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Arace v. Medico Investments, LLC

Court of Appeal of California, Fourth Appellate District, Division Two

March 24, 2020, Opinion Filed

E071194

Reporter

2020 Cal. App. LEXIS 397 *

MELANIE ARACE, as Personal Representative,
etc., Plaintiff and Respondent, v. MEDICO
INVESTMENTS, LLC, Defendant and Appellant.

Core Terms

damages, attorney's fees, neglect, costs, financial
abuse, elder abuse, remedies

Notice: CERTIFIED FOR PARTIAL
PUBLICATION*

Case Summary

Subsequent History: [*1] The Publication Status
of this Document has been Changed by the Court
from Unpublished to Published May 11, 2020.

Prior History: APPEAL from the Superior Court
of San Bernardino County, No. CIVDS1504449,
Brian S. McCarville, Judge.

Arace v. Medico Invs., LLC, 2020 Cal. App. Unpub.
LEXIS 1902 (Cal. App. 4th Dist., Mar. 24, 2020)

Disposition: Affirmed.

Overview

HOLDINGS: [1]-In an action under the Elder Abuse and Dependent Adult Civil Protection Act that was brought on behalf of an elderly relative, plaintiff was entitled to an award of attorney fees and costs for financial abuse. The jury found that defendant was liable for the misappropriation of the relative's property, that its conduct was a substantial factor in causing harm to the relative, and that plaintiff proved by clear and convincing evidence that defendant acted with recklessness, malice, oppression or fraud. Under the plain language of *Welf. & Inst. Code, § 15657.5*, an award of attorney fees is a mandatory form of relief regardless of whether the plaintiff is awarded any other form of relief.

* Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exception of parts II(A) and II(B)(2)(b).

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Family Law > Family Protection &
Welfare > Elderly Persons > Abuse,
Endangerment & Neglect

Governments > Legislation > Interpretation

[HNI](#) Elderly Persons, Abuse, Endangerment & Neglect

The California Legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act to protect elders by providing enhanced remedies which encourage private, civil enforcement of laws against elder abuse and neglect. These remedies include reasonable attorney fees and costs. [Welf. & Inst. Code, §§ 15657, subd. \(a\), 15657.5, subd. \(a\)](#). The Elder Abuse Act defines "abuse" as physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering, deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering, or financial abuse, as defined in [Welf. & Inst. Code, § 15610.30](#). [Welf. & Inst. Code, § 15610.07, subd. \(a\)](#).

Evidence > Burdens of Proof > Preponderance of Evidence

Family Law > Family Protection &
Welfare > Elderly Persons > Abuse,
Endangerment & Neglect

[HN2](#) Burdens of Proof, Preponderance of Evidence

Financial abuse of an elder occurs when a person or entity takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud. [Welf. & Inst. Code, § 15610.30, subd. \(a\)\(1\), \(2\)](#). When a plaintiff proves by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [§ 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. [Welf. & Inst. Code, § 15657.5, subd. \(a\)](#).

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > Family Protection &
Welfare > Elderly Persons > Abuse,
Endangerment & Neglect

[HN3](#) Burdens of Proof, Clear & Convincing Proof

Neglect is defined in [Welf. & Inst. Code, § 15610.57, subd. \(a\)\(1\)](#), which in turn includes the negligent failure of an elder custodian to assist in personal hygiene, or in the provision of food, clothing, or shelter, to provide medical care for physical and mental health needs, to protect from health and safety hazards, or to prevent malnutrition or dehydration. [§ 15610.57, subd. \(b\)\(1\)-\(b\)\(4\)](#). Thus, the statutory definition of "neglect" speaks not of the undertaking of services, but of the failure to provide care. This form of abuse is distinct from financial abuse because in order to recover enhanced remedies, including attorney fees and costs, a plaintiff must prove by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse. [§ 15657](#).

