not challenge the nonsuit grant on their bystander negligence claim. (See AOB 23-24.)

Plaintiffs contend that the nonsuits were "based upon the same basic error in excluding the evidence (the DPH records, the deposition testimony of Mr. Bennett and the expert testimony of KJ Page) of recklessness,

ratification, willful misconduct and breach of fiduciary duty . . . ." (AOB 24.) Because excluding this evidence was not erroneous for reasons stated in Arguments IA and IB, and because plaintiffs advance no other reason why the nonsuits were improper, plaintiffs' nonsuit arguments fail.

Even if this evidence should have been admitted, plaintiffs' nonsuit arguments would also fail for reasons specific to the nonsuited claims. (*Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 273 [Court of Appeal will consider grounds for nonsuit that identify "incurable defects," even if these grounds were not advanced in the trial court].)

Plaintiffs' fiduciary duty claim was based on defendant's purported failure to inform Speiginer's sons about the DPH reports. (1 RT 10.) This claim would fail as a matter of law because defendant had no fiduciary duty to tell plaintiffs about these reports, which plaintiffs' counsel acknowledged were matters of public record. (1 RT 10.) Skilled nursing facilities are subject to a "detailed statutory scheme regulating the standard of care provided . . ." (*Burden v. County of Santa Clara* (2000) 81 Cal.App.4th 244, 252.) The California legislature has mandated that certain information must be communicated to residents or prospective residents. (Health & Saf. Code, §§ 1417.15, 1418.21, 1429, 1429.1) Another statutory scheme requires facilities to divulge certain information in contracts with residents. (Health & Saf. Code §§ 1599.60-1599.84) None of these statutes requires a facility to disclose the DPH reports to residents or prospective residents. This Court should not impose a disclosure requirement that the legislature did not mandate.

Plaintiffs' fiduciary duty claim would also fail as a matter of law for

want of causation. Neither plaintiff participated in the decision to send Julius Speiginer to CCRC. (4 RT 697-698.) As soon as Julius Speiginer was admitted to CCRC on March 2, 2005, Gary Speiginer exercised a power of attorney for his father's medical decisions. (4 RT 747; 5 RT 937.) On or around March 15, 2005, Gary Speiginer began making calls in an attempt to have his father transferred from CCRC. (4 RT 704-705.) These efforts were unsuccessful, and Julius Speiginer remained at CCRC until he was taken to Riverside Community Hospital on March 31, 2005. (3 RT 340; 4 RT 705.) Because plaintiffs were not involved in sending Julius Speiginer to CCRC, and because Gary was unable to have him transferred from that facility, disclosure of the DPH reports would not have affected either Julius Speiginer's admission to CCRC or how long he stayed there. Therefore, even if not disclosing these reports breached defendant's fiduciary duty, no harm resulted from the breach.

Lastly, plaintiffs' fiduciary duty claim would fail as a matter of law because plaintiffs could not establish damages, which are an element of this cause of action. (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 ["'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach.'"].) Plaintiffs could not establish damages because the only compensatory damages plaintiffs requested in connection with their fiduciary duty cause of action were for Julius Speiginer's pain and suffering (1 AA 18) and those damages were unavailable. (Code Civ. Proc., § 377.34; *Sullivan v. Delta Air Lines, Inc*. (1997) 15 Cal.4th 288, 306 ["When, as here, the only damages at issue are for pain and suffering, to say

that such damages are not recoverable is the functional equivalent of saying that Sullivan's causes of action against Delta did not survive his death after judgment."].) Although plaintiffs also sued for punitive damages on this claim (1 AA 28), recovering compensatory damages or the equivalent is a prerequisite for obtaining punitive damages. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530.)

Plaintiffs' claim for elder abuse based on oppression, fraud and malice would have ultimately failed as a matter of law even if the excluded evidence had been admitted. The excluded evidence pertained to the treatment of patients other than Speiginer and therefore would not have been relevant to the jury's determination that defendant's employees did not act recklessly in their care of Speiginer, a determination that precluded any finding the defendant acted with oppression or malice, which involve conscious wrongdoing. (*Sababin v. Superior Court*, supra, 144 Cal.App.4th at p. 89 ["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. [Citation.] Oppression, fraud and malice involve intentional or conscious wrongdoing of a despicable or injurious nature."].) (Internal quotation marks omitted.) Because plaintiffs' fiduciary duty claim failed as a matter of law for reasons discussed above, there could not have been a finding of fraud.

