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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JACQUELINE KIRBY, Plaintiff and Appellant, v. PRIME HEALTHCARE CENTINELA LLC, et al., Defendants and Respondents.	B228909 (Los Angeles County Super. Ct. No. BC419576)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cary H. Nishimoto, Judge. Affirmed.

Lisa Fisher and Marilyn M. Smith for Plaintiff and Appellant.

Carroll, Kelly, Trotter, Franzen & McKenna, David P. Pruett and Brenda M. Ligorsky for Defendant and Respondent Prime Healthcare Centinela LLC, doing business as Centinela Hospital Medical Center.

Fonda & Fraser, LLP, Stephen C. Fraser, Craig Donahue and Daniel K. Dik for Defendant and Respondent Dat Q. Nguyen, M.D.

Appellant Jacqueline Kirby appeals from the judgment of dismissal entered upon the trial court's order sustaining the demurrers without leave to amend to appellant's causes of action for defamation, and negligent and intentional infliction of emotional distress asserted against respondents Centinela Hospital Medical Center,[1] Dr. Dat Nguyen and other doctors. Appellant alleged that she suffered injuries based on respondents' inadequate medical care given to appellant's adult-dependent daughter as well as the improper discharge from the hospital of appellant's daughter. She also maintains that respondents defamed her when they made statements and reports about appellant's caretaking of her daughter. The trial court sustained the demurrers without leave to amend, finding among other things that respondents were immune from liability for statements they allegedly made about appellant's caregiving to her daughter and that appellant did not allege facts supporting any viable theory of liability for intentional or negligent infliction of emotional distress. Before this court, appellant argues the lower court erred in dismissing her claims. As we shall explain, respondents were entitled to immunity for any reports they made about appellant's daughter's condition prior to her admission to the hospital, as well as appellant's conduct as a caretaker. Furthermore, appellant has not pled sufficient facts to show that she is entitled to relief for emotional distress she suffered as a result of respondents' conduct towards her daughter, nor does it appear that affording appellant an opportunity to amend could cure the defects in her causes of action. Accordingly, we affirm the judgment.

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[1] Appellant has alleged that Prime Health Care Services, Inc. is the parent company of Prime Healthcare Centinela LLC which does business as Centinela Hospital Medical Center.

FACTUAL AND PROCEDURAL BACKGROUND[2]

The parties. Appellant is the mother of Erika Richardson,[3] who is in her early 30s and suffers from a serious seizure disorder that has caused brain and neurological damage. Richardson has a limited ability to communicate and cannot live independently. Since age 12 when she first experienced these physical and mental impairments, Richardson has required assistance to conduct all of her activities of daily living, and appellant has been caring for her in appellant's home. According to the complaint, Richardson is a "dependent adult" within the meaning of the Welfare and Institutions Code section 15610.23. Over the years, Richardson has received services from the Western Regional Center ("Regional Center").

Appellant is the caretaker for Richardson, and brought this action as Richardson's guardian ad litem.

Respondents are medical and health care providers—Centinela Hospital Medical Center ("Centinela"), and one of the physicians, Dr. Dat Nguyen, who along with other doctors,[4] allegedly treated Richardson during her stay in Centinela in early 2008.

Facts Giving Rise to the Action. On February 21, 2008, Richardson experienced breathing problems. Suspecting that Richardson might be developing pneumonia, appellant arranged to have her daughter taken by ambulance for treatment to Centinela. Appellant alleged that when she arrived at Centinela and during her hospitalization there, Richardson received substandard medical treatment, including that Richardson was left unattended for extended and improper periods of time, that her condition was not

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2 The facts described are taken from the allegations in appellant's first amended complaint.

3 Although Richardson is a plaintiff in the underlying complaint, she is not a party to the appeal.

4 The other physicians named in the complaint as defendants are Paryus B. Patel, James E. Raus and David Kheradyar. None of these individuals are parties to this appeal.

properly assessed, and that she did not receive appropriate medicine or nursing services. Richardson was apparently "restrained" to her hospital bed using wrist ties without using proper and necessary precautions, and her treatment did not take into account her limited ability to communicate and her seizure disorder. Her condition and method of being restrained put her at risk of developing infections and decubitus ulcers (bedsores) on her body. Richardson had no "monitor" or "sitter" to determine when Richardson needed to be turned or moved on the bed. The complaint alleges that the hospital and doctors failed to monitor Richardson's condition during her hospitalization, notwithstanding their knowledge of her various impairments, which resulted in her suffering frequent and uncontrolled seizures and to develop a serious bedsore on her lower back during her stay at the hospital. While at Centinela, "lung surgery" was performed on Richardson and at some point she was moved to the intensive care unit.

The complaint further alleges that respondents failed to inform appellant that Richardson was suffering from a bedsore and other ailments and concealed both the consequences of keeping Richardson in a restrained position and the fact that she was not receiving adequate nursing care at Centinela. In addition, appellant claims she was not informed that Richardson would be discharged from the hospital.

Appellant was "shocked and dismayed" when on April 11, 2008, an ambulance arrived at her house and "dumped" Richardson, without any discharge documents, aftercare instructions, or other information about her daughter's medical condition. According to the complaint, when Richardson arrived at appellant's home she was "in a dirty hospital gown, without underwear, and without a diaper on, a towel was wrapped between her legs, the bandage was soiled, a dirty sheet was used to lift her from the gurney, and her back and skin had feces on it." In addition, an "in-dwelling" catheter had not been removed from Richardson. At the time of her discharge, Richardson continued to suffer from the effects of pneumonia and unbeknownst to appellant, Richardson had developed a "Stage IV" bedsore on her back. When appellant asked the ambulance driver for the discharge documents and aftercare instructions, he apparently stated that he had not been provided with them by the hospital. Appellant claims respondents did not

provide any information about how to treat Richardson's conditions, and for several days after Richardson's discharge, respondents did not respond to appellant's telephone calls. Appellant "was forced to undertake immediate care" of Richardson; she contacted a pharmacy to obtain appropriate pads to prevent further infection of the bedsore. Subsequently, Richardson was sent to another hospital for additional treatment and aftercare.

Thereafter, according to the complaint, respondents "published" false information in Richardson's hospital records and altered medical records to indicate that Richardson suffered from the bedsore on her back prior to her admission to Centinela. Respondents also allegedly conveyed this information to the Regional Center and filed a false claim with the Los Angeles County Adult Protective Services asserting the allegation that appellant had mistreated and neglected Richardson, causing her to develop the bedsore. These allegations led to an investigation of appellant's home. Richardson was removed from appellant's home and placed in a care facility and appellant was allowed only limited access to her daughter. The Regional Center also filed a petition to obtain conservatorship of Richardson. In June 2008, appellant objected to the proceedings, and endeavored to regain custody of her daughter. In October 2008, appellant was appointed "the Limited Conservator of Richardson."

