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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAMON A. DUVAL, Plaintiff and Appellant, v. TAMMY WILLIAMS et al., Defendants and Respondents.	B239657 (Los Angeles County Super. Ct. No. SC109325)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed.

Damon A. Duval, in pro. per.; Rosario Perry and Steven Coard for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Damon A. Duval appeals from the judgment of dismissal of his civil action against his ex-wife, Tammy Williams, and Marcus Andrew Boesch, her husband[1]. The trial court granted judgment on the pleadings with prejudice as to Williams. Duval was given 10 days leave to amend as to Boesch but failed to do so. Thereafter, on oral motion under Code of Civil Procedure section 581, subdivision (f), the action against Boesch was dismissed.

Duval points to an earlier trial court ruling, overruling a demurrer to his complaint. He argues the court should not have changed its mind by granting the motion for judgment on the pleadings. He also complains that he was not given notice of an oral motion to dismiss Boesch, and that the trial court based its ruling on "nonfacts." We find no basis for reversal and affirm.

FACTUAL AND PROCEDURAL SUMMARY

On review of an order granting judgment on the pleadings under Code of Civil Procedure section 438, subdivision (b)(1), we apply the same rules governing the review of an order sustaining a general demurrer. (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32.) "A defendant's motion for judgment on the pleadings should be granted if, under the facts as alleged in the pleading or subject to judicial notice, the complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) We accept the complaint's properly pleaded factual allegations as true and give them a liberal construction. [Citations.] We do not accept as true 'any contentions, deductions or conclusions of fact or law contained therein.' [Citation.] We review de novo, and '"are required to render our independent judgment on whether a cause of action has been stated"' [citation], without regard for the trial court's reasons for granting the motion. [Citation.]" (*Ibid.*)

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[1] In a declaration in opposition to the motion for judgment on the pleadings, Duval stated that Boesch had married Williams. Tammy Duval was named a defendant in this action as Tammy Williams. We use that designation in this opinion.

According to the judgment in the family law action between Duval and Williams (*In re Marriage of Duval*, Los Angeles Superior Court No. SD023958), they were married on December 25, 1998. They had a son, Bantu Jazz Eversmore Duval in September 2001, and a daughter, Maya Lilienne Duval, in December 2003. They separated in April 2006. Williams petitioned for dissolution. (We refer to this as the family law action). Duval and Williams entered into a conciliation court agreement and stipulation order regarding custody and parenting in September 2006 (conciliation agreement). They agreed to share joint legal custody of the children. They agreed to share information and the right to make major decisions regarding the health, education and welfare of the children. Neither parent was to make unilateral decisions without consulting the other regarding non-emergency medical treatment and major decisions regarding education.

Duval and Williams entered into a Marital Settlement Agreement. It was accepted by the family court in June 2007, and judgment was entered accordingly. The judgment provided that the parties were to share joint legal custody of the children under the same terms as set out in the conciliation agreement. The children were to be in Williams's care at all times not designated as Duval's time for visitation.

In August 2010, Duval filed the present civil action against Williams and Boesch, alleging causes of action for breach of contract, fraud, general negligence, intentional infliction of emotional distress and one labeled "intentional tort." He also attempted to bring the action in the names of his children, but had not been appointed guardian ad litem for them. The gravamen of the complaint is that Williams committed multiple violations of the family court judgment and did not properly care for the children. As to some claims, Boesch was alleged to have aided and abetted her in this conduct. Duval filed his 450 page complaint in pro. per. It includes pages of documents and pleadings, many of which are apparently from the family law case file.

A demurrer to the complaint filed on behalf of Williams and Boesch was overruled by the trial court at a hearing held on January 19, 2011. The statements by the trial court at this hearing form the basis for Duval's arguments that his complaint was

sufficient and should have withstood the later challenge brought by the defendants. He does not expressly acknowledge that Williams and Boesch successfully sought judgment on the pleadings later, after filing their answer to the complaint. Instead, he claims that the complaint was dismissed on an oral motion to dismiss of which he had no notice. Since Duval's position on appeal is largely dependent on the court's statements at the January 2011 hearing, we discuss that proceeding.

