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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANGELIQUE TERESA CHAIDEZ,

Plaintiff and Appellant,

v.

PARAMOUNT MEADOWS NURSING
CENTER, L.P., et al.,

Defendants and Respondents.

B234051

(Los Angeles County
Super. Ct. No. BC444760)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard E. Rico, Judge. Affirmed in part, reversed in part.

Balisok & Associates, Inc., Russell S. Balisok; Law Offices of Robert Dourian,
Robert Dourian and Z. Sondra Derderian for Plaintiff and Appellant.

Gittler & Bradford, Randy A. Berg and Marvin G. Fischler for Defendants and
Respondents Paramount Meadows Nursing Center, L.P., Jacob Graff, Julie T. Miller,
Nomer Gumasingi and Tammy Richardson.

La Follette, Johnson, Dehaas, Fesler & Ames, Bradley J. McGirr and John C.
Lender for Defendants and Respondents Long Beach Memorial Medical Center, Diane
Simmer and Eldad Adler.

Manning & Kass Ellrod, Ramirez, Trester, Louis W. Pappas, Steven J. Renick and Minas Samuelian for Defendant and Respondent Hosea Brown III.

La Follette, Johnson, Dehaas, Fesler & Ames, Dennis K. Ames and Michael J. Doubet for Defendant and Respondent Abraham Rayhaun.

Schmid & Voiles, Denise H. Greer, Susan Fox Dixon and Fredrick James for Defendant and Respondent Mir M. Madani.

Schuler, Brown & Ekizian, Michael D. Brown and Sam D. Ekizian for Defendant and Respondent Mojtaba Sabahi.

Angelique Teresa Chaidez (Chaidez) appeals from the judgment of dismissal of her second amended complaint (operative complaint) asserting causes of action against a skilled nursing facility, a hospital, and several health care professionals who cared for her father Oscar Chaidez (decedent) before his death. The wheel-chair bound and disabled decedent was a resident of Paramount Meadows Nursing Center (Paramount Meadows). Against doctor's orders, Paramount Meadows permitted the decedent to leave the premises without supervision and before taking daily medicine for his mental illness. The decedent did not return at the scheduled time, and his absence went unreported until the following day when he was found on the street severely injured and suffering from brain trauma. He was taken by paramedics to Long Beach Memorial Medical Center (hospital), where he was treated at the hospital in the intensive care unit for brain trauma. The decedent was transferred within the hospital the following day and later that day signed discharge papers acknowledging that he left the hospital against medical advice. Shortly after leaving the hospital, the decedent collapsed, and three days later he was declared brain dead.

Chaidez brought a survival action on behalf of the decedent and asserted a wrongful death cause of action on her own behalf against Paramount Meadows and its staff, the hospital and its employees, and several physicians who treated the decedent. The trial court entered judgment after sustaining demurrers without leave to amend to

several causes of action alleged in the operative complaint. We reverse in part, and affirm in part.

ALLEGED FACTS

For purposes of demurrer, we take all well-pleaded allegations in the operative complaint as true. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law asserted in the operative complaint.¹ (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Chaidez is the decedent's daughter and is his successor in interest. The decedent was approximately 51 years old, was blind in one eye, had one leg amputated, and suffered from mental illness exhibited by disordered thought processes, including paranoia, schizophrenia, delusions, agitation, and anxiety. The decedent also suffered from seizure disorder. The decedent was a resident of Paramount Meadows following his discharge from Brotman Medical Center, where he received psychiatric treatment and had been involuntarily admitted for approximately 40 days pursuant to Welfare and Institutions Code section 5150.²

¹ Chaidez amended her initial complaint after several defendants filed demurrers and motions to strike. After filing the first amended complaint, the trial court sustained demurrers with leave to amend. Chaidez then filed the operative complaint that is the focus of this appeal.

² Welfare and Institutions Code section 5150 states in pertinent part: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation."

Unless indicated otherwise, all further statutory references are to the Welfare and Institutions Code.

1. *Paramount Meadows*

Paramount Meadows operates a skilled nursing facility.³ Jacob Graff was the managing agent and director of Paramount Meadows, and Julie T. Miller served as its administrator. Nomer Gumasingi was the director of nursing, and Tammy Richardson was a registered nurse or licensed vocational nurse at the skilled nursing facility.