Therefore, even if the evidence in question was excluded improperly, the jury's finding that defendant's employees did not act recklessly, coupled with the fact that no fiduciary duty was violated, renders moot plaintiffs' contention that the court erred in granting a nonsuit on defendant's elder

abuse claim insofar as that claim alleged oppression, fraud and malice.

IV.

PLAINTIFFS HAVE FAILED TO SHOW ERROR OR PREJUDICE STEMMING FROM THE COURT'S RULINGS ON JURY INSTRUCTIONS.

Plaintiffs alleged that the judgment should be reversed because the court erroneously instructed the jury. (AOB 24-27.) Plaintiffs' argument fails at the threshold because they did not even attempt to show prejudice. Moreover, the court's rulings were correct and plaintiffs could not possibly have shown prejudice in regard to certain alleged instructional errors even if they had tried to do so.

A. Plaintiffs Did Not Even Attempt To Show Prejudice.

Even if one or more of the jury instructions was erroneous, reversal would be improper because plaintiffs did not even attempt to show prejudice. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 ["A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'"].) It is the appellant's burden to "show that error has resulted in a miscarriage of justice." (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1678.)

Whether instructional error was prejudicial depends on "'(1) the state

of the evidence, particularly conflicts on critical issues; (2) the effect of other instructions; (3) the effect of counsel's argument, particularly whether the respondent's arguments to the jury may have contributed to the misleading effect of the instructional error; (4) any indication by the jury that it was misled; and (5) the closeness of the verdict.'" (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1249.) Because plaintiffs did not discuss these factors, much less show that they demonstrated prejudice, their instructional error argument fails at the threshold. (*Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629 ["Assuming, *arguendo*, that the evidence failed to support liability under those theories, Kemper has failed to demonstrate any potential prejudice from the instructions."].)

B. The Court's Jury Instruction Rulings Were Correct.

The standard of review for instructional errors is de novo if the question is one of law. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1.) The court's instructions were proper. Plaintiffs complain about the following:

- The court's rejecting a jury instruction based on Civil Code section 3345 ("section 3345"), which permits penalty enhancement in actions by or on behalf of senior citizens to address unfair or deceptive acts or practices. (AOB 25.) Without citing the record, plaintiffs assert that the trial court rejected this instruction because it had excluded the DPH records, as well as Page's and Bennett's testimony based on those records.

(AOB 25.) Assuming plaintiffs are correct regarding the court's reason for rejecting the instruction, it should not have been given because the evidence was properly excluded.

This instruction would not at any rate have been proper because plaintiffs' claims tried to the jury were for elder abuse and wrongful death, neither of which is brought "to redress unfair or deceptive acts or practices or unfair methods of competition." (Civ. Code, § 3345 subd. (a); (*Novick v. UNUM Life Ins. Co. of America* (C.D. Cal. 1008) 570 F.Supp.2d 1207, 1211 ["trebling of punitive damages is available [under section 3345] when the 'underlying cause of action involves unfair practices.'"].) Additionally, the partial nonsuit granted on plaintiffs' elder abuse claim, coupled with the nonsuit on plaintiffs' fiduciary duty claim, precluded the jury from finding oppression, malice or fraud. Therefore, punitive damages could not have been awarded, so there would have been no penalty to enhance.

- The court's rejecting instructions on willful misconduct, breach of fiduciary duty, malice, oppression, fraud and punitive damages. (AOB 25.) Plaintiffs attribute this rejection to the exclusion of the DPH records, and Page's and Bennett's associated testimony. (AOB 25.) Assuming plaintiffs correctly gauged the court's rationale, the instructions should not have been given because the evidence was properly excluded. Additionally, the nonsuits precluded any of these instructions from being given except for willful misconduct.

- The court's rejecting instructions that "Title 22 Regulations" (5 AA 1141-1147) established the standard of care and that evidence of violating these regulations amounted to negligence p er se. (AOB 25-26.)

The court was correct because these regulations should not be applied outside of their context, the administration and management of skilled nursing facilities.

Defendant recognizes that other California courts have held to the contrary. (*Norman v. Life Care Centers of America, Inc.*, *supra*, 107 Cal.App.4th at pp. 1240-1248; *In re Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 522-524.) Those decisions are not binding upon this court and should not be followed because the regulations were enacted pursuant to a statutory scheme–the Long-Term Care, Health, Safety, and Security Act of 1973– intended to establish licensing, inspection and reporting, and citation systems. (Health & Saf. Code, §§ 1417, 1417.1.) Using the regulations as standards of care, and treating a failure to comply with them as negligence per se, would be incompatible with the realities of caring for those in need of skilled nursing.