Civil Procedure > Remedies > Costs &
Attorney Fees > Attorney Fees & Expenses

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > Appeals > Standards of
Review > Questions of Fact & Law

[HN4](#) [⬇] **Costs & Attorney Fees, Attorney Fees & Expenses**

Whether attorney fees may be awarded is a
question of law, which an appellate court reviews
de novo.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > Statutory
Awards

Evidence > Burdens of Proof > Preponderance
of Evidence

Family Law > Family Protection &
Welfare > Elderly Persons > Abuse,
Endangerment & Neglect

[HN5](#) [⬇] **Basis of Recovery, Statutory Awards**

The attorney fee provision in [Welf. & Inst. Code, § 15657.5](#), of the Elder Abuse and Dependent Adult Civil Protection Act is not discretionary in nature. Instead, [§ 15657.5, subd. \(a\)](#), states that where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [Welf. & Inst. Code, § 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. [§ 15657.5, subd. \(a\)](#).

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > Statutory
Awards

Family Law > Family Protection &
Welfare > Elderly Persons > Abuse,
Endangerment & Neglect

[HN6](#) [⬇] **Basis of Recovery, Statutory Awards**

Under the plain language of [Welf. & Inst. Code, § 15657.5](#), an award of attorney fees is a mandatory form of relief regardless of whether the plaintiff is awarded any other form of relief.

Civil Procedure > Remedies > Damages

[HN7](#) [⬇] **Remedies, Damages**

Each item of damages may be awarded only once,
regardless of the number of legal theories alleged.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

As a personal representative and successor in interest for an elderly relative, plaintiff initiated an action under the [Elder Abuse and Dependent Adult Civil Protection Act](#) against defendant, a residential care facility, and others. Plaintiff alleged that defendant or its employee engaged in multiple acts of elder abuse of the relative. The jury found in favor of plaintiff, who was awarded damages, attorney fees, and costs. (Superior Court of San Bernardino County, No. CIVDS1504449, Brian S. McCarville, Judge.)

The Court of Appeal affirmed the judgment. The court concluded that plaintiff was entitled to an award of attorney fees and costs for financial abuse. The jury found that defendant was liable for the misappropriation of the relative's property, that its

conduct was a substantial factor in causing harm to the relative, and that plaintiff proved by clear and convincing evidence that defendant acted with recklessness, malice, oppression or fraud. Under the plain language of [Welf. & Inst. Code, § 15657.5](#), an award of attorney fees is a mandatory form of relief regardless of whether the plaintiff is awarded any other form of relief. (Opinion by McKinster, Acting P. J., with Fields and Raphael, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Healing Arts and Institutions § 3—Elder Abuse Act—Remedies—Attorney Fees.

The Legislature enacted the [Elder Abuse and Dependent Adult Civil Protection Act](#) to protect elders by providing enhanced remedies which encourage private, civil enforcement of laws against elder abuse and neglect. These remedies include reasonable attorney fees and costs ([Welf. & Inst. Code, §§ 15657, subd. \(a\), 15657.5, subd. \(a\)](#)). The [Elder Abuse Act](#) defines “abuse” as physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering, deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering, or financial abuse, as defined in [Welf. & Inst. Code, § 15610.30](#) ([Welf. & Inst. Code, § 15610.07, subd. \(a\)](#)).

[CA\(2\)](#) (2)

Healing Arts and Institutions § 3—Elder Abuse Act—Remedies—Attorney Fees—Mandatory.

Financial abuse of an elder occurs when a person or entity takes, secretes, appropriates, obtains, or retains real or personal property of an elder or

dependent adult for a wrongful use or with intent to defraud or assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud ([Welf. & Inst. Code, § 15610.30, subd. \(a\)\(1\), \(2\)](#)). When a plaintiff proves by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [§ 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, the court must award to the plaintiff reasonable attorney's fees and costs ([Welf. & Inst. Code, § 15657.5, subd. \(a\)](#)).

[CA\(3\)](#) (3)

Healing Arts and Institutions § 3—Elder Abuse Act—Remedies—Attorney Fees—Neglect.