From August 17, 2009 through August 28, 2009, the decedent was a resident of Paramount Meadows. The decedent's attending physician was Dr. Steven Lee. Lee permitted the decedent to leave the skilled nursing facility, and his specific order allegedly stated the decedent " 'may go out on pass with responsible party with medications if not in conflict with his treatment plan.' " The decedent's medications, which were administered in the morning, included Lithium, for mood disorders and psychosis, and Zyprexa, another antipsychotic medication.

Early in the morning of August 28, 2009, the decedent expressed his desire to " 'go to the gym.' " Against doctor's orders, the decedent was "allowed by staff" to leave the skilled nursing facility unsupervised, and before he took his medications. Richardson allegedly was the charge nurse on duty at the time the decedent left the premises. It is alleged that this was not an inadvertent error by Paramount Meadows' staff, including Richardson. Chaidez had previously complained to the skilled nursing facility staff after she learned that on another occasion the decedent had left the skilled nursing facility unsupervised. Permitting the decedent to leave the skilled nursing facility without supervision allegedly was at the "instruction, agreement and acquiescence of . . . Graff, Miller, Gumasingi and Richardson."

Although the decedent was scheduled to return to the skilled nursing facility by 1:00 p.m., or at the latest 1:30 p.m., he failed to return. The decedent's absence was not reported to law enforcement authorities until the next morning (August 29). It is alleged

³ The operative complaint also names Paramount Meadows Nursing Center, L.P. In this court, attorneys for Paramount Meadows filed a brief responding on behalf of Paramount Meadows Nursing Center, L.P., erroneously sued as Paramount Meadows Nursing Center LLC. We use Paramount Meadows when appropriate.

that the skilled nursing facility “intentionally delayed” reporting the decedent missing to his family, governmental agencies, and law enforcement. Graff, Miller, Gumasingi, or Richardson allegedly made the decision to delay reporting, and the decision was ratified by the managing agents, corporate officers, or directors of the skilled nursing facility.

2. *Hospital*

On August 29, 2009, after the Los Angeles County Sheriff’s office had been notified of the decedent’s absence, paramedics found him “down on the street suffering from severe head trauma.” The decedent was transported to the emergency room at the hospital and was admitted to the intensive care unit (ICU) with “noted evidence of head trauma, including ‘*intracranial hemorrhage*’ and seizure activity.” A CT scan showed hemorrhage at the right occipital lobe and left frontal lobe. The decedent was medically unstable, and he allegedly required constant clinical assessment. Decedent’s condition was exacerbated by high blood pressure.

While at the hospital, the decedent was treated by hospital employees Eldad Adler, M.D. and Diana Simmer, R.N. In addition, neurologist Abraham Rayhaun, M.D., and physicians Mir Mahmoud Madani, M.D., and Mojtaba Sabahi, M.D. allegedly participated in the decedent’s treatment.

a. *Neurological Consult and Transfer Out of ICU*

On August 30, 2009, Rayhaun, board certified in neurological surgery, allegedly evaluated the decedent. Rayhaun’s report indicated that surgery was not required but recommended observations for any change in mental status that might be linked to continued or developing hemorrhaging. Rayhaun also allegedly authorized that the decedent be “ ‘stepped down’ ” to a lower level of care than provided in the ICU.

Alternatively, the operative complaint alleges the hospital’s medical records are contradictory, indicating that Rayhaun may not have evaluated the decedent, and the decedent was allowed to leave the hospital before a neurosurgical consult was performed.

b. *Events Leading to Discharge Against Medical Advice*

After the decedent was transferred out of the ICU, he began acting irrationally and combatively, pulling out IV tubes and disconnecting monitors. Adler, the decedent’s

physician, allegedly had recommended a psychiatric evaluation before the decedent was transferred out of ICU but no psychiatric evaluation was provided.

The decedent demanded to be discharged from the hospital. Hospital records allegedly indicate that before the decedent's discharge, Adler consulted with two other physicians, Madani and Sabahi. The operative complaint, however, also alleged that the hospital records might be inaccurate because Madani and Sabahi "may never have been notified of the discharge by Adler, and . . . Sabahi may never have attended to, consulted or assisted with respect to Decedent's care and treatment."