At the hearing, Duval said he agreed with the court's tentative order overruling the demurrer. He agreed to remove the names of his minor children as plaintiffs from the complaint. The trial court responded, "You don't have to change it. There is nothing that you need to do . . . at this point with regard to the complaint." The court explained to defense counsel that any challenge to the complaint must be specific even though the complaint was more than 450 pages long. It gave the defendants 30 days to file an answer.

The court declined to relate the civil and family court cases and held that the family law case was to remain in the family court while the present civil case would remain in the civil division. It observed: "I see no reason to relate the two and take over the family law proceedings or to send this to the family law court. Generally, if cases are related and one is either probate or family, it goes to the probate or family, but I think it's best to keep this case here", although "[t]he court can always change its mind based upon future proceedings. I'll keep an open mind on that." Defendants answered the complaint.

In November 2011, the defendants moved for judgment on the pleadings. They argued that the complaint in this civil action repeated the exact motions and issues addressed in the family court case regarding the residence of the children, their school enrollment and visitation. They also pointed out that Duval alleged that Maya had been molested by Boesch, charges heard and rejected in the family court. They asked the court to abate the civil action, citing *Neal v. Superior Court* (2001) 90 Cal.App.4th 22 (*Neal*) for the proposition that the family court has exclusive jurisdiction over family law issues. Duval opposed the motion in pro. per., pointing out that since Boesch was not a party to

the family law case, abatement was precluded. He also argued the family court was not the proper forum to litigate a civil action for damages between spouses.

At the hearing on the motion for judgment on the pleadings, Duval sought leave to amend his complaint to allege a cause of action for violation of Civil Code section 49, subdivision (a), which forbids "[t]he abduction or enticement of a child from a parent . . . entitled to its custody. . . ." When the trial court explained that an amended pleading would supersede the original complaint, Duval withdrew his oral motion and said he would reserve the right to file a written motion for leave to amend.

On the merits of the motion, Duval argued the family court had not taken away his parental rights, and he outlined how he proposed to prove his allegations at trial. Counsel for defendants argued that their motion should be granted under *Neal*, *supra*, 90 Cal.App.4th 22, because jurisdiction over the issues lies with the family court. The trial court took the matter under submission.

The trial court issued its ruling on the motion for judgment on the pleadings later that month. To the degree the motion constituted a plea in abatement, it was denied. The motion was granted as to Williams without leave to amend and the court ordered her dismissed from the action because the complaint repeated contentions made by Duval against Williams in the family law case. The court concluded that the same claims were made, or could be made, in the family law case and should not be litigated in two forums. Since the only damages Duval alleged were for emotional distress, the court concluded that he could not recover. The court relied on *In re Marriage of Segel* (1986) 179 Cal.App.3d 602, barring a parent from recovering emotional distress damages for interference with custodial rights. To the degree Duval alleged a cause of action for violation of Civil Code section 49, the court found no allegation that Williams had abducted or enticed the children away from Duval. The court also noted that the family court retained jurisdiction so long as the children are minors, entitling Duval to seek modification of family court orders or contempt.

Since Boesch is not a party to the family law case, the same reasoning did not apply to him. The court found that Duval's allegation of negligence failed to demonstrate

that Boesch had a duty to Duval which was breached. The cause of action for emotional distress was found to be based on conduct that is not so sufficiently extreme or outrageous as to be actionable for intentional infliction of emotional distress. Duval was granted 10 days leave to amend as to Boesch.