Litigation. On August 11, 2009, appellant filed a complaint against respondents and other doctors from Centinela as guardian ad litem on behalf of Richardson and for appellant's individual claims based on Richardson's care and discharge from the hospital, as well as the allegedly false statements made about appellant's neglect of Richardson. The original complaint asserted numerous causes of action for Richardson, including dependent adult abuse, breach of fiduciary duties, professional negligence, emotional distress, and negligence. Appellant alleged claims on her own behalf for negligent and intentional inflection of emotional distress and defamation.

Respondents and the other named defendants filed demurrers to the complaint. The court sustained the demurrers with leave to amend.

On March 25, 2010, appellant, on behalf of Richardson and herself, filed a first amended complaint. Causes of action one, two and three asserted Richardson's individual claims for dependent adult abuse, intentional infliction of emotional distress and negligence. These claims centered on Richardson's treatment while at Centinela and the circumstances and her condition when she was discharged from the hospital. Causes of action four through six contained appellant's individual claims for defamation, negligence infliction of emotional distress and intentional infliction of emotional distress.[5] As in the original complaint, the defamation cause of action was based on the allegedly false medical records and defamatory reports made to the Regional Center and protective services about appellant's treatment of Richardson in appellant's home prior to Richardson's hospitalization—in particular the claim that Richardson had already developed the bedsore prior to being admitted to Centinela. The emotional distress allegations were based on appellant's emotional injuries she suffered upon seeing the condition of her daughter when she was "dumped" at her home on April 11, 2008, and based on the respondents' defamatory statements made about appellant.

Doctors Kheradyar and Rau filed demurrers to the complaint on April 12, 2010.[6] On April 23, 2010, Dr. Patel filed his demurrer.[7] On April 26, 2010, Centinela filed its demurrer. Respondent Nguyen filed his demurrer on April 28, 2010. The court set the matter for hearing on June 1, 2010.

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[5] The complaint also alleged two new causes of action for "willful misconduct" and fraud. Respondents moved to strike these new claims because they were not part of the original pleadings and appellant had not been given leave to amend to add them. The lower court subsequently granted the motion to strike these claims and appellant has not appealed from the order striking these causes of action.

[6] Based on a stipulation of the parties, Doctors Kheradyar and Rau were dismissed from the action.

[7] Subsequent to the demurrer proceedings, the court granted Dr. Patel's motion for summary judgment on the claims asserted by Richardson.

Respondents argued that the complaint was uncertain and failed to state claims upon which relief could be granted. Specifically, as to the defamation claim they argued as mandatory abuse reporters pursuant to statute they were entitled to civil immunity under the Welfare and Institutions Code, immunity under Civil Code section 47, and the Penal Code. They also claimed that the one-year statute of limitations on the defamation claim had expired because appellant was aware of the purported false statements as early as June 2008 when she objected to the Regional Center's conservatorship petition.[8] As to the negligent inflection of emotional distress claim filed by appellant, respondents asserted that appellant was not entitled to relief because she was not a "direct victim" of the respondent's conduct and could not satisfy the requirements as a "bystander" to the conduct. In addition, they argued that the intentional infliction claim failed because of the immunities that applied to the defamation cause of action and because appellant had not alleged that the acts of "dumping" her daughter were intentionally directed at appellant.

In response to the demurrers, appellant objected to the timeliness of the demurrers and objected to the request for judicial notice.

On June 7, 2010, the court issued its ruling. The court overruled the demurrers as to the three causes of action filed on behalf of Richardson. Nonetheless, the court sustained the demurrers without leave to amend on the individual claims filed by appellant. As to the defamation claim, the court concluded that respondents were immune from liability for reporting suspected abuse under Welfare and Institutions Code section 15634; that the statements were privileged under Civil Code section 47, subdivision (c) and the claims were time barred under Code of Civil Procedure section

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[8] Centinela filed a request for judicial notice that included documents from Richardson's conservatorship case. In appellant's objections to the conservatorship petition, appellant included several statements that respondents claim demonstrated that appellant was aware of the defamatory statements (she had attributed to respondents) as early as June 2008.

340.[9] The court also granted the request for judicial notice. The court sustained the demurrers as to the negligent infliction of emotional distress cause of action, concluding that appellant had failed to alleged facts supporting a bystander theory of liability because she was not present during the injury producing event, was not aware of the negligence at the time it occurred and/or did not know it was causing injury to her daughter. The court dismissed the intentional infliction of emotional distress claim because of the immunities that applied to the defamation claim, and because appellant could not allege that the intentional conduct was directed at her. The court subsequently entered an order dismissing appellant's causes of action.

Appellant filed a timely notice of appeal.

DISCUSSION

I. Timeliness of the Demurrers

Before assessing the underlying merits, we first address the issue of timeliness of the demurrers. In a footnote in her opening brief, appellant asserts that the lower court should have rejected respondents' demurrers out of hand because they were filed more than 30 days after she filed the first amended complaint, and thus under Code of Civil Procedure section 430.40 were untimely filed. The lower court did not expressly rule on appellant's timeliness objection, but implicitly rejected it when the court decided the merits of the demurrers. The court did not err.

Appellant filed the first amended complaint on March 25, 2010, and the same day served it by mail, facsimile and overnight mail. Pursuant to Code of Civil Procedure section 1013, service by mail extended the time to respond by five calendar days, while service by facsimile and overnight mail extended the time to respond by two court days. Given these timeframes, respondents had at least until April 26, 2010, to file their

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[9] The court rejected the respondents argument that Penal Code section 11160 immunity applied, concluding that "Penal Code section 11160 et seq. is vague and uncertain in its application according to its terms. . . . This issue is properly the subject of a motion for summary judgment."

respective demurrers. Consequently, respondent Centinela's demurrer, filed on April 26, 2010, was timely filed.

Respondent Dr. Nguyen filed his demurrer on April 28, 2010. Although respondent Dr. Nguyen filed his demurrer a few days after the time to respond expired under Code of Civil Procedure section 430.40, the lower court nonetheless had discretion to consider it. (See *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 749 [court has discretion to consider an untimely demurrer]; *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 280 [concluding that the language regarding the time to respond to a complaint set forth in Code of Civil Procedure section 430.40 is not mandatory, especially with respect to the time limit for demurring to an amended complaint].) In view of the fact this case involved multiple defendants, nearly all of whom had filed timely demurrers, that this was the second round of demurrers filed in the case, and because appellant has not demonstrated that Dr. Nguyen's late demurrer limited her opportunity to respond or otherwise caused her to suffer prejudice, we conclude that the court did not abuse its discretion when it considered respondent Dr. Nguyen's demurrer on the merits.

II. The Court Properly Sustained the Demurrers to Appellant's Causes of Action Without Leave to Amend

Before this court, appellant asserts that the lower court erred in sustaining the demurrers to her individual claims asserted in the complaint. As we shall explain, we disagree.