Madani, Sabahi, Adler, and Simmer, the charge nurse, were consulted, approved, or failed to object to permitting the decedent to sign discharge papers and leave the hospital. The decision to permit the decedent to sign discharge papers allegedly was made without consideration of the decedent's health and safety, for financial considerations, and against hospital policy that required a 72-hour hold for patients that are thought to be "a danger to self or others," or "gravely disabled."

The decedent signed discharge papers, indicating that he was leaving the hospital " 'against medical advice.' " Upon discharge, the decedent "apparently demanded two tablets of a barbiturate based pain medication, and a bottle of vodka," which demonstrated "disordered thinking, contemporaneously with the effort to discharge him." Although the hospital had obtained the decedent's medical records and reports from Paramount Meadows, which included the names and addresses of the decedent's family members, the hospital did not contact anyone before the decedent left the hospital.

Following the decedent's discharge, Hosea Brown III, M.D., dictated a discharge summary. It is alleged that "[t]he information available to him at that time should have trumpeted to him . . . that Decedent was a psychiatric patient as well as an incompetent, gravely disabled neurological patient, and that he left the hospital suffering from severe brain trauma which needed constant monitoring, and that his discharge from Hospital without supervision or the company of adults who might offer help to him, subjected Decedent to the high probability of severe injury."

3. *The Decedent's Subsequent Injury and Death*

After leaving the hospital, the decedent was found by paramedics, collapsed, fallen from his wheelchair, and unresponsive. He was taken to East Los Angeles Doctor's Hospital. A CT scan revealed "catastrophic brain injury had occurred secondary to edema and or continued intra cranial bleeding."

On September 1, 2009, the decedent was transferred to Good Samaritan Hospital and was declared brain dead the following day.

PROCEEDINGS

1. *Operative Complaint*

a. *Paramount Meadows and Staff*

Based upon the alleged facts that the skilled nursing facility and its staff failed to safeguard the decedent and failed to follow his physician's orders, the operative complaint asserts the following causes of action against Paramount Meadows, and the individual defendants, Graff, Miller, Gumasingi, and Richardson: (1) dependent adult neglect (Welf. & Inst. Code, § 15610.57) (first cause of action); (2) willful or reckless misconduct (third cause of action); (3) violation of Penal Code section 368 (criminal elder and dependent adult abuse) (fourth cause of action); and (4) wrongful death (sixth cause of action).

b. *Hospital and Staff, and Physicians*

The operative complaint alleges the following causes of action against the hospital and its employees Simmer and Adler, and physicians Rayhaun, Madani, Sabahi, and Brown: (1) dependent adult neglect (Welf. & Inst. Code, § 15610.57) (second cause of action); (2) willful or reckless misconduct (third cause of action); (3) violation of Penal Code section 368 (fourth cause of action); (4) constructive fraud (fifth cause of action); and (5) wrongful death (sixth cause of action). These causes of action are based upon the alleged facts that the hospital and health care professionals treating the decedent failed to monitor him after suffering brain trauma, failed to conduct necessary tests and obtain consults, and made financially motivated decisions related to his care and treatment that led to his discharge.

2. *Demurrers to the Operative Complaint Sustained Without Leave to Amend*

Paramount Meadows, Graff, and Gumasingi filed a demurrer and a motion to strike. At the time the demurrer was filed, Richardson had not been named as a defendant. The hospital, Simmer, and Adler filed a demurrer and motion to strike, and the physicians (Rayhaun, Madani, Sabahi, and Brown) each filed separate demurrers and motions to strike.

The trial court sustained the demurrers to the survivor causes of action without leave to amend. The trial court noted that Chaidez had two other opportunities to amend the complaint and had not shown that she could plead the survivor actions with the requisite specificity. The trial court, however, gave Chaidez an opportunity to amend her wrongful death cause of action. Chaidez was granted 10 days leave to amend, but she elected not to amend.

3. *Stipulations, Dismissals, Judgment, and Appeal*

Chaidez moved for entry of judgment of dismissal in favor of the defendants. Because Rayhaun did not demurrer to the sixth cause of action for wrongful death, Chaidez and Rayhaun entered into a stipulation that Rayhaun was deemed to have filed a demurrer to the sixth cause of action. The trial court accepted the stipulation and ordered entry of dismissal.