The next hearing was in February 2012, after defendants sought to compel further responses to discovery. The court's tentative ruling explained that Duval had failed to file an amended pleading as to Boesch by the January 2012 deadline and that as of February 3, 2012, no amended complaint as to Boesch had been received by the court. It concluded that as of February 8, 2012, there was no complaint pending as to either Williams or Boesch and therefore the discovery motion was moot. The court cited Code of Civil Procedure section 581, subdivision (f)(2) which provides that a court may dismiss a complaint on motion after a demurrer is sustained with leave to amend, but no amended complaint is filed within the time allowed. The tentative ruling stated that the court was awaiting a motion by plaintiff or defendant to dismiss the action pursuant to Code of Civil Procedure section 581.

At the hearing, the court asked defense counsel if he wished to make a motion. Defense counsel responded, "I would go along with the courts under 581 to dismiss." Asked for his position, Duval said: "We can go with the tentative, your honor." The court then said the action would be dismissed pursuant to the oral motion under Code of Civil Procedure section 581, subdivision (f)(2). Both Duval and counsel for defendants waived notice. The court expressly asked Duval if he waived notice of the dismissal. Duval stated: "Yes, your honor. I would ask the court to have [defense counsel] prepare the order. I have made arrangements to appeal the decision by the court, and the appellate court would not allow me to start the process without a valid court order." The court then ordered defense counsel to prepare the judgment of dismissal as to both defendants. The court signed the judgment of dismissal which was filed February 22, 2012. Duval filed a timely appeal from the judgment.

DISCUSSION

I

Duval claims that "[t]he 2/8/12 motion to dismiss was an '*oral motion under CCP 581 subsection f paragraph 2*.' Nowhere is it found in the record that appellant was present for this oral motion's unveiling and presentation. Just one single solitary mention of an 'oral motion' prior to the case's dismissal exists in the transcript [See CRT pg. 2101; lines 27-28]." This claim is contrary to the procedural history we have summarized. Duval was present at the hearing on February 8, 2012, and was aware of the court's tentative ruling indicating the case would be dismissed against Boesch on motion because no amended complaint had been filed. Duval expressly agreed to this procedure in order to facilitate his appeal. We find no merit to the claim that he was uniformed about the dismissal of the complaint.

Duval also complains about his "*supposed*" failure to amend the complaint. His precise contention in this regard is unclear. He complains that the trial court should not have allowed him to request leave to amend in November 2011, because the complaint was sufficient. We note that Duval never formally amended his complaint. He cites no authority for the proposition that the trial court should have protected him from his own choices, and we are aware of none. "Pro. per. litigants are held to the same standards as attorneys. [Citations.]" (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) This claim is not a basis for reversal of the judgment of dismissal.

Ignoring the motion for judgment on the pleadings (and his own opposition) Duval repeatedly complains that the trial court switched from overruling the demurrer to concluding that the pleading was subject to dismissal. As we have seen, the trial court acted on a motion for judgment on the pleadings for which Duval was given proper notice and an opportunity to be heard.

Duval also argues the trial court's minute order on the motion for judgment on the pleadings cited various "nonfacts." Our review is independent and we do not rely on the trial court's reasoning. (*County of Orange v. Association of Orange County Deputy Sheriffs*, *supra*, 192 Cal.App.4th at p. 32.) Although Duval challenges the trial court's

treatment of various allegations on the ground that the facts cited by the court are incorrect or unsupported, he does not dispute that the facts at issue concern matters which arose in the family law action. As we next explain, the family law court had exclusive jurisdiction over those issues, which may not be raised in a separate suit. For that reason, the dismissal as to Williams was proper.

II

Most of Duval's allegations against Williams are based on violations of the family law court's orders, and the conciliation agreement and judgment in this proceeding.

The breach of contract cause of action alleges breaches of the conciliation agreement or the dissolution judgment. The fraud cause of action includes allegations of intentional and negligent misrepresentation, concealment, and promise made without intent to perform. It alleges that Williams committed fraud when she claimed under oath at a family law court hearing in April 2008, that she was unaware that she had to obtain Duval's consent before transferring the children from Santa Monica schools to schools in El Segundo. Duval alleged that Williams signed the family court orders requiring both parents to agree to such educational changes. The concealment allegations are that Williams concealed the residence address of the children, refused to give the children Duval's voice mail messages, and concealed the joint custody agreement from the childrens' schools.