A demurrer tests the sufficiency of the plaintiff's claims as a matter of law. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.) We review de novo the ruling on the demurrer, exercising our independent judgment to determine whether a cause of action has been stated. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the

complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "We do not, however, assume the truth of the legal contentions, deductions or conclusions; questions of law, such as the interpretation of a statute, are reviewed de novo." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373.) In addition, if a complaint on its face alleges facts amounting to an affirmative defense of absolute privilege a demurrer to it is properly sustained. (*Halvorsen v. Aramark Uniform Services, Inc*. (1998) 65 Cal.App.4th 1383, 1393, 1396.) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. If no liability exists as a matter of law, we must affirm the judgment. (*Traders Sports, Inc. v. City of San Leandro*, *supra*, 93 Cal.App.4th at pp. 43-44.) Appellant bears the burden of proving the trial court erred in sustaining the demurrer. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)[10] With these principles in mind, we turn to the appellant's individual causes of action.

A. Defamation Claim

In the first amended complaint appellant alleged the following facts to support her defamation cause of action. She claimed respondents (and the other doctors named in the complaint), which she collective referred to as the "Hospital Defendants," "published in Richardson's medical records the false statement that she was admitted to the hospital with a decubitus ulcer."[11] She further alleged that respondents filed a false report with

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[10] We typically apply the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318*; Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) Because appellant has not suggested on appeal how she might amend her complaint to state a valid cause of action, we will consider only the causes of action against respondent as pled. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint"].)

[11] The publication of the defamatory statements in Richardson's medical records is linked to respondents reporting the alleged abuse to public authorities. Specifically,

Los Angeles County Adult Protective Services claiming that appellant "caused and/or neglected Richardson allowing the formation of the decubitus ulcer," and that they also conveyed that information to the Regional Center.[12]

Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage. (Civ. Code, §§ 45, 46; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the "public" at large; communication to a single individual is sufficient. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 306; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 471, 476, pp. 557-558, 560-561.) Reprinting or recirculating a libelous writing has the same

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appellant alleged: "[t]he false representations of Hospital Defendants were communicated to and seen and read by all persons to whom Richardson's medical records were provided, including to Westside Regional Center, Adult Protective Services and court personnel in connection with the limited conservatorship action initiated by the Westside Regional Center." Appellant has not alleged or otherwise identified how "publishing" statements in Richardson's "medical records" was harmful outside the context of respondents allegedly providing those records and other information to the Regional Center, the Los Angeles County Adult Protective Services and in conservatorship proceedings. In fact, the injuries appellant alleged arising from this defamatory conduct are: the removal of Richardson from appellant's home; the investigation of appellant's treatment of her daughter; and the costs appellant incurred in connection with her efforts to gain custody of her daughter in the subsequent conservatorship proceedings. She has not alleged any distinct injuries resulting from the publication of the alleged false statement in the medical records apart from those damages arising from the other defamatory conduct. Nor, has she suggested on appeal how that conduct would be separately actionable if given the opportunity to amend. Consequently, the conduct—publishing the alleged defamatory statement in Richardson's medical records—is analyzed here as part and parcel of the other defamatory actions alleged in the complaint.

[12] She further alleged that she was unaware that respondents had disclosed and published the false information until October 2008 when the evidence of their conduct was produced in connection with the conservatorship proceedings.

effect as an original publication. (*Gilman v. McClatchy* (1896) 111 Cal. 606, 612 [44 P. 241]; Rest.2d Torts, §§ 576, 578; 5 Witkin, Summary of Cal. Law, *supra*, Torts, § 478, pp. 562-563.)

Below and before this court, respondents argue, inter alia, that they are immune from civil liability for the alleged defamatory statements under the Welfare and Institutions Code section 15634. We agree.

The Elder Abuse and Dependent Adult Civil Protection Act (the "Act") codified at section 15600 et seq. of the Welfare and Institutions Code is the Legislature's response to the problem of unreported elder (and adult dependent) abuse. (*Easton v. Sutter Coast Hosp.* (2000) 80 Cal.App.4th 485, 490-492; see *People v. Heitzman* (1994) 9 Cal.4th 189, 201-203 [construing Pen. Code § 368, subd. (a), which imposes criminal sanctions for elder abuse]; *ARA Living Centers-Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1559.) The statutory scheme set out in the Welfare and Institutions Code follows the statutory model for child abuse by mandating that health care providers report suspected elder abuse and immunizing from civil liability those who are required to make such reports. (Welf. & Inst. Code § 15634, subd. (a)[13]; see *People v. Heitzman, supra*, 9 Cal.4th at p. 202.)

The Act is intended to encourage reporting of abuse or neglect. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) Under Welfare and Institutions Code former section 15630, subdivision (a), "Any elder or dependent adult care custodian, health practitioner . . . is a

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[13] Section 15634 provides in pertinent part: "No care custodian, clergy member, health practitioner, mandated reporter of suspected financial abuse of an elder or dependent adult, or employee of an adult protective services agency or a local law enforcement agency who reports a known or suspected instance of abuse of an elder or dependent adult shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of abuse of an elder or dependent adult shall not incur civil or criminal liability as a result of any report authorized by this article, unless it can be proven that a false report was made and the person knew that the report was false. . . ." (§ 15634, subd. (a).)

mandated reporter."[14] (Added by Stats. 1994, ch. 594, § 7.) A "mandated reporter, who, in his or her professional capacity, or within the scope of his or her employment, has observed an incident that reasonably appears to be physical abuse, . . . or is told by an elder . . . that he or she has experienced . . . physical abuse shall report the known or suspected instance of abuse by telephone immediately or as soon as possible, and by written report sent within two working days. . . ." (Former § 15630, subd. (b), added by Stats. 1994, ch. 594, § 7.) "Health practitioner" is defined to include physicians, licensed nurses, and "any emergency medical technician I or II" or paramedic. (Welf. & Inst. Code, former § 15610.37, added by Stats. 1994, ch. 594, § 3.)

In addition, for mandated reporters, the privilege created by Welfare and Institutions Code section 15634 is absolute rather than qualified. The language of Welfare and Institutions Code section 15634 distinguishes between mandated reporters of abuse who make required or authorized reports and nonmandated reporters. As to those who must report, the rule is sweeping in its breadth – no health practitioner who reports shall be civilly liable for any report. However, the section goes on to create only a qualified privilege for "[a]ny other person reporting." Such nonmandated reporters "shall not incur civil or criminal liability as a result of any report authorized by this article, unless it can be proven that a false report was made and the person knew that the report was false." (Welf. & Inst. Code, § 15634, subd. (a).) The plain meaning of the statutory language is that for mandated reporters the truth or falsity of the report is of no moment – the privilege is absolute. (*Easton v. Sutter Coast Hosp., supra,* 80 Cal.App.4th at pp. 491-492.)

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[14] Section 15630, subd. (a) provides: "Any person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not he or she receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, clergy member, or employee of a county adult protective services agency or a local law enforcement agency, is a mandated reporter." (§ 15630, subd. (a).)