Neglect is defined in [Welf. & Inst. Code, § 15610.57, subd. \(a\)\(1\)](#), which in turn includes the negligent failure of an elder custodian to assist in personal hygiene, or in the provision of food, clothing, or shelter, to provide medical care for physical and mental health needs, to protect from health and safety hazards, or to prevent malnutrition or dehydration ([§ 15610.57, subd. \(b\)\(1\)–\(b\)\(4\)](#)). Thus, the statutory definition of “neglect” speaks not of the undertaking of services, but of the failure to provide care. This form of abuse is distinct from financial abuse because in order to recover enhanced remedies, including attorney fees and costs, a plaintiff must prove by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse.

[CA\(4\)](#) (4)

Healing Arts and Institutions § 3—Elder Abuse Act—Remedies—Attorney Fees—Mandatory.

The attorney fee provision in [Welf. & Inst. Code, § 15657.5](#), part of the [Elder Abuse and Dependent Adult Civil Protection Act](#), is not discretionary in

nature. Instead, [§ 15657.5, subd. \(a\)](#), states that where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [Welf. & Inst. Code, § 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, the court must award to the plaintiff reasonable attorney's fees and costs ([§ 15657.5, subd. \(a\)](#)).

[CA\(5\)](#) (5)

Healing Arts and Institutions § 3—Elder Abuse Act—Remedies—Attorney Fees—Mandatory.

In an action under the [Elder Abuse and Dependent Adult Civil Protection Act](#) that plaintiff brought on behalf of an elderly relative, plaintiff was entitled to an award of attorney fees and costs for financial abuse. The jury found that defendant was liable for the misappropriation of the relative's property, that its conduct was a substantial factor in causing harm to the relative, and that plaintiff proved by clear and convincing evidence that defendant acted with recklessness, malice, oppression or fraud. Under the plain language of [Welf. & Inst. Code, § 15657.5](#), an award of attorney fees is a mandatory form of relief regardless of whether the plaintiff is awarded any other form of relief.

[[Cal. Forms of Pleading and Practice \(2020\) ch. 5, Abuse of Minors, Elders, and Dependent Adults, § 5.49.](#)]

[CA\(6\)](#) (6)

Damages § 1—Award—Legal Theories Alleged.

Each item of damages may be awarded only once, regardless of the number of legal theories alleged.

Counsel: Pope & Gentile and Daniel K. Gentile for Defendant and Appellant.

Law Office of Susan D. Stein, Susan D. Stein; Law Office of Michael G. York and Michael G. York, for Plaintiff and Respondent.

Judges: Opinion by McKinster, Acting P. J., with Fields, and Raphael, JJ., concurring.

Opinion by: McKinster, Acting P. J.

Opinion

McKINSTER, Acting P. J.—Plaintiff and respondent Melanie Arace, as personal representative and successor in interest for Grace R. Miller (Miller) and trustee of the Grace R. Miller Trust dated May 8, 2002, initiated this action for elder abuse against Medico Investments, LLC (Medico), a residential care facility, and others. Plaintiff alleged that Medico, or its employee Elizabeth Colon (Colon), engaged in multiple acts of elder abuse of Miller. The jury found in favor of plaintiff, who was awarded damages, attorney fees, and costs.

On appeal, Medico contends (1) the trial court erred in denying its motion to continue the trial based on the unavailability of a material witness; [*2] (2) the trial court erred in awarding attorney fees and costs; and (3) plaintiff was not entitled to economic damages under her claim for elder abuse (neglect) since the jury declined to award noneconomic damages. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS¹

¹ According to Medico, the “facts are largely undisputed. To the extent there is any dispute regarding the facts, the dispute is not material as this appeal involves only legal issues.”

Plaintiff's great-aunt, Miller (born in 1927), was a resident of Foremost Senior Campus (Foremost), a residential care facility for the elderly, from March 31, 2010 to April 1, 2014. Foremost was owned by Leonard Crites, and Colon was an employee of Foremost. In 2010, Crites purchased Miller's home for \$66,000 with the promise that she would be "a lifetime resident at Foremost ... without charge." In May 2012, Medico purchased Foremost in a short sale and retained Colon as the administrator. Medico was not informed about Crites's agreement to provide Miller with free lifetime residency.

