

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

SYLVESTER MACK et al.,  
Plaintiffs and Appellants,  
v.  
LIAN SOUNG,  
Defendant and Respondent.

C031977  
(Super. Ct. No. CV001511)

APPEAL from a judgment of the Superior Court of the City of Stockton, County of San Joaquin, Sandra B. Smith, Judge. Affirmed in part and reversed in part with directions.

Chadeayne, Burns & Leachman and Ronald Van Leachman, for Plaintiffs and Appellants.

Steinheimer, Riggio, Haydel & Mordaunt; Riggio, Mordaunt & Kelly, Douglas A. Haydel, and Donald M. Riggio, for Defendant and Respondent.

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

This case presents the question of whether plaintiffs, the surviving children of Girtha Mack, can state a cause of action against her former physician for either violation of the Elder Abuse and Dependent Adult Civil Protection Act ("the Elder Abuse Act" or "the Act," Welf. & Inst. Code,<sup>1</sup> § 15600 et seq.), or for intentional infliction of emotional distress. The trial court sustained demurrers to both causes of action without leave to amend.

We will conclude that plaintiffs have sufficiently stated a cause of action against Dr. Lian Soung for elder abuse. In the unpublished portion of this opinion, we agree with the trial court that plaintiffs cannot state a cause of action against the doctor for intentional infliction of emotional distress. We affirm in part and reverse in part with directions.

#### BACKGROUND

Since this is an appeal from a judgment entered in defendant's favor following orders sustaining demurrers without leave to amend, we summarize and accept as true all material allegations of the complaint. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 8, fn. 3; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 7.) Because this appeal involves orders sustaining demurrers to two different causes of action appearing in

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<sup>1</sup> All further unspecified statutory references are to the Welfare and Institutions Code.

different amended versions of the complaint, we set forth the material allegations for each separately.

***Elder Abuse (Third Amended Complaint)***

Plaintiffs are the children of decedent Girtha Mack, who passed away on October 13, 1996. Defendant Soung is a licensed medical practitioner who attended to Girtha during her final days, during which she resided at Covenant Care Nursing and Rehabilitation Center (Covenant).<sup>2</sup> Both Dr. Soung and Covenant were health care providers within the meaning of the Elder Abuse Act.

Despite assurances by Covenant to plaintiffs that steps were being taken to prevent their mother from getting bedsores, in August 1996 (all further calendar references are to that year) Girtha was left in a bedpan for 13 consecutive hours, with the result that she developed an untreatable stage III bedsore. Covenant and Dr. Soung concealed the existence of the bedsore until September 4, and Covenant's employees refused to permit plaintiffs to inspect the injury until an ombudsman intervened on their behalf on September 10.

Knowing that Girtha's mental faculties were deteriorating, Dr. Soung entered into a consultative relationship with plaintiffs regarding her care and treatment. Dr. Soung not only concealed Girtha's injury but he also consistently opposed Girtha's hospitalization in September and October, representing

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<sup>2</sup> Although Covenant was originally a codefendant, it is no longer a party to this action.

that Covenant's care was "appropriate." When her condition worsened in October, Dr. Song abruptly abandoned Girtha as her physician without further notice and refused to respond to repeated requests by Covenant's staff to permit Girtha's hospitalization, thereby endangering her health. His actions were "reckless." Girtha died on October 13, a few days after Dr. Song gave written notice of his withdrawal as her physician.

***Intentional Infliction (Fifth Amended Complaint)***

The fifth amended complaint expanded on the allegations set forth above. It noted that Dr. Song had a high volume geriatric practice with many patients from long-term care facilities. On September 8, despite having received a message that Girtha has sustained a stage III bedpan injury, Dr. Song conducted a monthly exam and wrote that she had "not much change in condition" without mentioning the bedsore. Dr. Song was aware Girtha had a preference for medical intervention unless she was permanently comatose. On September 18, over the objection of Dr. Song but consistent with Girtha's wishes, Girtha was admitted to the hospital for treatment of her injury; she was readmitted to Covenant on September 23, by which time Dr. Song noted she was unable to understand her condition.