Here, appellant does not seriously dispute that that respondents – a hospital and treating doctor – qualify as health practitioners who are "mandated reporters" under the Act. But even if she did make such an argument, it would fail. The respondents are within that group of health care providers immunized from civil liability "as a result of any report required or authorized by this article." (See Welf. & Inst. Code, § 15630, subd. (a).)

The only issue remaining is whether the entity to which respondents made the reports at issue – the Regional Center and the Los Angeles County Adult Protective Services – are the proper entities under the Act to receive such reports. Under the Act the Los Angeles County Adult Protective Services is as an agency to whom reports of abuse can be made under the Act. (See Welf. & Inst. Code, § 15600, subd. (i) ["it is the intent of the Legislature in enacting this chapter to provide that *adult protective services agencies*, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports . . . or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety."])

We reached the same conclusion here with respect to the Regional Center where Richardson had previously received services. We do not agree with the suggestion in appellant's brief that the Regional Center has no mandated role, duty or interest in treating and protecting its developmentally disabled clients from suspected abuse and neglect or the implication in appellant's brief that the Regional Center is not a proper entity to receive or investigate such reports. First, the Regional Center is a "mandated reporter" under the Act. (See Welf. & Inst. Code, §§ 15630, 15601,[15] 15610.17, subd.

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15 The stated purpose of the Act is to "[r]equire health practitioners, *care custodians*, clergy members, and employees of county adult protective services agencies and local law enforcement agencies to report known or suspected cases of abuse of elders and

(o).)[16] In addition, as respondents point out, pursuant to statute the State Department of Developmental Services (SDDS) has "jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons." (Welf. & Inst. Code § 4416.) Under Welfare and Institutions Code section 15650, SDDS "shall conduct or assist in, or both, the investigation of reports of abuse of elder and dependent adults within their jurisdiction in conjunction with county adult protective services, local ombudsman programs and local law enforcement agencies." (Welf. & Inst. Code § 15650, subd. (d).) The Regional Center, established and regulated by the SDDS, carries out SDDS's statutory mandate for care, custody, and treatment of developmentally disabled persons by providing a variety of mental and physical health and educational support services, including the assessment, treatment and protection of developmentally disabled individuals in the local communities in which the centers operate. In light of the intent of the Act to encourage reporting suspected abuse and the protection of vulnerable individuals, and by virtue of the Regional Center's services it provides under the legal auspices of the SDDS, in our view, the Regional Center qualifies as an entity that may receive reports of abuse to its developmentally disabled clients, such as Richardson.

Consequently, in our view, respondents are absolutely immune from civil liability under Welfare and Institutions Code section 15634 based on the allegedly defamatory reports and information alleged in the first amended complaint provided by respondents to both the Regional Center and the Los Angeles County Adult Protective Services. In

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dependent adults and to encourage community members in general to do so." (Emphasis added.)

[16] "'Care custodian' means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff: . . . [¶¶] (o) Regional centers for persons with developmental disabilities."

view of this immunity, we conclude the court properly sustained the demurrer to appellant's individual defamation claim. [17]

B. Negligent Infliction of Emotional Distress

In the first amended complaint appellant alleged the following facts to support the cause of action for negligent infliction of emotional distress ("NIED"). She claimed that she was present when Richardson was "dumped" at appellant's home by an ambulance, without any discharge documents, aftercare instructions, or other information on Richardson's medical condition. According to the first amended complaint, when Richardson arrived at appellant's home she was "with an in-dwelling catheter attached, in a dirty hospital gown, without underwear, and without a diaper on, a towel was wrapped between her legs, the bandage was soiled, a dirty sheet was used to lift her from the gurney, and her back and skin had feces on it." Appellant further alleged that she also "discovered for the first time that her daughter has a serious, infected bedsore in her back which was not properly treated."[18] Appellant alleged that these circumstances caused her extreme emotional distress: appellant "was seriously panicked by seeing her daughter in that condition, not being able to contact the doctor, and not knowing how to treat the bedsore which was concealed from her by the Hospital Defendants."

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[17] Given this conclusion, we do not decide the merits of the other potential basis respondents assert to sustain the demurrer, namely, immunity under Penal Code sections 11160, 11161.8, 11161.9 and Civil Code section 47, subdivisions (b) and (c); or whether, the court properly granted judicial notice of certain documents from the conservatorship proceeding, and thereafter properly concluded that the statute of limitations—Code of Civil Procedure section 340, subdivision (c)—served to bar the defamation cause of action.

[18] In the common allegations in the first amended complaint, appellant pled that Richardson developed the bedsore on her lower back while she was in the hospital—"while a patient at Centinela . . . Richardson developed a decubitus ulcer (bedsore) above tailbone. . . ." Appellant also alleged the Hospital defendants failed to communicate with her regarding the "development of the bedsore," and thus appellant was unaware that Richardson had developed the bedsore until she was sent to appellant's home.

Negligent infliction of emotional distress is not an independent tort; it is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. (*Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 126; *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.) When emotional distress is the only injury plaintiff alleges, the courts have determined whether plaintiff can recover through the determination of whether a defendant owes a duty to the plaintiff.[19] (*Ess v. Eskaton Properties, Inc., supra*, 97 Cal.App.4th at p. 126.) The duty issue is a question of law for the court rather than the jury to resolve. (*Ibid.*)

In determining "duty" in NIED cases, California courts typically analyze the issue by reference to two theories of recovery: the "bystander" theory and the "direct victim" theory. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1071.) The distinction between the bystander and direct victim cases is found in the source of the duty owed by the defendant to the plaintiff.

The bystander cases address the question of duty in circumstances in which a plaintiff seeks to recover damages as a percipient witness to the injury of another. Bystander liability is premised upon a defendant's violation of a duty not to negligently

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[19] In this context, duty is the expression of the sum total of the considerations of policy that lead the court to conclude whether a particular plaintiff may maintain a cause of action. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) The major considerations include the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) Foreseeability of harm is a significant consideration in the duty analysis. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6.) However, with respect to negligent infliction of emotional distress, our Supreme Court has held that foreseeability of harm alone is not a useful guideline or meaningful restriction on the scope of the action. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 663-664; see also *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074.)

cause emotional distress to people who observe conduct which causes harm to another. (*Burgess v. Superior Court, supra,* 2 Cal.4th at pp. 1072-1073.)

"In contrast, the label 'direct victim' arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is 'assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.' [Citation.] In these cases, the limits set forth [above] have no direct application. [Citations.] Rather, well-settled principles of negligence are invoked to determine whether all elements of a cause of action, including duty, are present in a given case." (*Burgess v. Superior Court, supra,* 2 Cal.4th at p. 1073.)

Here appellant's complaint clearly alleges NIED under the bystander theory of liability. Specifically, appellant pled that she suffered emotional harm when she "saw" her daughter's condition at the time the ambulance dropped Richardson off at appellant's home. Less certain based on the allegations of the first amended complaint, however, is whether appellant also asserts liability under the direct victim theory. Before this court appellant maintains that she is arguing for liability under either theory. Consequently, we examine whether appellant can maintain a claim under both theories.