Similarly, with two exceptions, Duval's 18 counts of negligence as to Williams are based on matters within the jurisdiction of the family law court, including violations of custody, visitation and contact orders, resistance to counseling for the children, obtaining restraining and other orders against Duval in the family court case, and recording telephone calls by Duval to the children pursuant to a family court order. The intentional tort cause of action contains no factual allegations, but we construe it to be based on the same alleged conduct.

Here, in light of the custody and support issues in the case, the family court has jurisdiction until the children reach age 18 in 2019 and 2021 respectively. It is established that "family law cases 'should not be allowed to spill over into civil law . . . .'

(*Neal, supra,* 90 Cal.App.4th 25.)" (*In re Marriage of Burkle* (2006) 144 Cal.App.4th 387, 393–394 (*Burkle*).) In *Neal*, the ex-husband did not pay a note on the amount ordered by the family law court. His ex-wife sold the note to a collection agency. The ex-husband's civil action against the ex-wife and the collection agency alleged breach of the terms of the family law judgment. The Court of Appeal held that the civil court lacked jurisdiction over these claims. It reasoned "Almost all events in family law litigation can be reframed as civil law actions if a litigant wants to be creative with various causes of action. It is therefore incumbent on courts to examine the substance of claims, not just their nominal headings." (*Neal, supra,* at p. 25.)

The *Neal* court concluded that the civil breach of contract cause of action was based on noncompliance with the family law judgment, and the fraud cause of action was based on statements made in the family court. The abuse of process cause of action also was based on alleged false representations in the family court. The declaratory relief cause of action sought to clarify whether any amount owed by the husband under the family law judgment remained unpaid. (*Neal, supra*, 90 Cal.App.4th at p. 26.) The Court of Appeal characterized this as a family law order to show cause with civil headings. (*Ibid.*) The court directed the trial court to sustain demurrers without leave to amend, characterizing the action as "merely family law waged by other means." (*Id.* at pp. 26–27.)

In *Burkle*, *supra*, 144 Cal.App.4th 387, the Court of Appeal applied *Neal* to an action brought by a wife against her husband and two accounting firms alleging the husband failed to make two payments required by an interim order of the family law court in a dissolution proceeding and seeking tax documents she had sought in the dissolution proceeding. As in *Neal*, the civil action alleged noncompliance with the terms of a family law order. All claims stemmed directly from the family law case. (*Id.* at p. 394.) The court held that these claims had to be brought in the family law court. (*Ibid.*) The wife in *Burkle* argued that not all husband-wife disputes must be resolved in family court, allowing tort and contract actions between spouses. The Court of Appeal

acknowledged that general principle, but concluded that it "has no application when a dissolution proceeding is pending . . . ." (144 Cal.App.4th at p. 395.)

The principles discussed in *Neal* and *Burkle* apply here. Duval's civil action against Williams is an attempt to litigate matters that are within the jurisdiction of the family law court.

At oral argument, counsel for Duval argued that two alleged incidents did not arise from matters within the family law court's jurisdiction. Duval alleged that he suffered damages as a result of witnessing Williams putting their daughter to bed with a chronic diaper rash infection without medication to relieve the child's discomfort. He claimed damages as a bystander witnessing this incident, which greatly heightened his level of concern regarding the safety of both children. Counsel also cited the allegation that Duval's son was next to him when Williams began a rant against him on the telephone. After asking to speak to their son, Williams allegedly told him that Duval was going to ruin his Christmas. Duval hung up the telephone, as the child began to moan. Duval alleged he suffered severe emotional trauma as a result of this incident.

It appears that these allegations come within Duval's claim for emotional distress, although it is unclear whether they sound in negligence or intentional infliction of emotional distress. In either case, they are insufficient.