The facts in this case illustrate this incompatibility. One regulation relied on by plaintiff deals with preventing decubitis ulcers, contractures and deformities by requiring "[C]hanging position of bedfast and chairfast patients with preventive skin care in accordance with the needs of the patient" and "[m]aintaining proper body alignment and joint movement to prevent contractures and deformities." (5 AA 1143.) Speiginer, who sometimes refused pain medication for fear of becoming addicted (4 RT 490), was in sufficient pain from the spread of metastatic cancer (6 RT 1234) that he would at times would refuse treatment, including movement, intended to prevent skin breakdown. (3 RT 451-1–451-2; 4 RT 479; 6 RT 1073; 7 RT 1517.) Given that Speiginer had the right to refuse treatment (3

RT 433; 5 RT 977), applying these regulations as standards of care and giving a per se negligence instruction would have been highly unfair.

- The court's rejecting plaintiffs' ratification instruction and giving another instruction. Plaintiffs contend that their instruction "expressly stated the test for employer ratification of abuse, 'failure to intervene in a known pattern of workplace abuse,' College Hospital v. Superior Court (Cowell) (1994) 8 Cal.4th 704, 726." (AOB 26.) Plaintiffs are wrong because there is no one test for ratification; the case plaintiffs cite merely stated that "[t]he issue commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known." (*College Hospital v. Superior Court*, *supra*, 8 Cal.4th at p. 726.) The court's instruction here permitted the jury to find ratification under two different rationales. (6 AA 1500.) Plaintiffs fail to even assert that neither rationale was proper. Moreover, plaintiffs offer no argument why their instruction would have been justified under the evidence before the jury.

Plaintiffs also complain that the court's ratification instruction "limited the jury's consideration to only one managing agent (Director of Nursing Klarenbach) and requir[ed] the jury to find that Ms. Klarenbach personally knew of Mr. Speiginer's abuse and approved of it . . . ." (AOB 26.) Plaintiffs fail to explain why the evidence before the jury justified naming any other managing agents. Moreover, plaintiffs are wrong when they say that the jury was required to find Ms. Klarenbach knew and approved of abuse; the jury could have alternatively found defendant liable

if Ms. Klarenbach had advance knowledge of the unfitness of the employees who treated Speiginer. (6 AA 1500.) Plaintiffs assert that "the giving of this instruction was erroneous and misleading" (AOB 26), but don't offer any reasons other than those discussed above. For all these reasons, plaintiffs have failed to show that the court's ratification instruction was improper.

- The court's rejecting "the CACI instruction on Multiple Causes," while purportedly instructing the jury "on Respondent's contention that Mr. Speiginer's injuries and death were the result of his failure to follow medical advice." (AOB 26.) Plaintiffs assert that the court's actions "misled the jury into believing it could not allocate fault for Mr. Speiginer's death between these multiple causes," which in turn "resulted in the jury's finding that Respondent's neglect was not 'a cause' of Mr. Speiginer's death." (AOB 26-27.)

Plaintiffs' argument is not only completely speculative, it fails at the threshold because plaintiffs' failure to cite any evidence regarding what caused Speiginer's death precludes plaintiffs from showing they were entitled to this instruction. Moreover, the instruction was unnecessary even if potentially justified because the court gave other instructions making it perfectly clear that the jury was to allocate fault and that defendant could still be liable even if Speiginer's conduct contributed to his injuries or death. The court instructed the jury that a substantial factor "does not have to be the only cause of the harm" (8 RT 1671) and that if defendant proved that Speiginer's conduct was a substantial factor in causing his harm, plaintiffs' damages would be reduced by the percentage of Speiginer's

responsibility. (8 RT 1672.) These instructions leave no doubt that the jury knew that it could have found for Speiginer on his wrongful death claim, had it deemed defendant to have contributed to Speiginer's death.

C. Even If Plaintiffs Had Attempted To Show Prejudice, They Could Not Have Demonstrated That Some Of The Claimed Instructional Errors Were Prejudicial.

Plaintiffs could not possibly have shown prejudice in regard to certain alleged instructional errors even if they had tried to do so.

The jury's verdict that defendant's employees were not reckless precluded any finding of willful misconduct, which is "intentional wrongful conduct, done either with a knowledge that serious injury to [another] probably will result or with a wanton and reckless disregard of the possible results." (*Manuel v. Pacific Gas & Elec. Co.* (2009) 173 Cal.App.4th 927, 939. (Internal quotation marks omitted.) The jury's finding that defendant's employees were not reckless also precluded a finding of ratification, so any error in the court's ratification instruction would not be prejudicial.