As Girtha's communicativeness waned, Dr. Song spoke increasingly to plaintiffs about her care, thereby entering into a consultative relationship with them. On September 3 and 10, the doctor was called to testify at an administrative hearing to revoke the license of a nursing care home, based on the same

issues that had arisen between Covenant and Girtha. He also learned the Department of Health Services was investigating the treatment that led to Girtha's bedpan injury. Consequently, Dr. Song became openly hostile to plaintiffs, whom he viewed as "troublemakers."

On October 8, Dr. Song mailed a notice of withdrawal of care to Girtha's former address. Though he knew plaintiffs were capable of making surrogate decisions for her care, he failed to contact them. On October 9, he advised plaintiff Sylvester Mack that he would withdraw in 30 days unless plaintiffs found another physician earlier. At that time he had examined Girtha and found that she had a large swelling on the side of her face. On October 11, plaintiffs were advised by nurses at Covenant that Girtha was dying, but that Dr. Song refused to permit her hospitalization. Since Dr. Song's authority was essential to transfer Girtha to the hospital, plaintiffs were forced to remove Girtha's wristband and tell the emergency room staff that she had no primary physician, in order to secure Girtha's admission to the hospital. Dr. Song's "wilful and abrupt abandonment" of Girtha with "no warning" was "despicable and malicious, and with conscious disregard for the rights and feelings of [Girtha] and her family." As a result of Dr. Song's actions, plaintiffs were "shocked and humiliated," causing them to suffer "serious distress."

#### ***Procedural Synopsis***

Plaintiffs' complaint sought relief against Dr. Song on multiple legal theories and underwent several revisions in

response to demurrers which were sustained with leave to amend. In ruling on the demurrer to the third amended complaint, Judge Murray issued a lengthy memorandum opinion in which he determined that the demurrer to the elder abuse cause of action against Dr. Soung should be sustained *without* leave to amend. In the same memorandum, Judge Murray sustained the demurrer to the cause of action for intentional infliction of emotional distress (IIED) *with* leave to amend, noting that the inclusion of "those facts set forth on page 5, line[s] 16-21 of Plaintiffs' points and authorities" would be sufficient to state a cause of action for IIED on a theory of recklessness.

Plaintiffs filed a fourth amended complaint to which Dr. Soung interposed a demurrer to the cause of action for IIED. The demurrer was heard by Judge Saiers, who sustained it with leave to amend. Plaintiffs then filed a fifth amended complaint. This time Judge Saiers sustained the demurrer to the IIED claim without leave.

After the foregoing orders were entered, Dr. Soung obtained an order granting summary judgment as to plaintiffs' only surviving cause of action, that of professional negligence, on the ground that the total recoverable damages against Dr. Soung could not exceed the amount plaintiffs already received from a settling codefendant. Plaintiffs appeal from the ensuing judgment entered by Judge Smith in favor of Dr. Soung.

#### **APPEAL**

Plaintiffs challenge the two rulings which eliminated their elder abuse and IIED causes of action respectively. On appeal

from a final judgment, the appellate court "may review . . . any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (Code Civ. Proc., § 906.) We therefore review each order sustaining Dr. Soung's demurrer without leave to amend, applying the following principles: "On appeal from a dismissal after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.] We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts properly pled. [Citations.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] If no liability exists as a matter of law, we must affirm that part of the judgment sustaining the demurrer. [Citation.] [¶] . . . A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500-1501.)

## ***I***

### ***The Elder Abuse Cause of Action***

Plaintiffs contend the trial court abused its discretion in sustaining Dr. Soung's demurrer to the elder abuse cause of

action without leave to amend. As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. (§ 15600; see *ARA Living Centers-Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1559.) In addition to adopting measures designed to encourage reporting of abuse and neglect (§ 15630 et seq.), the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died. (§ 15657; see *Delaney v. Baker* (1999) 20 Cal.4th 23, 33.)

In order to be entitled to these heightened remedies, section 15657 provides that the plaintiff must establish "recklessness, oppression, fraud, or malice in the commission of this abuse" by "clear and convincing evidence."<sup>3</sup> "'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

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<sup>3</sup> Section 15657 provides in part: "Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse . . . , neglect . . . , or fiduciary abuse . . . [of an elderly or dependent adult], and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law: [¶] (a) The court shall award to the plaintiff reasonable attorney's fees and costs. . . . [¶] (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure [forbidding a decedent plaintiff's estate from obtaining pain and suffering damages] shall not apply. . . ." (Fn. omitted.)