1. The Bystander Theory

The lower court concluded appellant had failed to allege sufficient facts supporting a bystander theory of liability because she was not present during the injury producing event, was not aware of the negligence at the time it occurred and/or did not know it was causing injury to her daughter. As we shall explain, we agree.

In *Thing v. La Chusa, supra,* 48 Cal.3d 644 (*Thing*), the California Supreme Court set out three mandatory requirements that claims for NIED must satisfy to be accepted as valid: "that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the

time it occurs and is then aware that it is causing injury to the victim;[20] and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (*Thing, supra*, at pp. 667-668, fns. omitted.) Applying the bystander requirements to the facts in *Thing*, the Court held that the plaintiff as a matter of law could not state a claim for NIED. The plaintiff mother had been nearby when the defendant's automobile struck and injured her minor child, but the plaintiff had not seen or heard the accident; instead, she became aware of it only when someone told her it had occurred and she rushed to the scene and saw her child lying injured and unconscious on the road. Under these facts, the plaintiff could not satisfy the requirement of having been present at the scene of the injury-producing event at the time it occurred and of having then been aware that it was causing injury to the victim. The *Thing* Court reinforced its conclusion by disapproving the suggestion in prior cases that a negligent actor is liable to all those persons "who may have suffered emotional distress on viewing or learning about the injurious consequences

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[20] *Bird v. Saenz* (2002) 28 Cal.4th 910, is instructive on the application of the bystander requirement that plaintiff be contemporaneously *aware* of the injury producing event. Plaintiffs in *Bird* were the adult daughters of decedent, who was a cancer patient. During a simple surgical procedure to insert a venous catheter to facilitate chemotherapy, one of decedent's arteries was nicked, causing internal bleeding and necessitating major surgery. In concluding that decedent's daughters did not have a cause of action for negligent infliction of emotional distress, the court rejected the daughters' argument that the injury producing event was the defendants' failure to diagnose and treat their mother's damaged artery, in that the daughters, at the time, did not know there had been a failure to treat the damaged artery. The court explained: "The problem with defining the injury-producing event as defendants' failure to diagnose and treat the damaged artery is that plaintiffs could not meaningfully have perceived any such failure. Except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders . . . . Even if plaintiffs believed, as they stated in their declarations, that their mother was bleeding to death, they had no reason to know that the care she was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event – the transected artery – had occurred, they had no basis for believing that another, subtler event was occurring in its wake." (*Bird v. Saenz*, *supra*, 28 Cal.4th at p. 917.)

of his conduct" rather than on viewing the injury-producing event, itself. (*Thing v. La Chusa*, *supra*, 48 Cal.3d at p. 668.)

The bystander requirement at issue here is the second one, namely, whether the appellant was present at the scene of the injury-producing event at the time it occurred and was aware that it was causing injury to her daughter.

Here appellant has alleged several "injury-producing events" each of which is analyzed with respect to where and when they occurred as well as when appellant became aware of them. First, with respect to the bedsore, appellant pled that the injury occurred at the hospital and that respondents had failed to apprise her that Richardson had developed the bedsore during her hospitalization. In view of these facts, the bedsore could not support a NIED cause of action under the bystander theory because appellant was not present for the injury-producing event that caused the bedsore and she was not aware of the injury until some point after Richardson was dropped off at appellant's home.

The second group of injuries alleged center on other aspects of Richardson's condition and appearance when the ambulance dropped her off at appellant's home on April 11, 2008--the failure to remove Richardson's in-dwelling catheter; Richardson wearing a dirty hospital gown and a soiled bandage, her skin covered in feces, without underwear, or a diaper, and with a towel was wrapped between her legs. While appellant certainly observed these conditions at the time Richardson was dropped off at appellant's home, they did not occur in appellant's presence. Respondents' conduct giving rise to these conditions and as well as the alleged injuries themselves occurred at the hospital prior to, or at the point Richardson was discharged. Appellant was not present at the hospital at the time respondents discharged Richardson. Appellant was not aware of these conditions until after they had occurred. As with the bedsore, because appellant was not present at the event that caused injury to her daughter, appellant cannot pursue a

bystander cause of action based on Richardson's condition and appearance when she arrived home.[21]

These facts stand in contrast to those in a case cited by appellant: *Ochoa v. Superior Court* (1985) 39 Cal.3d 159 (*Ochoa*). In *Ochoa* plaintiffs were the parents of Rudy Ochoa, a teenage boy, who died while housed in juvenile hall. Rudy became ill and went to the infirmary for care and treatment. When his parents visited him, they observed that he was extremely sick. Rudy was holding his left side in an effort to relieve severe pain. Upon seeing her son suffering, Mrs. Ochoa expressed her concern to juvenile hall authorities that her son was not receiving proper medical care. (*Id.* at pp. 162-163.) The following day, Rudy was admitted into the infirmary. When Mrs. Ochoa visited him, he was very pale, appeared dehydrated, and his skin was clammy and sweaty. He appeared to be going into convulsions, and he was hallucinating during most of the visit. During lucid periods, Rudy complained of being very sick and of being in pain. A very distressed Mrs. Ochoa pleaded with juvenile hall authorities to allow her to take her

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[21] Had appellant been present at the hospital at the time Richardson was released, appellant may have observed respondents' alleged negligent conduct and Richardson's injuries while they were occurring. Under that hypothetical factual scenario we might have reached a different conclusion here. We recognize it may be difficult to perceive any distinction between observing these events at the hospital and observing Richardson's condition when the ambulance dropped her off in terms of the distress suffered by appellant. However, the NIED bystander theory has consistently been interpreted by our Supreme Court to require the plaintiff's presence at the scene of the injury and the contemporaneous awareness of the injury. Indeed, it was upon this very basis--the fact that the plaintiff in *Thing* could not satisfy the requirement of having been present at the scene of the injury-producing event (the car accident) at the time it occurred and of having then been aware that it was causing injury to the victim—that the Court rejected the application of the bystander theory. This narrow interpretation of the bystander theory reflects the Court's view expressed in *Burgess* that "[b]ecause in such cases the class of potential plaintiffs could be limitless, resulting in the imposition of liability out of all proportion to the culpability of the defendant, this court has circumscribed the class of bystanders to whom a defendant owes a duty to avoid negligently inflicting emotional distress." (*Burgess v. Superior Court*, *supra*, 2 Cal.4th at p. 1073.)

son to a private doctor. Her requests were refused. (*Ochoa v. Superior Court*, *supra*, 39 Cal.3d at p. 163.)

