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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ARGY DIAMANTIDES-ABEL, Plaintiff and Appellant, v. LONG BEACH MEMORIAL MEDICAL CENTER et al., Defendants and Respondents.	B246535 (Los Angeles County Super. Ct. No. NC057208)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Argy Diamantides-Abel, in pro. per., for Plaintiff and Appellant.

Law Office of Kent M. Bridwell, Kent M. Bridwell and Lynn E. Moyer for Defendants and Respondents.

Vassiliki Diamantides, the mother of appellant Argy Diamantides-Abel, was a patient at the Long Beach Memorial Medical Center (LB Memorial) in July 2009 for approximately two weeks, and again in November 2009 for approximately three days. After her release in November, she was transferred to Kindred Hospital Westminster, a nursing facility operated by THC-Orange County, Inc. (TCH). She died at the THC facility on February 18, 2010, at the age of 94.[1] After the death of her mother, appellant brought suit for elder abuse and other related claims against a number of parties, including respondents LB Memorial; Bonnie Lewis, an LB Memorial social worker; Jorge Jose Bermudez, who notarized Vassiliki's signature on a general power of attorney and an advance health care directive durable power of attorney naming appellant's brother, Nick Diamantides, conservator and health care representative; James and Linde Holstein, who witnessed Vassiliki's signature on the general power of attorney and advance health care directive; and Tina Cates, an employee of the nursing facility operated by THC.[2] The trial court sustained the demurrers of respondents LB Memorial, Lewis and the Holsteins and entered judgment in their favor. In so doing, the court also dismissed Bermudez and Cates, who had not demurred.

Appellant contends she sufficiently pled a claim for elder abuse against LB Memorial, Lewis and Cates, and claims for negligent and intentional infliction of emotional distress and fraud against the Holsteins and Bermudez. She further contends the trial court erred in dismissing Bermudez and Cates because they did

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[1] Appellant states Vassiliki was 93 at the time of her death. If she was born in June 1915 and died in February 2010, as alleged in the operative complaint, she would have been 94.

[2] Appellant also brought suit against THC and her mother's doctor, T. Tyler Nguyen, M.D. Claims against those defendants are still pending and they are not parties to this appeal. Because they share a surname, Vassiliki and Nick are referred to by their first names.

not personally file demurrers, and that the court erred in dismissing the fraud claim against the Holsteins and Bermudez because the Holsteins' demurrer included no argument specifically directed at that claim. We conclude the claims to which the demurrers were sustained were insufficiently pled and/or barred by the statute of limitations or the provisions of Code of Civil Procedure section 377.34, precluding claims for emotional distress by successors in interest. We further conclude that Bermudez and Cates were properly dismissed. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Original Complaint*

On February 21, 2012, appellant, acting in propria persona, filed a complaint naming respondents, as well as THC and Dr. Nguyen. The complaint was brought in appellant's individual capacity and in her capacity as successor in interest to Vassiliki.[3] The complaint alleged claims for elder abuse, medical negligence, and negligent and intentional infliction of emotional distress.[4] With respect to elder

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[3] Code of Civil Procedure section 377.30 provides that a cause of action that survives the death of the person entitled to commence it "passes to the decedent's successor in interest . . . [and] may be commenced by the decedent's personal representative, or, if none, by the decedent's successor in interest." To become Vassiliki's successor in interest, appellant petitioned under section 377.32 which requires the petitioner to file an affidavit or declaration stating (1) if the decedent's estate was administered, that the cause of action was distributed to the petitioner or (2) if the estate was not administered, that the petitioner is the decedent's successor in interest as statutorily defined and no other person has superior right to commence the action. (Code Civ. Proc., § 377.32; see *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1523-1524.) An order appointing appellant Vassiliki's successor in interest was filed March 8, 2012.