[citations][.] Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' [Citation.]" (*Delaney, supra*, 20 Cal.4th at pp. 31-32.)

For demurrer purposes, the allegations of a complaint must be "liberally construed with a view to substantial justice between the parties." (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1105.) A liberal construction of the pleading discloses the following salient facts: (1) Girtha developed a serious untreatable bedsore injury in August 1996 while she was housed at Covenant and Dr. Song was her attending physician; (2) Covenant, with assistance from Dr. Song, covered up and concealed the existence of the bedsore until intervention by a county ombudsman finally compelled Covenant to reveal the injury to plaintiffs; (3) over Dr. Song's objection, Girtha was hospitalized for three days for treatment of the injury and then returned to Covenant; (4) Dr. Song subsequently became aware of Girtha's inability to communicate and turned to plaintiffs for consultation regarding her care and treatment; (5) as Girtha's conditioned worsened, plaintiffs expressed the desire that she be transferred to a hospital, which was consistent with her wishes; Dr. Song responded by criticizing the power of attorney by which Girtha gave plaintiffs decisionmaking authority over her treatment and opposed hospitalization; and (6) when Girtha's condition reached the critical stage, Dr. Song gave notice of

withdrawal as her physician, refused to respond to requests by Covenant's staff to hospitalize her, and abruptly abandoned her care. In pursuing this course of conduct, Dr. Soung acted recklessly.

Dr. Soung argues these allegations establish at most, a claim of professional negligence, but not "neglect" within the meaning of the Elder Abuse Act. We disagree.

Section 15610.07 states that "abuse of an elder" includes "neglect." "Neglect" is defined in section 15610.57, as "either of the following: [¶] (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise. [¶] . . . [¶] (b) *Neglect includes, but is not limited to, all of the following: [¶]. . . [¶] (2) Failure to provide medical care for physical and mental health needs. . . .*" (Italics added.) As stated in *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, "[a] physician cannot just walk away from a patient after accepting the patient for treatment. A physician cannot withdraw treatment from a patient without due notice and an ample opportunity afforded to secure the presence of another medical attendant." (*Id.* at p. 1138, citing *Payton v. Weaver* (1982) 131 Cal.App.3d 38, 45.)

We have no trouble concluding that a doctor who conceals the existence of a serious bedsore on a nursing home patient under his care, opposes her hospitalization where circumstances indicate it is medically necessary, and then abandons the

patient in her dying hour of need commits "neglect" within the meaning of the Act. Further, if it can be proved by clear and convincing evidence that such acts were committed with "recklessness, oppression, fraud, or malice," the heightened remedies of section 15657 will apply.<sup>4</sup>

Dr. Soung additionally claims he cannot be liable under the Elder Abuse Act because he was not Girtha's custodian or caretaker. He relies upon that language in section 15610.57 defining "neglect" as the negligent failure of "any person having *the care or custody* of an elder . . . to exercise that degree of care that a reasonable person in a like position would exercise." (Italics added.) From the italicized wording, he concludes that this provision applies only to institutional health care facilities and cannot apply to physicians such as himself, who merely treat elderly patients on an "as needed" basis. He is wrong.

The Act was expressly designed to protect elders and other dependent adults who "may be subjected to abuse, neglect, or abandonment . . . ." (§ 15600, subd. (a).) Within the Act, two

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<sup>4</sup> The trial court predicated its order sustaining the demurrer to this cause of action without leave to amend on plaintiffs' failure or unwillingness to allege "willful misconduct" by Dr. Soung. That ruling was mistaken. Recklessly withdrawing needed medical care from an elderly patient with conscious disregard for the high probability of injury or suffering, whether "willful misconduct" or not, is precisely the sort of egregious behavior which the Legislature sought to remedy in passing the Act. (See §§ 15600, subds. (a), (d), 15610.57, subd. (b)(2).)

groups of persons who ordinarily assume responsibility for the "care and custody" of the elderly are identified and defined: health practitioners and care custodians. A "health practitioner" is defined in section 15610.37 as a "*physician and surgeon, psychiatrist, psychologist, dentist, . . .*" etc., who "treats an elder . . . for any condition." (Italics added.) "Care custodians," on the other hand, are administrators and employees of public and private institutions which provide "care or services for elders or dependent adults," including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. (§ 15610.17.) The Legislature thus recognized that *both* classes of professionals — health practitioners as well as care custodians — should be charged with responsibility for the health, safety and welfare of elderly and dependent adults. This recognition is made explicit in the "reporting" section of the Act which states that "[a]ny person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation, including . . . any elder or dependent adult care custodian, health practitioner, . . . is a mandated reporter." (§ 15630, subd. (a), italics added.)