In early 2013, after discovering that Miller was living at Foremost rent free, Medico brought this information to Colon's attention. Around the same time, Medico learned that Colon had a durable power of attorney over Miller's property and health care decisions, having obtained it on February 11, 2013. At Colon's request, Medico allowed Miller to [*3] remain at Foremost and reduced her monthly charge by 50 percent. However, since Colon had power of attorney, Medico sought payment for Miller's past due account. During her stay, Miller was well taken care of by the staff at Foremost. She remained there until March 27, 2014, when Colon moved Miller out of Foremost and into a private home.

By late 2014, plaintiff contacted Miller and discovered that Colon controlled Miller's finances. In February 2015, upon plaintiff's demand, Colon surrendered her power of attorney over Miller and \$145,885.90 of Miller's money, which Colon had deposited into her personal bank account in late 2013.

On April 1, 2015, plaintiff initiated this action. In December 2015, Miller passed away. On April 11, 2016, a first amended complaint for damages was filed alleging: (1) fraud/constructive fraud; (2) conversion; (3) fraud; (4) breach of fiduciary duty; (5) intentional infliction of emotional distress; (6) elder abuse; (7) negligence against Medico on the grounds it was liable for Colon's alleged misappropriation of Miller's assets; and (8)

negligent supervision.

Plaintiffs' claims were tried before a jury. The special verdict form contained three causes of actions [*4] against Medico: financial abuse, neglect, and negligence. The jury found in favor of plaintiff on her claim for financial abuse but assessed no economic or noneconomic damages. The jury also found in favor of plaintiff on her claim for neglect, assessed \$39,296.32 in economic damages, \$0 in noneconomic damages, and found that Medico acted with recklessness, oppression, or fraud. Finally, the jury found that Medico was negligent, but its negligence was not a substantial factor in causing harm to plaintiff. Judgment was entered for plaintiff, who was awarded \$39,296.32 in economic damages, \$89,410 in attorney fees, and \$20,995.36 in costs.

II. DISCUSSION

*A. The Trial Court Properly Denied Medico's Motion to Continue Trial.** [NOT CERTIFIED FOR PUBLICATION]

B. Plaintiff Is Entitled to Damages and Attorney Fees.

Medico argues plaintiff is not entitled to attorney fees under her claim for financial abuse or damages under her claim for neglect pursuant to the [Elder Abuse and Dependent Adult Civil Protection Act \(Elder Abuse Act\)](#). [*5] ([Welf. & Inst. Code, § 15600 et seq.](#))³ As we explain, we disagree.

1. Applicable legal principles.

[HNI](#)[↑] [CA\(1\)](#)[↑] (1) The Legislature enacted the [Elder Abuse Act](#) "to protect elders by providing enhanced remedies which encourage private, civil enforcement of laws against elder abuse and neglect." ([Negrete v. Fid. & Guar. Life Ins. Co.](#)

* See footnote, *ante*, page ____.

³ All further statutory references are to the Welfare & Institutions Code unless otherwise stated.

(*C.D. Cal. 2006*) 444 *F.Supp.2d* 998, 1001.) These remedies include reasonable attorney fees and costs. (§§ 15657, *subd. (a)*, 15657.5, *subd. (a)*.) The *Elder Abuse Act* defines “abuse” as “[p]hysical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering,” “deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering,” or “[f]inancial abuse, as defined in [Section 15610.30](#).” (§ 15610.07, *subd. (a)*.)

CA(2) [↑] (2) Only two types of statutory elder abuse are relevant to this case: financial and neglect. **HN2** [↑] Financial abuse occurs when a person or entity “[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud” or “assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud.” (§ 15610.30, *subd. (a)(1)*, *(a)(2)*.) When a plaintiff proves “by a preponderance of the evidence that a defendant [*6] is liable for financial abuse, as defined in [Section 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, the court *shall award* to the plaintiff reasonable attorney's fees and costs.” (§ 15657.5, *subd. (a)*, italics added.)