[4] Respondents LB Memorial, Lewis and Cates, as well as TCH and Dr. Nguyen, were named in the claim for elder abuse. LB Memorial, along with TCH and Dr. Nguyen, was also named in the claim for medical negligence. Respondents Bermudez and the Holsteins were named in the claims for negligent and intentional infliction of emotional distress. The title page of the complaint indicated that claims for

(Fn. continued on next page.)

abuse, the complaint alleged that when Vassiliki was first admitted to LB Memorial in July 2009, appellant and Vassiliki's caregiver reported she was being abused by Nick, who lived with Vassiliki in her home. When the time came to release Vassiliki, Nick refused to take her back home, so she was instead transferred to a nursing home.[5] Vassiliki was re-admitted to LB Memorial in November 2009 and transferred to THC's nursing facility after her release. Both nursing home transfers were alleged to be "against [Vassiliki's] will" in accordance with a "fraudulent" power of attorney held by Nick. Respondent Cates, along with THC and Dr. Nguyen, allegedly neglected Vassiliki at the THC nursing facility by refusing to provide dialysis in her last days. The complaint further alleged that from November 27, 2009, until her death on February 18, 2010, Vassiliki "could not take care of herself and was not able to understand or handle her own business and legal affairs and was incompetent within the meaning of Code of Civil Procedure [section] 352[, subd.] (a)."[6]

LB Memorial, Lewis and THC demurred.[7] The demurrers asserted that appellant could not appear as a successor to her mother's claims without an

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wrongful death, fraud, unfair business practices, and "abandonment" were included, but no such claims were asserted in the body of the complaint.

[5] There are no allegations concerning Vassiliki's care at this nursing facility and it was never made a party to the lawsuit.

[6] Code of Civil Procedure section 352, subdivision (a), provides that the applicable statute of limitations is tolled if a cause of action accrues when the person entitled to bring the action is "insane," defined as "'incapable of caring for his [or her] property or transacting business or understanding the nature or effects of his [or her] acts . . . .'" (*Alcott Rehabilitation Hospital v. Superior Court* (2001) 93 Cal.App.4th 94, 101.)

[7] When these demurrers were filed, Linde Holstein and Tina Cates had not been served. James Holstein answered the complaint acting in propria persona. His "answer" was more akin to a demurrer: it included a lengthy argument, including citation to legal authority, addressing whether his actions in witnessing Vassiliki's signature on a power of attorney could have proximately caused any of her or appellant's alleged injuries.

attorney, that the claims asserted against these defendants (elder abuse and medical malpractice) were barred by the statute of limitations, and that these claims were inadequately pled.[8] The court sustained the demurrers to the elder abuse and medical malpractice claims. Specifically with respect to LB Memorial, the court's order stated: "[T]here are no facts against Memorial which constitute elder abuse. [Appellant] allege[d] Memorial transferred decedent to [THC's facility], which neglected her. . . . [T]here are no alleged facts of recklessness or egregious misconduct. [¶] . . . [¶] . . . . Even if a power of attorney was fraudulent and [M]emorial honored it, that is not medical malpractice nor elder abuse."

B. *First Amended Complaint*

Appellant filed a first amended complaint (FAC).[9] The FAC added numerous allegations with respect to Nick, contending that in July 2009, he was "abusing [Vassiliki] psychologically and financially," including taking her money, firing her caregivers, and overmedicating her.[10] In addition, Nick allegedly refused to recognize that Vassiliki needed hospital care when the caregiver found her unresponsive and barely breathing, and instructed the caregiver not to call paramedics. Appellant arrived for a visit and took her mother to LB Memorial on July 12. Appellant reported the alleged abuse to hospital social worker Julie Crouch. Subsequently, appellant learned that the matter had been assigned to social worker Lewis, and she provided additional information concerning the alleged abuse to Lewis. Appellant learned on July 25 that Vassiliki had been

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8 The demurring parties also moved to strike the claim for punitive damages.