Richardson then filed a demurrer. Richardson and Chaidez entered into a stipulation that the “court’s rulings with respect to the demurrer of the Paramount Meadows defendants are hereby amended to include Richardson as a demurring party.”

Judgment was entered and this timely appeal followed.

DISCUSSION

1. *Standard of Review*

On appeal from a judgment of dismissal following an order sustaining a demurrer, “we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose.” (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 (*McCall*).) We assume the truth of the properly pleaded factual allegations, facts that can reasonably be

inferred from those pleaded, and facts of which judicial notice may be taken.

(*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

2. *Dependent Adult Abuse (First and Second Causes of Action)*

The first and second causes of action in the operative complaint seek enhanced remedies for dependent adult abuse under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) (Welf. & Inst. Code, § 15600 et seq.). The Elder Abuse Act was enacted to provide for the “private, civil enforcement of laws against elder abuse and neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 (*Delaney*)). It affords heightened remedies to a person who proves “by clear and convincing evidence” both that a defendant is liable for physical abuse, neglect, or financial abuse (as defined in the Elder Abuse Act) and that the defendant is guilty of “recklessness, oppression, fraud, or malice” in the commission of such abuse. (§ 15657.)

Neglect is defined in section 15610.57 as “[t]he negligent failure of any person having the care or custody of an elder or dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” (§ 15610.57, subd. (a)(1).) “Neglect includes, but is not limited to, all of the following: [¶] (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. [¶] (2) Failure to provide medical care for physical and mental health needs. . . . [¶] (3) Failure to protect from health and safety hazards. [¶] (4) Failure to prevent malnutrition or dehydration. . . .” (§ 15610.57, subd. (b)(1)-(4).) “[N]eglect as a form of abuse under the Elder Abuse Act refers ‘to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.’ [Citation.]” (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404.)

In *Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th 396, the court compiled the cases and distilled several factors that must be present to plead

neglect under the Elder Abuse Act.⁴ (*Id.* at pp. 405-407.) The plaintiff must allege facts establishing that the defendant: “(1) had responsibility for meeting the basic needs of the elder or dependent adult,” including nutrition, hydration, hygiene, or medical care; “(2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs”; and “(3) denied or withheld goods or services necessary to meet the elder or dependent adult’s basic needs, either with knowledge that injury was substantially certain . . . or with conscious disregard of the high probability of such injury” (*Id.* at pp. 406-407.) The plaintiff also must allege that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering, and the causal link between the neglect and injury must be specifically alleged. (*Id.* at p. 407.)

The conduct proscribed by section 15657 does not include acts of professional negligence, but refers to forms of abuse or neglect performed with some state of culpability greater than negligence. (*Delaney, supra*, 20 Cal.4th at pp. 30-37.) The high standard imposed by section 15657 protects health care providers from liability under the statute “for acts of simple or even gross negligence.” (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 785.) When medical care of a dependent adult is at issue, neglect is not the undertaking of medical services but the failure to provide medical care. (*Delaney*, at p. 34; see also *Covenant Care, Inc. v. Superior Court*, at p. 783.)

a. *Paramount Meadows and Staff*

The operative complaint alleges neglect within the meaning of the Elder Abuse Act against Paramount Meadows and its staff (Graff, Miller, Gumasingi, and Richardson). Chaidez alleges that the skilled nursing facility (1) had responsibility for meeting the basic needs of the decedent; (2) knew that the decedent was a disabled man suffering from paranoia, schizophrenia, anxiety, agitation, and other mental conditions,

⁴ Chaidez notes the split of authority as to whether the claim for abuse or neglect of a dependent adult is “a cause of action” or provides “heightened remedies” for some other cause of action. (See *Carter v. Prime Healthcare Paradise Valley LLC, supra*, 198 Cal.App.4th at p. 403, fn. 6.) We do not resolve this issue because our focus is on the pleading requirements.

and knew he previously had received psychiatric treatment; (3) knew that based upon his doctor's orders, the decedent could not leave the skilled nursing facility alone and without taking his medications to control his mental illness; (4) failed to follow doctor's orders by permitting him to leave the facility unsupervised; and (5) did not report the decedent's absence when he failed to return to the skilled nursing facility.