Mrs. Ochoa attempted to bring Rudy's fever down by applying cold compresses. When infirmary personnel asked her to leave, she refused. Rudy begged his mother not to leave him. Mrs. Ochoa then attempted to roll Rudy onto his side. Rudy began to yell and scream as a result of excruciating pain he suffered in his chest area. He asked for the doctor who was summoned but did not examine Rudy in Mrs. Ochoa's presence. Rudy was vomiting and was unable to retain any fluids. Infirmary personnel observed him cough up blood. (*Ochoa v. Superior Court*, *supra*, 39 Cal.3d at pp. 163-164.) Juvenile hall authorities again asked Mrs. Ochoa to leave. Rudy held onto her and begged her to stay because he was so sick. Mrs. Ochoa attempted to reassure her son that he would be cared for, but was then required to leave. This was the last time Mrs. Ochoa saw Rudy alive. (*Ochoa v. Superior Court*, *supra*, 39 Cal.3d at p. 164.) Although a physician in the infirmary had advised Mrs. Ochoa that Rudy only had the flu, he actually had bilateral pneumonia and a temperature of 105 degrees. (*Id.* at p. 163.) In concluding that Mrs. Ochoa had stated a cause of action for negligent infliction of emotional distress, this state's high court observed that "Mrs. Ochoa was aware of and observed conduct by the defendants which produced injury in her child. She was aware of the fact that her child was in need of immediate medical attention. To her knowledge the defendant had failed to provide the necessary care." The court was "satisfied that when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted." (*Ochoa v. Superior Court*, *supra*, 39 Cal.3d at pp. 169-170.) In *Ochoa*, the plaintiff was present while her son was being injured—she was in the infirmary at the time the defendants failed to treat him, which resulted in his death.

No so here – the negligent treatment of Richardson only came to appellant's attention when Richardson was brought home, after Richardson suffered the injuries alleged. Inasmuch as appellant was not present at the hospital when Richardson was released to go home, appellant did not know that the conduct was causing injury at the

time it occurred; she did not experience a contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury.

We reach the same conclusion with respect to respondents' alleged failure to provide a discharge plan, or aftercare instructions for Richardson. Even assuming that the failure to provide such information occurred in appellant's presence when the ambulance delivered Richardson to appellant's home, rather than at the hospital when the respondents released Richardson for transport home, appellant has not identified how that circumstance injured her daughter, nor that she had contemporaneous awareness that it was causing injury.

Furthermore, we reject appellant's effort to define the "dumping" of Richardson at appellant's home as a separate injury-producing event. Appellant has not identified how leaving Richardson at her home gave rise to a new or distinct injury to Richardson apart from those injuries that Richardson had already suffered. It appears that absent reference to the other injuries (i.e., the bedsore, the failure to remove the catheter, leaving her in a dirty hospital gown in an unclean condition and releasing her without discharge documents or aftercare instructions) "dumping" Richardson at appellant's home was not injurious. By the time Richardson arrived home she had already suffered the alleged injuries for which she is seeking to recover. Respondents' alleged failures – to prevent and treat the bedsore, to remove the catheter, and leaving her in a dirty hospital, gown in an unclean condition – did not occur in appellant's presence at her home, they happened at the hospital before Richardson arrived home. Likewise Richardson's arrival at her mother's home shifted caretaking responsibilities to appellant and created a new burden on appellant; it did not, however, give rise to an additional injury to Richardson. The focus of the bystander theory is that the plaintiff is seeking to recover emotional distress damages from observing injuries to a *third-party*, not from any direct injury to plaintiff.

In sum, rather than witnessing an injury-producing event, itself, appellant seeks to recover for emotional distress she suffered on viewing the injurious *consequences* of respondents' alleged negligent conduct; the bystander theory of NIED does not provide a remedy for appellant's emotional distress under those circumstances.

2. The Direct Victim Theory

"In cases of negligence, a plaintiff's action must be founded on a duty owed to the plaintiff; not a duty owed only to some other person." (*Hong Soo Shin v. Oyoung Kong* (2000) 80 Cal.App.4th 498, 506.) "'Negligence in the air, so to speak, will not do.'" (*Ibid*. quoting Prosser & Keeton, Torts (5th ed. 1984) § 53, p. 357.) Accordingly, "direct victim" cases involve the breach of a duty owed the plaintiff that was assumed by the defendant, imposed on the defendant as a matter of law, or arose out of a preexisting relationship between the two. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc*., *supra*, 48 Cal.3d at p. 590; see also *Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129-130.)

Decisions of our Supreme Court upholding direct victim causes of action include *Molien v. Kaiser Foundation Hospital* (1980) 27 Cal.3d 916 (hereafter *Molien*), in which a doctor misdiagnosed a patient as having syphilis and advised her to tell her husband so he could be tested and treated if necessary. Since the doctor's negligence was expressly directed at the husband as well as the wife, the husband was permitted to pursue a claim for emotional distress. (*Id*. at pp. 922-923.)[22] In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, *supra*, 48 Cal.3d 583, a psychotherapist treating mothers and their sons for intrafamily difficulties sexually abused the sons. The mothers were permitted to sue for emotional distress since they, as well as their sons, were patients. (*Id*. at p. 591.) In *Burgess v. Superior Court*, *supra*, 2 Cal.4th 1064, the court held that a mother could sue for emotional distress caused by injuries to her child as a result of malpractice during childbirth since the mother, as well as the child, was a patient. (*Id*. at p. 1078.)

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22 In *Burgess*, the Court acknowledged that the broad language analyzing duty in *Molien* had created the misperception that duty could be determined in negligent infliction of emotional distress cases by examining only "foreseeability." Our Supreme Court has since said that to this extent the decision in *Molien* should not be relied upon and its discussion of duty is limited to its particular facts. (*Burgess v. Superior Court*, *supra*, 2 Cal.4th at p. 1074.)

Here appellant does not claim to be respondents' patient. Nonetheless, appellant argues that as Richardson's caretaker she had a "special relationship" with respondents that imposed duty upon respondent to provide appellant with training and aftercare instructions to assist appellant in caring for Richardson. Appellant does not cite to any legal authority to support her "special relationship" argument. Rather, using the negligence per se doctrine, appellant attempts to establish that respondents breached a duty owed her pursuant to statute. Where a statutory standard establishes the defendant's duty, "proof of the defendant's violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547.) This rule, known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence.

The negligence per se doctrine, as codified in Evidence Code section 669,[23] creates a presumption of negligence if four elements are established: "(1) the defendant

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[23] Evidence Code section 669 provides:

"(a) The failure of a person to exercise due care is presumed if:
"(1) He violated a statute, ordinance, or regulation of a public entity;
"(2) The violation proximately caused death or injury to person or property;
"(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
"(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
"(b) This presumption may be rebutted by proof that:
"(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
"(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications."

violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420.) The first two elements are questions of fact, while the latter two are questions of law. (*Ibid*.)