9 Although no demurrer had been sustained to the emotional distress claims, appellant revised those as well.

10 Nick was not added as a party.

discharged from LB Memorial the previous day and taken to a nursing facility "against her will" at Nick's instruction. On November 24, 2009, Vassiliki was again admitted to LB Memorial and when released on November 27, she was again transferred to a nursing facility -- THC's Kindred Hospital -- rather than returned home. On the day she was transferred, Vassiliki was allegedly in a "fragile condition" with a "high risk for infection," and "need[ed] . . . assistance with virtually all activities of daily living." In addition, she was allegedly suffering "difficulty breathing," a "deep puncture wound [on] her shin," and multiple "decubitus ulcers" (bed sores).

The FAC alleged that while Vassiliki was at THC, the facility failed to monitor Vassiliki's condition, failed to maintain her gastro feeding tube in a clean and sanitary manner, and failed to ensure she retained motion in her limbs. In December 2009, Vassiliki allegedly suffered a collapsed lung which was not promptly treated, resulting in an emergency tracheotomy. In addition, she allegedly suffered infections that caused the left side of her face to be greatly swollen and threatened her life. In January 2010, Dr. Nguyen recommended a dialysis treatment, which Nick -- acting as her health care representative -- instructed the facility not to provide. The specific allegations pertaining to Cates stated that she was the "social director" for the facility, and that appellant had advised her that Nick did not have legal authority to control Vassiliki's health care because Vassiliki had not signed the advance health care directive naming Nick as her representative, and that Vassiliki wanted to go home.[11] Appellant also allegedly complained to Cates and "the nurses on duty" that Vassiliki was being

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[11] The FAC also alleged generally that Cates was Vassiliki's "'Care Custodian[]'" and a "managerial employee" responsible for Vassiliki's "care, welfare, protection and/or safe discharge."

fed through a gastro tube, that Vassiliki's gastro tube and catheter had been in place too long, that Vassiliki was being kept in bed rather than taken outside for sunshine and air, that nothing was being done to correct Vassiliki's contracted leg, and that Vassiliki was being put in the same rooms as sick patients, leaving her susceptible to infection.

The first cause of action in the FAC for elder abuse was asserted in appellant's capacity as successor in interest to Vassiliki. This was the only claim asserted against LB Memorial and Lewis. The second cause of action, also entitled "elder abuse," was asserted in appellant's individual capacity. Cates was named in the first and second causes of action.[12]

The tenth through thirteenth causes of action, for negligent and intentional infliction of emotional distress -- asserted in appellant's individual capacity and in her capacity as successor in interest to her mother -- and the fourteenth cause of action for fraud -- asserted in both capacities -- were brought against respondents Bermudez and the Holsteins. These causes of action alleged that Bermudez, acting as the notary, and the Holsteins, acting as the witnesses, fraudulently stated they had seen Vassiliki sign one or more powers of attorney, or that they acted in the capacities of notary and witnesses knowing she did not have the mental capacity to sign, and that they knew or should have known that the documents they signed would be used against Vassiliki's interests. The FAC specifically alleged that one of the relevant powers of attorney (apparently referring to the advance health care directive) was not signed in May 2009, as the notary and witnesses attested, but in

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[12] These claims were also asserted against TCH and Dr. Nguyen. The third cause of action for violation of rights under the Health and Safety Code, the fourth, fifth and sixth causes of action for fraud and constructive fraud, the seventh cause of action for unfair business practices, the eighth cause of action for negligence, and the ninth cause of action for wrongful death were asserted against TCH and Dr. Nguyen or TCH alone.

January 2010, and was backdated to May 2009 to match the date on the general power of attorney.