In addition, the operative complaint alleges these actions constituted a dereliction of the physician's orders and were carried out in conscious disregard of the high probability of injury or harm. This satisfies the pleading requirements to allege recklessness or oppression. (§ 15657.) The trial court erred in sustaining the demurrers of these defendants to this cause of action.

b. *Hospital and Staff, and Physicians*

Mack v. Soung (2000) 80 Cal.App.4th 966 is illustrative of the conduct necessary to allege neglect by a physician under the Elder Abuse Act. As noted, when medical care is at issue, it is not the undertaking of medical services, but the failure to provide medical care. (*Delaney, supra*, 20 Cal.4th at p. 34.) In *Mack v. Soung*, the complaint alleged the physician concealed the existence of untreatable stage III pressure ulcers of a patient under his care, opposed her hospitalization, and then abandoned the patient and refused to respond to staff requests to permit her hospitalization. (*Mack v. Soung*, at pp. 969, 973.) The court had no "trouble concluding" that these allegations were sufficient to seek heightened remedies under the Elder Abuse Act. (*Id.* at p. 973.)

Here, the operative complaint does not meet the pleading threshold established in *Mack v. Soung* to show that either the hospital's employees (Simmer and Adler), or the physicians failed to provide medical care while treating the decedent at the hospital or when permitting the decedent to leave the hospital against medical advice.

(1). *Hospital and Staff*

Unlike the physician in *Mack v. Soung*, Adler and Simmer, employees of the hospital, did not neglect the decedent by failing to provide medical care or did not abandon him while the decedent was under their care. Adler and Simmer allegedly cared for and treated the decedent, but Adler allegedly failed to obtain a psychiatric evaluation,

and both Adler and Simmer knew that the decedent should have been monitored for any changes in his condition. They also allegedly participated in the decision to permit the decedent to sign discharge papers, knowing that his condition required monitoring and without first obtaining a psychiatric evaluation. These allegations demonstrate decisions related to rendering medical care, not abandonment or failing to provide medical care.

Chaidez, however, contends that she has alleged the failure to provide medical care because the decedent was permitted to sign discharge papers so the hospital and the health care professionals could avoid the unreimbursed costs associated with treating his injuries. In support of this argument, Chaidez relies on *McCall*, *supra*, 25 Cal.4th at p. 426, which in turn, relied on *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 128-129 (*Moore*). Both cases discuss a cause of action for breach of a duty by medical professionals, not conduct that the Legislature has proscribed under the Elder Abuse Act. (*McCall*, at p. 426; *Moore*, at pp. 128-129.) The *McCall* court repeated the allegations that a provider may breach its duty by permitting its financial interest detrimentally to affect treatment decisionmaking or failing to disclose such interest, but the court specifically stated it did not “determine the sufficiency of any of the McCalls’ allegations to state a cause of action.” (*McCall*, at p. 426 & fn. 10.) *Moore* involved a plaintiff who alleged that his doctor breached his duty when the doctor used the plaintiff’s cells to conduct research and benefitted financially without informing the plaintiff. (*Moore*, at pp. 126-128 & fn. 6.) The *Moore* court held that the plaintiff could state a cause of action for either breach of fiduciary duty or for the performance of medical procedures without informed consent. (*Id.* at pp. 128-129.) There are no similar allegations here that would even support a cause of action for breach of fiduciary duty, which gives rise to negligence and is distinct from the statutory requirements that the Legislature has determined are necessary to seek heightened remedies under the Elder Abuse Act. The trial court properly sustained the demurrer to this cause of action without leave to amend.

(2). *Physicians*

The allegations against the physicians relate to the medical care provided, not the failure to provide medical care. Rayhaun allegedly should not have transferred the decedent from the ICU, which led to the decision to permit the decedent to leave the hospital. Madani and Sabahi allegedly consulted (or did not consult) with Adler and agreed to permit the decedent to leave the hospital. And Brown did not consult on the discharge, but should have taken steps to correct any error related to the discharge when he dictated the discharge summary. Inadvertence, incompetence, unskillfulness, or the failure to take reasonable precautions, does not rise to the level of a conscious choice of actionable neglect like the physician in *Mack v. Soung*. The trial court did not err in sustaining the demurrers of Rayhaun, Madani, Sabahi, and Brown to this cause of action without leave to amend.