These incidents do not allege a viable claim for damages for intentional infliction of emotional distress because the conduct upon which such a claim is based must be "'"'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" [Citations.]" In *Burkle, supra,* 144 Cal.App.4th at pp. 397–398, the court found that claims for intentional infliction of emotional distress were properly dismissed on demurrer because reasonable jurors would not differ on whether the conduct alleged met this standard. (*Id*. at p. 398.) The conduct on which Duval bases these two allegations fails for the same reason; reasonable jurors would not differ on whether this conduct was so extreme as to exceed all bounds tolerated in a civilized community.

Duval's claims arising from these two incidents also may be based on a negligent infliction of emotional distress theory. Under California law, "[t]here is no independent

tort of negligent infliction of emotional distress. [Citation.] The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. [Citations.]" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984–985.) "[T]here is no duty to avoid negligently causing emotional distress to another . . . ." (*Id.* at p. 984.) "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests. [Citations.]" (*Id.* at p. 985.) Duval has not alleged a duty which would come within this standard.

One of the requirements for recovery of damages for emotional distress caused by observing negligently inflicted injury is that the plaintiff's reaction be '"beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances."' (*Fortman v. Forvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 835, quoting *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667–668.) "In *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 (*Molien*), the Supreme Court made it clear that to recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was 'serious.' [Citations.] [¶] Moreover, the [*Molien*] court explained, '"serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." [Citation.]' (*Molien, supra*, 27 Cal.3d at p. 928, quoting *Rodrigues v. State* (1970) 52 Haw. 283 [472 P.2d 509, 520].)" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377–1378.)

Duval's claims do not satisfy the standard set out in *Molien, supra,* 27 Cal.3d at p. 928.) As a matter of law, the circumstances of the two incidents he alleges would not cause a reasonable man to be unable to adequately cope with the mental stress they are alleged to have engendered.

Judgment on the pleadings in favor of Williams without leave to amend was proper.

III

Duval failed to file an amended complaint against Boesch within the time allowed. "'When a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as possible [citation]; and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. [Citations.]' [Citation.]" (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.)

Boesch is not named in the cause of action for breach of contract, which is based on the conciliation agreement and divorce judgment between Williams and Duval. Duval's cause of action for fraud is based in part on Williams' alleged misrepresentation that she did not know Duval's consent was required to transfer the children to other schools. As to that theory, Duval alleges that Boesch is accountable as "an abetting accomplice." He alleges: "It is more than reasonable to assume that these decisions were conspired to within the walls of their residence." Boesch is not named in the other fraud allegations. The allegation as to Boesch does not satisfy the requirement that fraud claims be pleaded with specificity. (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 231 ["Each element of a fraud count must be pleaded with particularity so as to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action . . . . [Citation.]"].)

"The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917–918.)" (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) Duval attempts to allege a cause of action for negligence against Boesch in six of his 18 counts of negligence. The gravamen of the negligence claim is that defendants engaged in conduct designed to remove him from his children (parental alienation) and that *Duval* had a duty to protect his children from improper treatment by Williams, in which Boesch allegedly aided and abetted. His direct victim theory is that defendants breached a duty to him, were negligent, and their conduct was a substantial

factor in the severe emotional distress he suffered as a result. He claims bystander recovery for negligence because of his close relationship to the victims (the children), his presence at the scene, and serious emotional distress to him as a result. He claims that a duty arises from the parent's duty to rescue his or her minor children.

Duval's allegations in counts 2 (resistance to counseling), 11 (Williams' statement in family court that she was unaware Duval had to consent to school transfer) and 17 (surreptitious recording of telephone calls) against Boesch are based on alleged conduct by Williams, to which he adds: "I hold the other defendant, Marcus [Markus] Andrew Boesch, accountable to this breach of duty of care and negligence *as an abetting accomplice and contributor* as well." Count 3 alleges that both defendants allowed the children to be in the care of a young woman who allegedly had a criminal history and possessed drug paraphernalia. Count 4 alleges that Boesch molested Duval's daughter. Count 18 alleges that when Duval was speaking to his daughter on the telephone, he heard Boesch tell his daughter, "'He's an idiot.'"