Demurrers and motions to strike were brought by respondents LB Memorial, Lewis and the Holsteins.[13] LB Memorial and Lewis contended the claim against them for elder abuse was time-barred and failed to state sufficient facts to constitute a cognizable cause of action. The Holsteins similarly contended the emotional distress claims were barred by the applicable statute of limitations and failed to state facts sufficient to constitute a cognizable cause of action. The defendants continued to assert that it was improper for appellant to represent herself in propria persona. In her oppositions, appellant contended that no legal authority precluded a party identified as a successor in interest under Code of Civil Procedure section 377.32 from self-representation. She further contended the complaint was timely filed because the damage continued until Vassiliki's death on February 18, 2010, and the statute of limitations was tolled during Vassiliki's lifetime due to her lack of capacity. Appellant's oppositions included a perfunctory request for leave to amend, but identified no additional facts that she would allege should leave be granted.

The court sustained the demurrer of LB Memorial and Lewis to the elder abuse claim without leave to amend, stating in its order that "release of decedent into the care of [appellant's] brother Nick does not constitute elder abuse." The

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[13] THC and Dr. Nguyen also demurred and moved to strike the claims asserted against them, which included the second cause of action for elder abuse asserted in appellant's individual capacity against these defendants and Cates. THC observed that appellant, not being an elderly person herself, appeared to have no basis to assert a claim for elder abuse in her individual capacity. The court sustained TCH's and Dr. Nguyen's demurrers to the second cause of action for elder abuse in appellant's individual capacity, stating: "[Appellant] is not herself an elder and did not suffer abuse." Appellant does not contest that determination on appeal.

court further stated as to Lewis, "[n]o facts reflect that decedent was under this Defendant's care within the statutory meaning." With respect to the Holsteins' demurrer, the order stated only that it was sustained in its entirety without leave to amend, and that the Holsteins were to submit a judgment of dismissal for the court's signature. The court's order also stated that Cates and Bermudez were to submit judgments of dismissal. Judgments were entered and this appeal followed.[14]

DISCUSSION

A. *Standard of Review*

"On appeal from a judgment of dismissal entered after a general demurrer is sustained, our review is de novo. [Citation.] We examine the allegations of the complaint to determine whether it states a cause of action, and if not, we determine whether there is a reasonable possibility that it could be amended to do so. [Citation.] . . . '"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . " . . . [W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]'" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 525, quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"'If substantial facts which constitute a cause of action are averred in the complaint or can be inferred by reasonable intendment from the matters which are pleaded, although the allegations of these facts are intermingled with conclusions of law, the complaint is not subject to demurrer for insufficiency.'" (*Berkley v.*

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[14] Before filing the notice of appeal, appellant first moved ex parte for an order "correcting or revising" the court's order, essentially a motion for reconsideration. The motion was denied.

Dowds, *supra*, 152 Cal.App.4th at p. 525, quoting *Krug v. Meeham* (1952) 109 Cal.App.2d 274, 277.) "Further, 'we are not limited to [appellant's] theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory.'" (*Berkley v. Dowds*, *supra*, at p. 525, italics omitted, quoting *Barquis v. Merchants Collection Assn*. (1972) 7 Cal.3d 94, 103.) With these standards in mind, we review the allegations of the FAC to determine whether demurrers to the subject claims were properly sustained and whether each respondent was properly dismissed.

B. *LB Memorial and Lewis*

The sole cause of action naming LB Memorial and Lewis was the first for elder abuse. Appellant contends the FAC adequately asserted a claim for elder abuse against these respondents based on their having neglected and abandoned Vassiliki within the meaning of the governing statute. We disagree.

A claim of elder abuse arises under the Abuse of a Dependent Adult Act (Welf. & Inst. Code, § 15600 et seq.), often known as the "Elder Abuse Act."[15] "'The Elder Abuse Act makes certain enhanced remedies available to a plaintiff who proves abuse of an elder, i.e., a "person residing in this state, 65 years of age or older." (§ 15610.27.) In particular, a plaintiff who proves "by clear and convincing evidence" both that a defendant is liable for physical abuse, neglect or financial abuse (as these terms are defined in the Act) and that the defendant is