Under the negligence per se doctrine "violation of a statute gives rise to a presumption of negligence in the absence of justification or excuse, provided that the 'person suffering . . . the injury . . . was one of the class of persons for whose protection the statute . . . was adopted.'" (*Walters v. Sloan* (1977) 20 Cal.3d 199, 206-207.) In short, "for a statute . . . to be relevant to a determination of negligence, not only must the injury be a proximate result of the violation, but the plaintiff must be a member of the class of persons the statute ... was designed to protect, and the harm must have been one the statute ... was designed to prevent." (*Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324.) Consequently, if one is not within the protected class or the injury did not result from an occurrence of the nature that the transgressed statute was designed to prevent, Evidence Code section 669 has no application. (*Mark v. Pacific Gas & Electric Co.* (1972) 7 Cal.3d 170, 183; *Hosking v. San Pedro Marine, Inc.* (1979) 98 Cal.App.3d 98, 102; *Cade v. Mid-City Hosp. Corp*. (1975) 45 Cal.App.3d 589, 596-597.)

Appellant argues that Health and Safety Code section 1262.5[24] and federal law

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[24] Health & Safety Code section 1262.5 provides in pertinent part:

"(a) Each hospital shall have a written discharge planning policy and process.

"(b) The policy required by subdivision (a) shall require that appropriate arrangements for posthospital care, including, but not limited to, care at home, in a skilled nursing or intermediate care facility, or from a hospice, are made prior to discharge for those patients who are likely to suffer adverse health consequences upon discharge if there is no adequate discharge planning. If the hospital determines that the patient and

(42 C.F.R. § 482.43 and 42 U.S.C. § 1395x, subd. (ee)[25] impose a duty upon hospitals to provide a patient *and* a patient's caretakers discharge information and aftercare

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family members or interested persons need to be counseled to prepare them for posthospital care, the hospital shall provide for that counseling.

"(c) The process required by subdivision (a) shall require that the patient be informed, orally or in writing, of the continuing health care requirements following discharge from the hospital. The right to information regarding continuing health care requirements following discharge shall apply to the person who has legal responsibility to make decisions regarding medical care on behalf of the patient, if the patient is unable to make those decisions for himself or herself. In addition, a patient may request that friends or family members be given this information, even if the patient is able to make his or her own decisions regarding medical care."

[25] 42 Code of Federal Regulations section 482.43 provides in pertinent part:

"The hospital must have in effect a discharge planning process that applies to all patients. The hospital's policies and procedures must be specified in writing.

"(a) Standard: Identification of patients in need of discharge planning. The hospital must identify at an early stage of hospitalization all patients who are likely to suffer adverse health consequences upon discharge if there is no adequate discharge planning.

"(b) Standard: Discharge planning evaluation.

"(1) The hospital must provide a discharge planning evaluation to the patients identified in paragraph (a) of this section, and to other patients upon the patient's request, the request of a person acting on the patient's behalf, or the request of the physician.

"(2) A registered nurse, social worker, or other appropriately qualified personnel must develop, or supervise the development of, the evaluation.

"(3) The discharge planning evaluation must include an evaluation of the likelihood of a patient needing post- hospital services and of the availability of the services.

"(4) The discharge planning evaluation must include an evaluation of the likelihood of a patient's capacity for self-care or of the possibility of the patient being cared for in the environment from which he or she entered the hospital….[¶¶]

] "(6) The hospital must include the discharge planning evaluation in the patient's medical record for use in establishing an appropriate discharge plan and must discuss the results of the evaluation with the patient or individual acting on his or her behalf.

"(c) Standard: Discharge plan. [¶¶]

"(5) As needed, the patient and family members or interested persons must be counseled to prepare them for post-hospital care. [¶¶]

instructions for the patient's post-discharge care. Appellant claims that when a patient, like Richardson, is totally disabled the duty to provide information and post-discharge services is owed to both Richardson and appellant, and that the failure to discharge this duty supports the imposition of liability for both Richardson and herself.

Respondents argue that duties imposed under the Health and Safety Code and/or the federal law (to provide discharge information or aftercare services) are owed *only* to Richardson; that they are intended to benefit (and to facilitate the care of) the patient, not the caretaker. They also assert that any emotional injury appellant allegedly suffered as a result of the alleged failure to provide this information was not of the sort that these laws were designed to prevent. We agree with respondents.

According to its legislative history, Health and Safety Code section 1262.5 was implemented in the early 2000s to address an increasing problem of "unnecessary institutional placement, [in] . . . nursing homes, state hospitals, and other nonhome-like settings," of senior citizens and disabled individuals. (Section 1262.5 Hist. & Statutory

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"(7) The hospital, as part of the discharge planning process, must inform the patient or the patient's family of their freedom to choose among participating Medicare providers of posthospital care services and must, when possible, respect patient and family preferences when they are expressed. The hospital must not specify or otherwise limit the qualified providers that are available to the patient."

42 United States Code section 1395x, subdivision (ee) provides:

"(ee) Discharge planning process [¶]

"(2) The Secretary shall develop guidelines and standards for the discharge planning process in order to ensure a timely and smooth transition to the most appropriate type of and setting for post-hospital or rehabilitative care. The guidelines and standards shall include the following:

"(A) The hospital must identify, at an early stage of hospitalization, those patients who are likely to suffer adverse health consequences upon discharge in the absence of adequate discharge planning.

"(B) Hospitals must provide a discharge planning evaluation for patients identified under subparagraph (A) and for other patients upon the request of the patient, patient's representative, or patient's physician. [¶¶]

"(E) The discharge planning evaluation must be included in the patient's medical record for use in establishing an appropriate discharge plan and the results of the evaluation must be discussed with the patient (or the patient's representative)."

Notes.) Consequently, the Legislature found and declared "that patients being transferred to a skilled nursing facility or intermediate care facility need information regarding their continuing health care requirements so that they may advocate for appropriate care for themselves"; and thus "[i]t is the intent of the Legislature that each hospital patient be given information about his or her continuing health care requirements following discharge from the hospital." (Section 1262.5 Hist. & Statutory Notes.)

In view of the language of the statute and its legislative history, we cannot agree with appellant that Health & Safety Code section 1262.5 imposes a separate duty on a hospital to provide a patient's caretaker with information. We conclude that the duty imposed by Health & Safety Code section 1262.5 is owed to patients, and is imposed only for the patient's benefit. The statute anticipates that a hospital may discharge its statutory duty by providing the necessary information directly to the patient or to the patient's family, caretaker or other interested individuals. The language in the statute, cited by appellant—"The right to information regarding continuing health care requirements following discharge shall apply to the person who has legal responsibility to make decisions regarding medical care on behalf of the patient, if the patient is unable to make those decisions for himself or herself"—does not support the imposition of an additional duty owed to the caretaker, but instead merely describes one of the ways in which the hospital may discharge its duty to the patient. Consequently, appellant was not in the class of persons the statute was intended to protect. In addition, the harm the statute was designed to prevent is injury to the patient, such as unnecessary institutional placement, or suffering adverse health consequences upon discharge from the hospital. There is nothing in the language of the statute or the legislative history to suggest that the statute was intended to prevent emotional distress to a patient's caretakers.[26]

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[26] We reach the same conclusion with respect to the federal law and regulation cited by appellant, namely 42 Code of Federal Regulations section 482.43 and 42 United States Code section §1395x, subdivision (ee). Appellant has cited no authorities, nor has this court found any relevant case law interpreting the federal law which support appellant's

We find the decision in *Huggins v. Longs Drug Stores California, Inc., supra*, 6 Cal.4th 124 (hereafter *Huggins*) to be instructive on this point. In *Huggins*, the plaintiff parents alleged they suffered emotional distress due to injuries suffered by their child when, because of a pharmacy's negligence, the parents administered medication at five times the proper dosage. The Court of Appeal upheld the parents' direct victim cause of action, reasoning that a pharmacy assumes a duty of care to a patient's closely related caregivers when it fills a prescription with actual or constructive knowledge that the patient is a child or otherwise helpless. (*Id.*, at p. 130.) The Supreme Court observed that the Court of Appeal's conclusion "comports neither with California case law nor with sound public policy." (*Ibid*.)