Moreover, the jury could not have found willful misconduct because, as with fiduciary duty, the damages element was lacking. Willful misconduct is an "aggravated form of negligence " and damages are an element of negligence. (*Berkley v. Dowds*, *supra*, 152 Cal.App.4th at p. 526.) (Internal quotation marks omitted.) Although plaintiffs did not specify the compensatory damages they requested on this claim (1 AA 27), those damages could only have been for pain and suffering, and therefore

would not have been recoverable. (Code Civ. Proc., § 377.34.)

The jury's finding that defendant breached the duty of care rendered irrelevant any error in not instructing the jury on the "Title 22 regulations" or on negligence per se insofar as breach of the duty of care was concerned. (Compare *Norman v. Life Care Centers of America, Inc.*, supra, 107 Cal.App.4th at pp. 1238, 1253 [refusal to instruct on regulations and give a negligence per se instruction was reversible error when jury found defendant had not neglected plaintiff's decedent].) Because the jury found that defendant breached the duty of care, plaintiffs could not have gotten a better result on this issue even if the jury had been instructed that the regulations set standards of care and violating them amounted to negligence per se.

V.

PLAINTIFFS HAVE FAILED TO SHOW ERROR OR PREJUDICE STEMMING FROM THE COURT'S SPECIAL VERDICT FORM.

Plaintiffs advance various reasons why the court's special verdict form was purportedly improper. As plaintiffs acknowledge, these reasons are largely derivative of plaintiffs' other arguments. (AOB 27 ["all of this was based upon the prior errors in law . . . "].) Because those arguments were wrong, this one is as well.

The only potentially new contention was plaintiffs' assertion that the trial court should have clarified that an officer or managing agent was acting on behalf of the corporation and would not be found individually

liable. (AOB 27.) However, there were no other defendants whom the jury could have found liable. Moreover, as plaintiffs' counsel acknowledged, the question refers to the instructions in which the phrase "officer or managing agent" is explained. (8 RT 1659.) That explanation clearly states that the officer or managing agent is acting on behalf of the corporation. (6 (AA 1500.) Lastly, any error was not prejudicial because the jury never reached ratification.

VI.

PLAINTIFFS' HEALTH AND SAFETY CODE SECTION 1430(b) CLAIM WAS PROPERLY TRIED TO THE COURT.

Plaintiffs contend they had a right to jury trial on their Health and Safety Code section 1430(b) ("section 1430(b)") claim. (AOB 28.) Plaintiffs are wrong because the gist of this claim is equitable, not legal. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9 [jury trial right is restricted to actions triable to a jury in 1850; test is whether the gist of the action is legal or equitable].) This issue is a question of law subject to de novo review. (*Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 283.)

Plaintiffs rely on *Grossblatt v. Wright* (1951) 108 Cal.App.2d 475 ("*Grossblatt*.") (AOB 28.) *Grossblatt* was an action under the United States Housing and Rent Act of 1947 where the plaintiff sought to recover triple damages, as well as attorneys' fees and costs. (*Grossblatt* at p. 477.)

The court determined that the action was for debt because plaintiff alleged that defendant owed him $1,300 for rent overcharges, so the action was one at law. (*Id.* at pp. 484-486.) *Grossblatt* is inapposite because section 1430(b) was not intended to compensate plaintiffs for damages suffered, but was designed to deter or enjoin violations of patient rights.

The statute's legislative history reveals that advocates of SB 1930, which ultimately became Health and Safety Code section 1430, subdivision (b) ("section 1430(b)"), believed that patient rights were not being protected by existing enforcement mechanisms. (Request for Judicial Notice, Declaration of Maria A. Sanders, Attachment A, pp. 1-4.)[1] Early versions of SB 1930 provided for compensatory damages in addition to injunctive relief; one version included punitive damages as well. (*Id*. at pp. 5-10.) The bill was ultimately amended in the Assembly to eliminate damages and provide instead for a $500 fine, costs, attorney fees and injunctive relief. (*Id.* at p. 12.) The bill analysis performed for the Assembly Committee on Judiciary stated that "[b]y setting up a private right of action and awarding a fine and attorney fees the personal and private rights of these residents can be protected." (*Id*. at pp. 13-14.)