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[15] As this court noted in *Berkley v. Dowds*, this is something of a misnomer because the Act also applies to nonelderly dependent adults. (*Berkley v. Dowds*, *supra*, 152 Cal.App.4th at p. 529, fn. 10.) However, most cases under the Act, including this one, have involved the elderly. Accordingly, the statute will be referred to herein as the "Elder Abuse Act" or the "Act." Undesignated statutory references are to the Welfare and Institutions Code.

guilty of "recklessness, oppression, fraud, or malice" in the commission of such abuse may recover attorney fees and costs. (§ 15657, subd. (a).) On the same proof, a plaintiff who sues as the personal representative or successor in interest of a deceased elder is partially relieved of the limitation on damages imposed by Code of Civil Procedure section 377.34 and may recover damages for the decedent's predeath pain and suffering. (§ 15657, subd. (b).)'" (*Worsham v. O'Connor Hospital* (2014) 226 Cal.App.4th 331, 336, quoting *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 (*Carter*).)

Appellant's contention that she asserted a claim for abandonment or neglect under the Act is simply incorrect. Neglect as a form of abuse is defined under the Act as "[t]he 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." (§ 15610.57, subd. (a)(1).) The statute specifically includes within the definition of neglect "[f]ailure to assist in personal hygiene, or in the provision of food, clothing or shelter"; "[f]ailure to provide medical care for physical and mental health needs"; "[f]ailure to protect from health and safety hazards"; and "[f]ailure to prevent malnutrition or dehydration." (*Id*., subd. (b)(1)-(4); see *Delaney v. Baker* (1999) 20 Cal.4th 23, 34 ["'[N]eglect' . . . [refers to] the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults . . . to carry out their custodial obligations."].) "Abandonment" is defined as "the desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody." (§ 15610.05.)

It is clear from the allegations of the complaint that neither LB Memorial nor Lewis abandoned or neglected Vassiliki within the meaning of the Act. LB Memorial admitted her twice on an emergency basis and provided treatment for

her acute medical conditions. The FAC contains no indication that the medical care provided by LB Memorial was deficient in any manner or that Vassiliki was in need of acute medical assistance when LB Memorial discharged her and transferred her to the nursing facilities. By transferring Vassiliki to these facilities, LB Memorial entrusted her care to nursing facilities designed to address her chronic conditions. These acts do not constitute neglect or abandonment, or provide any other basis for a claim under the Elder Abuse Act. Moreover, as the trial court found, the allegations against Lewis were even weaker, as she was not alleged to have had custody of Vassiliki, nor to have been personally responsible for her care.

Appellant faults LB Memorial for failing to return Vassiliki to her home. As Nick was living in that home and was, according to the allegations of the FAC, abusing Vassiliki, firing caregivers and neglecting his mother's medical needs, LB Memorial's decision to transfer her to the nursing facilities after it concluded its treatment represented neither abandonment nor neglect, but rather assurance that she would receive proper post-hospitalization care. LB Memorial had no means of ousting Nick and installing the necessary caregivers in Vassiliki's home, and appellant does not claim that anyone in the home was capable of caring for Vassiliki in her allegedly "fragile condition," dealing with her "high risk for infection," or addressing her numerous medical conditions.

Appellant also apparently faults LB Memorial -- and Lewis -- for failing to take her side in her battle with her brother over how to properly care for their mother in her final days and the validity of his powers of attorney. She asserts that they were "reckless[]" in relying on Nick's general power of attorney even after she advised them of the alleged abuse, and that respondents wrongfully prevented her from making health care decisions for her mother. The FAC gave no indication that the medical care provided by LB Memorial would have been

different in any respect had respondents believed appellant and viewed Nick's documents with the suspicion appellant contends they deserved. As long as they provided appropriate medical care during Vassiliki's admission to LB Memorial and did nothing to endanger Vassiliki or place her at risk of abuse, neither LB Memorial nor Lewis was under an obligation to resolve the truth of appellant's allegations or assist her in her dispute with Nick. Accordingly, even if appellant could establish that LB Memorial's and/or Lewis's acquiescence in Nick's directives was reckless or in bad faith, the lack of any injury to Vassiliki while a patient at LB Memorial precluded assertion of an elder abuse claim on this basis. Appellant identifies no facts that could be added to the FAC to correct this claim's deficiencies as it related to LB Memorial and Lewis. Accordingly, the trial court did not err in sustaining their demurrer without leave to amend.