Unlike, for example, section 15610.07, subdivision (b), which imposes liability only upon "care custodians,"<sup>5</sup> the statute

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<sup>5</sup> Section 15610.07, subdivision (b) defines "'Abuse of an elder'" as "[t]he deprivation *by a care custodian* of goods or services that are necessary to avoid physical harm or mental suffering." (Italics added.)

defining "neglect" is not restricted to care custodians. Instead it applies generally to anyone having "care or custody" of an elder, and specifically mentions the "[f]ailure to provide medical care for physical and mental health needs." (§ 15610.57, subd. (b)(2).) Similarly, the heightened remedies section is not limited to care custodians but targets any "defendant" who commits abuse or neglect and does so with "recklessness, oppression, fraud, or malice." (§ 15657.)

Dr. Soung's argument is also vitiated by the California Supreme Court's recent decision in *Delaney, supra*, 20 Cal.4th 23. There, the defendant, a nursing care home, was found liable for reckless neglect in failing to care for an elderly decedent who contracted a horrible bedsore. (*Id.* at pp. 27-28.) The defendant claimed that since it was a licensed health care provider, it could be liable only for professional negligence, and was exempt from liability under section 15657. The defendant predicated this claim on section 15657.2, which states that actions based on a health care professional's negligent act or omission shall remain governed by those laws applicable to professional negligence. (*Delaney, supra*, at p. 27.)

The *Delaney* court rejected this argument, noting that the distinction between "reckless neglect" within the meaning of section 15657 and "professional negligence" as described in section 15657.2 was one of degree, and did not turn on the defendant's status as a health care professional or custodian. "Section 15657.2 can . . . be read as making clear that the acts proscribed by section 15657 do not include acts of simple

professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence." (20 Cal.4th at p. 32.) The court held that health care professionals are not exempt from the heightened remedies triggered by section 15657 when they are guilty of "reckless neglect." (20 Cal.4th at pp. 31-32.)

*Delaney* establishes that health care providers are not exempt from liability for reckless neglect simply because the cause of action arises from the rendition of health care services. Rather, health practitioners who assume care or custody of the elderly are subject to liability if their misconduct rises to the level of neglect, abuse, or abandonment.

Dr. Soung's interpretation would impose liability on residential institutions housing the elderly for willful deprivation of medical care, but exempt physicians from engaging in the same conduct. The statutory language does not so provide. Moreover, there is no evidence the Legislature intended to leave such a loophole in the Act. As *Delaney* teaches, liability under the Act should not turn upon the licensing status of the defendant. (20 Cal.4th at p. 35.) We conclude that Dr. Soung's status as a physician does not immunize him from liability for elder abuse.

## **II**

### ***Intentional Infliction of Emotional Distress***

We next turn to the order sustaining the demurrer without leave to amend as to the IIED cause of action in the fifth amended complaint.

Initially, plaintiffs raise a procedural challenge to the ruling: they claim that because Judge Murray indicated, in his written memorandum, that plaintiffs would be able to state a cause of action for IIED if they included certain additional facts in their complaint, and gave them leave to amend, Dr. Soung had no right to file another demurrer once plaintiffs amended their complaint in the fashion the judge indicated would withstand demurrer. Instead, Dr. Soung should have filed a motion for reconsideration. (Code Civ. Proc., § 1008.) Because he did not, plaintiffs argue, the sustaining of a subsequent demurrer *without* leave to amend by a different judge was in excess of the court's jurisdiction.