As the Supreme Court explained, to support a direct victim cause of action for emotional distress, the plaintiff must himself or herself be a patient of the defendant caregiver. (*Huggins*, *supra*, 6 Cal.4th at pp. 131-132.) The Court concluded: "[h]ere, the end and aim of the prescription dispensed by defendant was to provide medical treatment for plaintiffs' infant son, Kodee. He, not plaintiffs, was the only patient being served by the transaction." The parents' contractual relationship with the pharmacy, their personal participation in administering the medication, and their familial relationship with the dependent child were not sufficient to support a direct victim cause of action. (*Id.* at pp. 132-133.) Pertinent to the duties of a pharmacist under the standards of the profession and the law, the Court held:

> "Nothing in [the professional duties of the pharmacists] imposes any legal responsibility upon pharmacists for the emotional well-being of the patient's parents, even if the pharmacist knows the patient is an infant and that the parents will be administering the medication. Recent amendments to the regulations, added after defendant filled the prescription for Kodee, provide that the pharmacist must provide oral consultation about the prescription drug to '[the] patient or the patient's agent' (Cal. Code Regs., tit. 16, § 1707.2; italics added). The obvious purpose of providing for consultation with a patient's agent

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view that the regulations impose an independent duty on hospitals owed to patient caretakers and representatives.

> has nothing to do with the agent's personal welfare; the purpose is simply to assure that the pharmacist's advice is put to good use for the benefit of the patient even in situations in which the patient would be unable to understand the advice." (*Id.* at p. 132.)

The Supreme Court was aware that a parent will be practically certain to suffer emotional distress as a result of injury to a child through professional negligence, but found that to be insufficient to warrant establishing a new right of recovery for intangible injury. (*Huggins, supra*, 6 Cal.4th at p. 133.) Policy factors, including increased insurance costs and undesirable self-protective reservations that would follow, counseled against the enlargement of potential liabilities of caregivers for intangible injury. (*Ibid*.)

The rationale in *Huggins* supports our conclusion. Even if the respondents knew that Richardson was unable to take care of herself and thus appellant would assume caretaking duties after Richardson's discharge, nothing about that circumstance created a special relationship between respondents and appellant or imposed a duty upon respondents to protect the emotional well being of appellant. Furthermore, similar to regulations requiring consultation with a patient's agent as discussed in *Huggins*, the purpose of providing for post-discharge health information to appellant, as Richardson's caretaker, has nothing to do with appellant's personal welfare; the purpose is simply to assure that Richardson received the appropriate post-discharge care.

In sum, because appellant was not respondents' patient and because she has not alleged or identified sufficient facts to otherwise show a duty (a) assumed by respondent; (b) imposed as a matter of law; or (c) that arose out of a preexisting relationship between the two, she cannot demonstrate respondents' NIED liability under the "direct victim" theory.

In view of all of the foregoing, the lower court properly sustained the demurrer on appellant's cause of action for NIED.

C. Intentional Infliction of Emotional Distress

In the first amended complaint, appellant alleged that her intentional infliction of emotional distress (IIED) cause of action was supported by the following conduct: (1)

the defamatory statements respondents purportedly made about appellant concerning her treatment of Richardson, including that she had developed the bedsore prior to being admitted to the hospital; and (2) "dumping" Richardson at her home on April 11, 2008.

The court sustained the demurrer on this claim because of the immunities that applied to the defamation claim and because appellant had not stated facts to show that the act of dumping were directed against her. The lower court was correct.

Preliminarily, as demonstrated elsewhere, whether the cause of action is labeled "defamation" or "IIED," respondents are entitled to absolute immunity for any alleged distress caused by the defamatory conduct.

Second, as a matter of law the facts pled as to the "dumping" do not support a cause of action for IIED. The elements of a prima facie case for the tort of intentional infliction of emotional distress are as follows: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Ibid.*) "Generally, conduct will be found to be actionable where the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028, quoting Rest.2d Torts, § 46, com. d, p. 73.)

The fact that conduct might be termed outrageous is not itself sufficient. "The tort calls for intentional, or at least reckless conduct – conduct intended to inflict injury or engaged in with the realization that injury will result." (*Davidson v. City of Westminster*, *supra*, 32 Cal.3d at p. 210.) The conduct must be of a nature that is especially calculated to cause mental distress of a very serious kind. (*Ochoa*, *supra*, 39 Cal.3d at p. 165, fn. 5.)

Moreover, to support the cause of action, "[i]t is not enough that the conduct be intentional and outrageous. It must be conduct *directed at the plaintiff*, or occur in the

presence of a plaintiff of whom the defendant is aware." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 (*Christensen*).) "The requirement that the defendant's conduct be directed primarily at the plaintiff is a factor which distinguishes intentional infliction of emotional distress from the negligent infliction of such injury." (*Id.* at p. 904.) In circumstances in which a plaintiff seeks to recover for emotional distress suffered as the result of conduct directed primarily at another, recovery – to the extent it has been allowed at all – "has been limited to '"the most extreme cases of violent attack, where there is some special likelihood of fright or shock."'" (*Id.* at p. 905, quoting *Ochoa, supra*, 39 Cal.3d at p. 165, fn. 5.)

Here appellant has neither pled nor otherwise identified facts to show that the condition of her daughter when she arrived at appellant's home or the fact that she was "dumped" there without discharge documents or aftercare information, was conduct that was intentionally directed at appellant. Likewise the facts pled do not suggest an extreme case of a violent attack, where there is some special likelihood of fright or shock. All of respondents' actions were directed at Richardson.

Consequently, we are left to conclude that the trial court properly sustained the demurrer on appellant's individual causes of action for defamation, negligent and intentional infliction of emotional distress.[27] In addition, because appellant has not identified any possible factual scenario or plausible legal theory to revive her claims we conclude they cannot be cured by amendment and thus the court did not abuse its discretion when it did not give appellant another opportunity to amend her causes of action.

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[27] To the extent that appellant's first amended complaint can be construed as attempting to assert a claim for parental loss of consortium, that claim fails as a matter of law as well. (See *Borer v. American Airlines* (1977) 19 Cal.3d 441, 453 [refusing to recognize a cause of action for loss of parental consortium].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**