C. *Cates*

Appellant's primary objection to the court's dismissal of THC employee Cates is that she had neither demurred nor appeared at the time the court sustained the demurrers and issued the dismissal orders.[16] "The objection that a complaint does not state facts sufficient to constitute a cause of action may be raised at any stage of the proceedings and, even for the first time upon appeal." (*Horacek v. Smith* (1948) 33 Cal.2d 186, 191; accord, *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 283 [attack on the fundamental validity of a cause of action may be raised at any time].) As the court stated in *McAllister v. County of Monterey*, where the plaintiff complained that a "'procedurally improper'" second demurrer had been sustained: "[Plaintiff's] contention that the perceived

[16] It appears from the record that Cates had been improperly served at an out-of-date address, but that the court had yet to resolve her motion to quash.

irregularity caused the dismissal of his complaint and the attendant loss of his right to judicial review of his claims against the [defendant] misses the point. Those claims were not lost because of the procedures employed; rather, they were rejected because they lack substantive merit . . . ." (147 Cal.App.4th at p. 283.)

The demurring parties placed before the court the validity of the two causes of action naming themselves and Cates, giving the court both the opportunity and the obligation to resolve the viability of these claims. Cates was in a similar position to Lewis, in that she was an employee of a medical facility to which Vassiliki had been admitted, but had no obvious responsibility for Vassiliki's care or medical treatment. Appellant has been given ample opportunity in this appeal to explain the basis for the claim against Cates and persuade us the trial court erred in dismissing her. Accordingly, we address the merits of the claim against Cates despite the procedural irregularity.

In her brief, appellant repeats the conclusory language of the FAC that Cates was the "care custodian" of Vassiliki within the meaning of the Elder Abuse Act and a "managerial employee responsible for Vassiliki's care, welfare, protection and safe discharge," but provides no factual allegations to support these conclusions. Cates was specifically identified in the FAC as the THC facility's "social director," a position whose title conveys no obvious responsibility for medical decisions or patient care. Moreover, appellant claims Cates was in the "same boat" as LB Memorial and Lewis because she "followed direction[s] from [Nick]," but fails to identify what directions she followed that injured Vassiliki other than the decision to withhold dialysis, which was clearly in the hands of

Dr. Nguyen and other medical personnel.[17] Ultimately, it appears that Cates was named in the FAC not because she was responsible for Vassiliki's medical care, but because she was the person at the THC facility to whom appellant confided her allegations about Nick and, like Lewis, she failed to prevent Nick from exercising the control over Vassiliki's care granted him by the general power of attorney and the advance health care directive. Appellant's use of Cates as a sounding board did not transform her into a care custodian or managerial employee for purposes of an elder abuse claim. The trial court did not err in dismissing Cates.

D. *The Holsteins and Bermudez*

Appellant contends the allegations of the negligent and intentional infliction of emotional distress and fraud claims in the FAC were sufficient to state causes of action against the Holsteins and Bermudez.[18] After independent review, we find they were not.

1. *Emotional Distress Claims*

With respect to the claims for negligent and intentional infliction of emotional distress appellant asserted as successor in interest to her mother, these claims are barred by the rule that in an action or proceeding by a decedent's

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[17] The FAC specifically alleged that Dr. Nguyen made the decision regarding dialysis after consulting with the "case management team." It did not allege that Cates was a part of that team.