The argument is unsound. "An oral or written opinion by a trial judge, discussing and purporting to decide the issues in the manner of an appellate court opinion, is merely an informal statement of his views." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 10, p. 547.) While helpful in framing issues or interpreting ambiguous portions of the judgment, it is *not* the judgment or order of the court. (*Ibid.*) Therefore, the "Tentative Decision" by Judge Murray was nothing more than a statement of reasons which has no binding effect. (See *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-647.) Any language therein suggesting ways plaintiffs might amend their complaint cannot be construed as a judicial decree that plaintiffs were entitled to a demurrer-proof cause of action on the next round of pleading. Once plaintiffs amended their complaint, Dr. Soung was entitled to test its sufficiency with

another demurrer; he was not obligated to file a motion asking Judge Murray to "reconsider" his memorandum opinion.

In any event, if the complaint on its face shows that there can be no liability on the part of Dr. Soung *as a matter of law*, any procedural error which the court committed in sustaining demurrer without leave to amend is clearly nonprejudicial.

(Cal. Const., art. VI, § 13; see *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.)

The fifth amended complaint, while containing additional embellishments over prior versions, features the same essential set of facts to support plaintiffs' claim for IIED: Dr. Soung was aware of Girtha's preference for all means of medical intervention unless she was permanently comatose; he was aware of her decreased mental faculties and consulted with plaintiffs regarding decisionmaking about her care; he knew that she had contracted a serious bed sore injury, yet concealed it and consistently opposed her hospitalization; eventually, Dr. Soung tried to withdraw as Girtha's physician and abandoned her in the last days of her life, forcing plaintiffs to use self-help in getting Girtha admitted to the hospital.

In *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903, the state Supreme Court reviewed the elements of IIED. "The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and

(3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citation.] The defendant must have engaged in conduct intended to inflict injury or engaged in with the realization that injury will result. [Citation.]" (*Ibid.*, internal quotation marks omitted.) The court went on to state: "It is *not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff*, or occur in the presence of a plaintiff of whom the defendant is aware." (*Ibid.*, italics added.) The court held that family members and close relatives of decedents whose remains were mishandled by the defendant could not sue for IIED, because the defendant's misconduct was not directed primarily at them or calculated to cause them injury. (*Id.* at p. 906.)

The *Christensen* court cited its earlier decision in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, a case parallel to but presenting more egregious facts than the one at bar. Plaintiffs in *Ochoa* were the parents of a minor who died while confined in a juvenile facility. The complaint alleged that they experienced extreme mental and emotional distress when they visited their son after he fell ill with pneumonia. They saw him delirious, screaming in great pain, and coughing up blood. The facility refused to allow them to take him to a private physician and forced his mother to leave him although he begged her to stay at his side. After several days he died. (*Id.* at

pp. 163-164.) *Ochoa* held that because the defendant's conduct was directed primarily at the decedent, the parents could not maintain a cause of action on a theory of IIED. The only exception to this rule noted by the court was "the most extreme cases of violent attack, where there is some especial likelihood of fright or shock.'" (*Ochoa, supra*, at p. 165, fn. 5; accord *Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1272-1274.)

*Christensen* also cited as "particularly instructive" (54 Cal.3d at p. 904) the case of *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, wherein it unanimously held that there could be no IIED recovery against police officers for failing to intervene or protect plaintiff as they observed her being stabbed in a laundromat. "Absent an *intent* to injure, such inaction is not the kind of 'extreme and outrageous conduct' that gives rise to liability under the 'intentional infliction of emotional distress' tort." (*Id.* at p. 210, italics added.)

These cases are dispositive. The gravamen of plaintiffs' complaint is that Dr. Song exhibited callous indifference toward Girtha's medical needs and abandoned her summarily in her final days. Although they state that they suffered great emotional distress, plaintiffs cannot sustain a claim that Dr. Song's abandonment of Girtha, whether intentional or reckless, was directed primarily at *them*.

Consequently, Dr. Song cannot be liable on a theory of intentional infliction of emotional distress. The demurrer was properly sustained without leave to amend.

**DISPOSITION**

The judgment is affirmed as to the court's ruling regarding the intentional infliction of emotional distress cause of action and reversed as to the court's ruling on the elder abuse cause of action. The cause is remanded to the trial court with directions to vacate its order sustaining the demurrer to the elder abuse cause of action of the third amended complaint and enter a new order overruling the demurrer as to that cause of action only. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 26(a).) (CERTIFIED FOR PARTIAL PUBLICATION.)

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CALLAHAN, J.

We concur:

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SCOTLAND, P.J.

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NICHOLSON, J.