The legislature's replacing damages with a minimal fine demonstrates beyond any doubt that section 1430(b) was not intended to compensate plaintiffs, but to deter, and if necessary, enjoin violations by providing attorneys with an incentive to enforce these rights. Referring to the Long-Term Care, Health, Safety and Security Act of 1973, which

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[1/] Defendant's Request for Judicial Notice has been filed contemporaneously with this brief.

includes section 1430(b), our Supreme Court has stated that "'[t]he focus of the Act's statutory scheme is *preventative*.'" (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295.)

Therefore, actions brought under section 1430(b) are not the equivalent of a traditional tort action for damages, but are instead an equitable action brought to enforce statutory rights or prohibitions. (*DiPirro v. Bonde Corp.* (2007) 153 Cal.App.4th 150, 163, 182-183 [court trial proper because civil penalties under the California Safe Drinking Water and Toxic Enforcement Act, which is "informational and preventative rather than compensatory in its nature and function," were "designed to deter misconduct and harm, not to compensate the plaintiff for actual damages sustained."]; *Mendoza v. Ruesga*, *supra*, 169 Cal.App.4th at p. 285, fn. 9 [claim for civil penalties under the immigration consultants act is a matter for the trial court rather than a jury].) For this reason, plaintiffs' section 1430(b) claim was properly tried to the court.

VII.

PLAINTIFFS' CONTENTION THAT THE TRIAL COURT REFUSED TO RENDER A PROPER AND COMPLETE STATEMENT OF DECISION IS MERITLESS BECAUSE THE COURT SATISFIED THE STATUTORY REQUIREMENTS.

Plaintiffs contend the trial court "refused to render a proper and complete statement of decision on this claim," characterizing both an

original and a supplemental statement of decision as "fatally flawed" "[a]s discussed at length in Appellants' Objections . . . ." (AOB 28; see *Paterno v. State of California*, *supra*, 74 Cal.App.4th at p. 109 ["An appellant cannot rely on incorporation of trial court papers, but must tender arguments *in the appellate briefs*."].)

Much of plaintiffs' argument is irrelevant because it simply disagrees with substance of the Statement of Decision and its supplement. (See, e.g., AOB 29 ["The Statement misconstrues and essentially eviscerates the legislative intent and the plain language of Section 1430(b) to provide a deterrent to abuse of the elderly in nursing homes."].) A statement of decision is intended to avoid inferences in favor of the judgment by requiring a court to explain the basis for its decision. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Objections are to be based on alleged omissions or ambiguities. (*Id.* at p. 1133, citing Code Civ. Proc., § 634.) A litigant's disagreement with the statement of decision is therefore not a proper subject for objections. (*Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292 [premature signing of a statement of decision was harmless error because the litigant's "objections went to the underlying *merits* of the proposed decision, not its *conformity* with what the trial court had previously announced"].)

Plaintiffs complain that the first Statement of Decision (6 AA 1611-1612) purportedly fails to mention alleged jury findings of "neglect and abuse." (AOB 29.) Plaintiffs fail to explain why the court should have cited the jury's findings in order to show the basis for its own decision. Plaintiffs also complain that the court "ignores the evidence of repeated and

extensive residents' rights violations." (AOB 29.) However, the Statement of Decision made it clear the court had found one regulation was violated and that plaintiffs had failed to meet their burden rregarding other alleged violations. (6 AA 1611-1612.)

The Supplemental Statement of Decision, issued in response to plaintiffs' objections, discussed the jury's findings as well as stating that "[o]n the subject of alleged nutritional violations, and all other violations unrelated to the failures described in the original statement of decision, the court finds that plaintiffs failed to meet their burden of proof." (7 AA 1702.) This statement addressed the lacunae alleged in plaintiffs' objections and made the court's findings clear beyond peradventure. The remainder of plaintiffs' complaints about the initial Statement of Decision, as well as all of plaintiffs' complaints about the Supplemental Statement of Decision, do not allege omissions or ambiguities; they just quarrel with the court's findings and are therefore irrelevant.

If plaintiffs' arguments that the court's Statement of Decision and its Supplement failed to address certain matters were meritorious, the most relief they could obtain would be a remand to enter a new Statement of Decision. (*Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1398 ("*Espinoza*") ["Normally, the court's failure to provide a properly requested statement of decision results in a remand ordering the court to issue such a statement."].) Although other issues justified reversal for a new trial in *Espinoza*, there are no such issues here. Because plaintiffs' arguments regarding the court's Statement of Decision and its supplement lack any merit, however, there is no need for a remand.

CONCLUSION

For the reasons stated above, defendant respectfully requests this Court to affirm the judgment.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached Appellant's Opening Brief contains 13,841 words excluding the tables of contents and authorities, and this certificate.

DATED: November 22, 2011

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