[18] Appellant also contends with respect to the Holsteins that their failure in their propria persona demurrer to specifically address the fraud claim or to state that their arguments were directed at all four of the emotional distress claims precluded the court from dismissing these respondents. With respect to Bermudez, appellant contends that his failure to demur should have precluded the court from dismissing him. As discussed, we may address for the first time on appeal whether appellant asserted cognizable claims, despite any procedural irregularities in the trial court.

personal representative or successor in interest on the decedent's cause of action, damages for the decedent's pain, suffering and emotional distress are not recoverable. (Code Civ. Proc., § 377.34; *The MEGA Life and Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1532-1533; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1142 [discussing Code of Civil Procedure section 377.34's predecessor statute, former Probate Code section 573; see *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 779-780.)

With respect to the emotional distress claims asserted in appellant's individual capacity, it is apparent on the face of the FAC that these claims were barred by the applicable two-year statute of limitations. (See Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) The FAC contended these respondents' wrongful acts occurred in May 2009 and again in January 2010, when they signed documents attesting under oath that they had witnessed Vassiliki sign the general power of attorney naming Nick conservator and the advance health care directive naming Nick her health care representative. Thus, the statute of limitations accrued more than two years prior to the filing of the complaint on February 21, 2012. (See *Brisbane Lodging, L.P. v. Webcor Builders, Inc*. (2013) 216 Cal.App.4th 1249, 1257 ["Generally, in both tort and contract actions, the statute of limitations 'begins to run upon the occurrence of the last element essential to the cause of action.' [Citation.] 'The cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and the obligation or liability arises . . . .' [Citation.]"].)

The statute of limitations may be tolled where the plaintiff does not immediately discover or suspect that wrongdoing has occurred. (*Brisbane Lodging, L.P. v. Webcor Builders, Inc*., *supra*, at p. 1257.) But a plaintiff is """under a duty to reasonably investigate."""" (*Ibid*.) """[A] *suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause, will commence

the limitations period,"'" and "'"'those failing to act with reasonable dispatch will be barred."'" (*Ibid.*) Appellant may not have been immediately aware that her mother had signed the powers of attorney naming Nick her conservator and health care representative. According to the allegations of the FAC, however, as early as November 2009, appellant believed -- and attempted to convince others -- that Nick did not have legal authority to control their mother's health care, and that she either had not signed or lacked the capacity to sign the general power of attorney held by Nick. The FAC also specifically alleged that on January 15, 2010, when the prospect of the dialysis treatment arose, the THC defendants and Dr. Nguyen "knew or should have known, that on the date Nick's power of attorney was purportedly signed by [Vassiliki], that [Vassiliki] did not have the capacity to sign documents of such import," and that the advance health care directive produced by Nick in January 2010 was "backdate[d]" and "fraudulent." Having a superior understanding of the situation and the facts surrounding her mother's circumstances, appellant is equally charged with knowledge or suspicion that the documents were fraudulent.[19] Yet she did not file suit against the Holsteins or Bermudez for more than two years.

Appellant contended below and contends on appeal that the complaint was timely because the damage continued until Vassiliki's death on February 18, 2012. In some circumstances, the statute of limitations may be tolled by continuing *misconduct*. (See *Dominguez v. Washing Mutual Bank* (2008) 168 Cal.App.4th 714, 721 ["A continuing violation exists if . . . the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period

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[19] Indeed, appellant alleged that she consulted an attorney and went to court on January 22, 2010 to assert the invalidity of Nick's powers and her superior right to control their mother's health care decisions.