It is fundamental that a cause of action for negligence must allege a duty by the defendant to the plaintiff and a breach of that duty. The duty required for a cause of action for negligence may be imposed by law, assumed by the defendant, or arise from a special relationship. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205.) Duval attempts to allege a duty on the basis of a special relationship with Boesch. His only allegation in this regard is: "The plaintiff establishes that they and the defendants had an extensive relationship and that the defendants *owed* the plaintiffs a duty of care. Any 'prudent and reasonable person' could forsee this risk of damage or injury."

Duval cites no authority for the proposition that a person with whom an ex-wife is living has a duty of care toward a former husband. We have found none. "'As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.' (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.) This principle is generally

recognized and accepted. (Rest.2d Torts, § 314; Harper James and Gray on Torts (3d ed. 2007) § 18.6, p. 874, fn. 11.) It applies 'no matter how great the danger in which the other is placed, or how easily he or she could be rescued' (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1038, pp. 332–333 [citing authorities]) and even if the actor 'realizes or should realize that action on his part is necessary for another's aid or protection.' (Rest.2d Torts, § 314.)" (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 601, fn. omitted.)

"'Such a duty may arise, however, if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." [Citations.]' (*Davidson v. City of Westminster* [(1982)] 32 Cal.3d [197,] 203, quoting Rest.2d Torts, supra, § 315.)" (*Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 644–645.)

"'As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.' [Citation.] As formulated by the authors of the Restatement Second of Torts, 'The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.' (Rest.2d Torts, *supra*, § 314.)" (*Hansra v. Superior Court*, *supra*, 7 Cal.App.4th at p. 644.) The *Hansra* court concluded that the ability to control the third party (here Williams) is essential. """[T]he absence of such an ability is fatal to a claim of legal responsibility' . . . . Where, as in the instant case, the natural relationship between the parties . . . creates no inference of an ability to control, the actual custodial ability must affirmatively appear." [Citations.]' [Citation.]" (*Id*. at p. 645.) Duval has not satisfied this requirement.

Finally, Duval's fourth cause of action is labeled "Intentional Tort" and claims unspecified violations of his civil rights under the California and United States Constitutions as well as 42 U.S.C. section 1983. He also alleges that erroneous denial of visitation rights constitutes a due process violation of a parent's right to litigate and establish an exception to the preference for adoption in a dependency proceeding under

Welfare and Institutions Code section 366.26, subdivision (c)(1)(a). No dependency proceeding is before us. The fourth cause of action also includes conclusory allegations of breaches of legal duties including negligent infliction of emotional distress on the children. As we have seen, Duval agreed that he would not pursue claims on behalf of the children when he appeared at the hearing on the demurrer in January 2011.

The fourth cause of action also summarily alleges intentional infliction of emotional distress without identifying the particular conduct giving rise to this claim. In addition, a number of Duval's negligence claims against Boesch appear to be for intentional infliction of emotional distress. Negligence counts 17 and 18, which allege Boesch acted as an accomplice, are labeled "Intentional Infliction of Emotional Distress." Since Duval alleges only that he suffered emotional distress as a result of the other alleged conduct, other causes of action may be construed as alleging the same theory. We conclude the conduct alleged by Duval "is not, as a matter of law, '"conduct . . . so extreme as to exceed all bounds of that usually tolerated in a civilized community."' [Citations.]" (*Burkle, supra,* 144 Cal.App.4th at pp. 397–398.)

In sum, we conclude that the civil action against Williams was properly dismissed because Duval's claims against her are within the jurisdiction of the family law court. As to Boesch, Duval failed to plead a basis for recovery, and did not amend when given leave to do so to remedy those deficiencies.

DISPOSITION

The judgment of dismissal is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J. MANELLA, J.