3. *Willful and Reckless Misconduct (Third Cause of Action)*

In *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, the court discussed the pleading requirements of a claim for “willful misconduct.” The *Berkley* court noted that “[t]he parties have argued extensively about whether a tort called ‘willful misconduct’ is recognized in California. It is not a separate tort, but simply ‘ “ ‘an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care’ [citations].” ’ [Citation.] Its pleading requirements are similar to negligence but stricter. [Citation.]” (*Id.* at p. 526.)

Willful misconduct is the “intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences.” (*Williams v. Carr* (1968) 68 Cal.2d 579, 584.) Three elements must be present to raise a negligent act to the level of willful misconduct: “(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.” [Citation.]” (*Bains v. Western Pacific R.R. Co.* (1976) 56 Cal.App.3d 902, 905.)

a. *Paramount Meadows and Staff*

The operative complaint alleges willful misconduct on the part of Paramount Meadows and its staff (Graff, Miller, Gumasingi, and Richardson). Paramount Meadows allegedly failed to supervise the decedent and to prevent him from leaving the skilled nursing facility without support and supervision, which they knew posed a probable risk of injury to him, and by this conduct failed to avoid the harm. The trial court erred in sustaining the demurrers of these defendants to this cause of action.

b. *Hospital and Staff, and Physicians*

The operative complaint does not plead facts sufficient to state a cause of action for willful misconduct against the hospital, Adler, Simmer, or the physicians. There are no allegations that the hospital, its employees (Adler and Simmer), or the physicians (Rayhaun, Madani, Sabahi, Brown) made medical treatment decisions with a conscious disregard of the probable risk of injury to the decedent. As for the decedent's discharge, the operative complaint is devoid of facts that those involved in the decision consciously failed to act so as to avoid probable injury to him. The factual allegations, at most, plead negligence. The trial court properly sustained the demurrers of these defendants to this cause of action without leave to amend.

4. *Criminal Dependent Adult Abuse (Fourth Cause of Action)*

As noted, the Elder Abuse Act was enacted to provide for the "private, civil enforcement of laws against elder abuse and neglect." (*Delaney, supra*, 20 Cal.4th at p. 33.) Chaidez contends, however, that under *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1224, the decedent has a private right of action for a violation of Penal Code section 368, addressing crimes against elder or dependent adults. Unlike *Angie M.*, where the Legislature impliedly recognized a private right of action, the Legislature has not impliedly or expressly recognized a private right of action in Penal Code section 368. (*Angie M. v. Superior Court*, at p. 1225; see also *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 141-142.)

Appellant's reliance on *Angie M.* also is misplaced because that court relied on *Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059, and *Laczko v. Jules Meyers, Inc.*

(1969) 276 Cal.App.2d 293, for the proposition that a “[v]iolation of a criminal statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the criminal statute.” (*Angie M. v. Superior Court*, *supra*, 37 Cal.App.4th at p. 1224; *Michael R. v. Jeffrey B.*, at p. 1067; *Laczko v. Jules Meyers, Inc.*, at p. 295.) Both cases cited this proposition while discussing a statutory duty to impose tort liability, not a private right of action under the respective statute. (*Michael R. v. Jeffrey B.*, at p. 1067 [“Although a statute that provides solely for a criminal penalty does not *create* a civil liability, the significance of the statute in a civil suit for negligence involves its formulation of a standard of conduct that the court then adopts in the determination of such liability.”]; *Laczko v. Jules Meyers, Inc.*, at p. 295 [“We hold that respondent’s breach of its statutory duty to appellant constituted an actionable tort.”]; see also 5 Witkin, Summary of Cal. Law (10th ed. 2005), Torts, § 11, pp. 54-55 [“Situations in which a statute is alleged to create a new private cause of action must be distinguished from those in which a statute is merely employed to establish the elements of a common law cause of action, as where the breach of a statute is presumed to be a breach of the standard of due care in a negligence action.”].) The trial court properly sustained the demurrers to this cause of action without leave to amend.

5. *Constructive Fraud (Fifth Cause of Action)*

The operative complaint does not sufficiently plead a cause of action for constructive fraud against the hospital, Adler, Simmer, and the physicians (Rayhaun, Madani, Sabahi, and Brown). This cause of action is based upon the allegations that the defendants failed to disclose to the decedent a financial conflict of interest arising from the reimbursement costs associated with his care that adversely affected their health care decisions.