. . . .") It is not tolled by continuing *damage*; the statute commences to run upon the initial occurrence of "'"appreciable and actual harm, however uncertain in amount."'" (*Van Dyke v. Dunker & Aced* (1996) 46 Cal.App.4th 446, 452, quoting *City of San Diego v. U.S. Gypsum Co*. (1994) 30 Cal.App.4th 575, 582.) According to the FAC, appellant suffered significant emotional distress in July 2009 and again in November 2009. She was aware of the reason: the allegedly fraudulent general power of attorney and advance health care directive which were being used by Nick to control medical decisions for their mother. Her claim for negligent and intentional infliction of emotional distress filed in February 2012 was thus untimely.[20]

2. *Fraud Claim*

Appellant's fraud claim is based on the allegations that the Holsteins and Bermudez falsely attested that they had observed Vassiliki sign the general power of attorney and advance health care directive, and that she appeared to be of sound mind at the time. Put simply, she claims that these respondents committed perjury. A civil action for damages for injuries arising from perjury has never been

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[20] Because we conclude the emotional distress claims were barred by Code of Civil Procedure 377.34 and the statute of limitations, we do not address whether assisting in the procurement of a fraudulent general power of attorney or advance health care directive which leads to exploitation of, or injury to, an elderly person or dependent adult is sufficiently outrageous conduct to support a claim for intentional infliction of emotional distress. With respect to the negligent infliction of emotional distress claim, we note that a bystander attempting to assert a claim for emotional distress suffered in observing injury to another "may recover only for the emotional distress suffered as a result of plaintiff's presence at the injury-producing event and the contemporaneous awareness that the injury was being suffered." (*Campanano v. California Medical Center* (1995) 38 Cal.App.4th 1322, 1328-1329.) Appellant was not present when respondents signed the general power of attorney or advance health care directive, and the injury that allegedly resulted was not contemporaneous, but occurred long after the documents were signed.

recognized in California. (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1429 ["There is no civil cause of action for 'perjury.'"]; *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 915 ["[I]njurious perjury and suborning such perjury cannot be the basis of a civil action."]; *Legg v. Ford* (1960) 185 Cal.App.2d 534, 542-543 ["Subornation of perjury, being a crime and not a tort, is subject to criminal prosecution brought in the interest of the state and not to redress a private wrong."]; *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 765 ["[O]ne who by perjury has injured another is not answerable civilly . . . ."]; *Ting v. U.S.* (9th Cir. 1991) 927 F.2d 1504, 1515 [plaintiff, victim of a police shooting, could state no claim based on allegedly false reports of his shooting made by police officers]; *Hupp v. City of Beaumont* (C.D. Cal. Dec. 12, 2011, Case No. EDCV 11-TH-VAP (SP)) [2011 U.S. Dist. LEXIS 151709, *8-10] [allegedly false statement in traffic citation signed under penalty of perjury that plaintiff's license place could not be read not actionable].)

Appellant's attempt to recast a prohibited civil perjury claim as a claim of fraud is unavailing. Fraud as a tort requires multiple elements, including the plaintiff's detrimental reliance on false or fraudulent misrepresentations. (*Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 783 [no fraud claim stated when no allegations explaining how plaintiff relied on misrepresentations].) Here, appellant claims that respondents relied on the general power of attorney and advance health care directive purportedly executed by Vassiliki. There is nothing in the FAC to suggest that either appellant or Vassiliki relied on these documents. To the contrary, appellant alleged she was suspicious of the documents from the beginning and demanded that they be disregarded. As the court stated in *Carter, supra,* 198 Cal.App.4th 409, where the plaintiffs alleged that the defendant hospital "'fraudulently' documented the infusion of antibiotics and the stocking of the crash cart": "[P]laintiffs did not allege in the first amended

complaint, and they do not explain on appeal, how [their deceased father] relied to his detriment on such fraudulent documentation. Although neglect that is fraudulent may be sufficient to trigger the enhanced remedies available under the Elder Abuse Act [citations], without detrimental reliance, there is no fraud [citations]." Because appellant's fraud claim was clearly deficient on its face, the court did not err in dismissing it.[21]

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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[21] Appellant asserts in her brief that the court erred in granting respondents' motions to strike her punitive damage claims. The court did not resolve respondents' motions to strike, but instead deemed them moot because all the claims against respondents were resolved by the court's order sustaining the demurrers. As we affirm the court's order, we likewise need not address any issues pertaining to the motions to strike.