HN3 [↑] **CA(3)** [↑] (3) Neglect is defined in [section 15610.57, subdivision \(a\)\(1\)](#), which in turn includes the negligent failure of an elder custodian “to assist in personal hygiene, or in the provision of food, clothing, or shelter,” “to provide medical care for physical and mental health needs,” “to protect from health and safety hazards,” or “to prevent malnutrition or dehydration.” (§ 15610.57, *subd. (b)(1)–(b)(4)*, italics added.) Thus, the statutory definition of “neglect” speaks not of the undertaking of services, but of *the failure to provide care*. (Cf. *Delaney v. Baker* (1999) 20 *Cal.4th* 23, 34 [82 *Cal. Rptr. 2d* 610, 971 *P.2d* 986].) This form of abuse is distinct from financial abuse because in order to recover enhanced

remedies, including attorney fees and costs, a plaintiff must prove “by clear and convincing evidence” that the defendant “has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse.” (§ 15657; see § 15610.07, *subd. (a)*.)

2. Analysis.

a. The award of attorney fees and costs for financial abuse was proper.

According to the special verdict form, the jury found Medico or its employee took, hid, appropriated, [*7] obtained or retained Miller's property with the intent to defraud or by undue influence, and that this conduct was a substantial factor in causing harm to Miller. The jury did not assess any economic or noneconomic damages. **HN4** [↑] “Whether attorney fees may be awarded is a question of law, which we review de novo.” (*Dzwonkowski v. Spinella* (2011) 200 *Cal.App.4th* 930, 934 [133 *Cal. Rptr. 3d* 274].)

CA(4) [↑] (4) Medico argues that when a plaintiff recovers no damages “there is no legitimate basis upon which the court should deviate from the fundamental rule which requires that a plaintiff suffer actual damages before it is deemed a prevailing party entitled to recover attorney's fees and costs.” We disagree. **HN5** [↑] The attorney fee provision in [section 15657.5](#) is not discretionary in nature. Instead, [section 15657.5, subdivision \(a\)](#), states that “[w]here it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [Section 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, *the court shall award to the plaintiff reasonable attorney's fees and costs*.” (§ 15657.5, *subd. (a)*, italics added.)

CA(5) [↑] (5) Here, the jury found that Medico was liable for the misappropriation of Miller's property, that its conduct was “a substantial factor in causing harm” to Miller, and that plaintiff proved “by clear [*8] and convincing evidence that Medico”

acted with “recklessness, malice, oppression or fraud.” [HN6](#)^[↑] Under the plain language of the statute, an award of attorney fees is a mandatory form of relief regardless of whether the plaintiff is awarded any other form of relief.⁴

b. *The economic damages award for elder abuse (neglect) was proper.** [NOT CERTIFIED FOR PUBLICATION]

III. DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

Fields, J., and Raphael, J., concurred.

End of Document

⁴ [CA\(6\)](#)^[↑] (6) We reject Medico's attempt to cherry-pick jury instructions in support of its interpretation of the special verdict forms. According to Medico, the “jury was meticulously instructed as to the types of damages which it could award,” and that it “must find” that Miller was harmed in order for plaintiff to establish her claim for financial abuse. Given these “clear and unequivocal instructions,” Medico argues “the jury spoke very loudly when it found that there was no harm to Miller.” Not so. The jury was also instructed that plaintiff was seeking damages from Medico “under more than one legal theory. However, [HN7](#)^[↑] each item of damages may be awarded only once, regardless of the number of legal theories alleged.” Given this specific instruction, it is equally arguable that the jury did not believe it could award the \$39,296.32 in damages under both the financial abuse and the neglect causes of action. (See, e.g., [OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. \(2007\) 157 Cal.App.4th 835, 877–880 \[68 Cal. Rptr. 3d 828\]](#) [jury's award of \$0 in damages was jury's effort to avoid double recovery].)

* See footnote, *ante*, page ____.