The elements of constructive fraud are: “1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, [¶] 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.” (Civ. Code, § 1573.) Constructive

fraud, like actual fraud, must be pleaded with specificity. (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 961.)

The allegations of constructive fraud fail to plead a cause of action with specificity, in that the operative complaint does not allege any act the decedent took in reliance on the defendants' actions. (See *Moore, supra*, 51 Cal.3d at p. 129.) The trial court properly sustained the demurrers to this cause of action without leave to amend.

6. *Wrongful Death (Sixth Cause of Action)*

Wrongful death is a statutorily created cause of action brought by the heirs against a person who causes the death of another by a wrongful act or neglect. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263.) The cause of action for wrongful death is a statutory claim that does not belong to the decedent, but to the persons specified by statute. (Code Civ. Proc., §§ 377.60-377.62.) Its purpose is to compensate specified persons for the loss of companionship and for other losses suffered as a result of a decedent's death. (*Quiroz v. Seventh Ave. Center*, at p. 1263.) The damages recoverable are expressly limited to those not recoverable in a survivor action under Code of Civil Procedure section 377.34. (*Id.* at p. 1264.) Chaidez seeks to recover only for her injuries, that is, the deprivation of her father's financial support.

“ ‘The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*. [Citations.]’ [Citation.]” (*Quiroz v. Seventh Ave. Center, supra*, 140 Cal.App.4th at p. 1263.) In an action for wrongful death, the complaint must allege all the elements of negligence or other wrongful conduct. Wrongful death based upon negligent conduct involves pleading a duty of care owed to the decedent and breach of duty, that is, the negligent act or omission, resulting in the death of the decedent. (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105.)

a. *Paramount Meadows and Staff*

Contrary to Paramount Meadows' contention, the operative complaint alleges a nexus between the skilled nursing facility's omissions and the decedent's death from brain trauma. The operative complaint alleges that the skilled nursing facility and its

staff (Graff, Miller, Gumasingi, and Richardson) permitted the decedent to leave without a responsible person and delayed reporting his absence to authorities. During this “missing period,” the decedent allegedly fell and suffered brain trauma, which led to his death. Had the decedent been supervised, he might not have suffered the injury that led to his death, or he might have received immediate medical attention. It also is possible that the injuries he suffered during this “missing period” did not cause his death. But, we cannot resolve this issue at the pleading stage. The trial court erred in sustaining the demurrers to this cause of action.

b. *Hospital and Staff, and Physicians*

When considering the allegations related to the decedent’s discharge from the hospital, the operative complaint sufficiently alleges a cause of action for wrongful death against the hospital, Adler, and Simmer. Adler and Simmer allegedly knew the decedent had to be monitored for changes in his condition and knew that he was mentally unstable. Upon discharge, the decedent allegedly was found in the street unresponsive, diagnosed with brain edema, and later declared brain dead. These allegations are sufficient to withstand a demurrer.

As for the physicians, viewing the pleadings in the light most favorable to Chaidez, Rayhaun transferred the decedent out of ICU, which led to his discharge, and Sabahi and Madani allegedly participated in the decision to permit the decedent to leave the hospital while suffering from brain trauma and exhibiting mental instability. The operative complaint alleges that had the decedent remained in the hospital, he would not have sustained the injuries that led to his death. This is sufficient to withstand demurrer.

Brown’s demurrer also should have been overruled. Brown allegedly dictated the discharge summary, and his omission was the failure to alert authorities after the decedent’s discharge. Had Brown alerted authorities, the decedent might not have suffered the injuries that led to his death. For purposes of demurrer, we find the allegations sufficient. The trial court erred in sustaining the demurrers of these defendants to this cause of action.

DISPOSITION

The judgment is reversed with directions to overrule the demurrers filed by Paramount Meadows, Graff, Miller, Gumasingi, and Richardson to the causes of action alleged in the second amended complaint for dependent adult abuse (first cause of action), willful misconduct (third cause of action), and wrongful death (sixth cause of action). Further, the judgment is reversed with directions to overrule the demurrers filed by the hospital, Adler, Simmer, Rayhaun, Madani, Sabahi, and Brown to the cause of action for wrongful death (sixth cause of action). The judgment is otherwise affirmed. This matter is remanded to the superior court for further proceedings consistent with this opinion. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.