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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BENJAMIN RAMIREZ,

Plaintiff and Appellant,

v.

AMERICAN GENERAL LIFE  
INSURANCE COMPANY et al.,

Defendants and Respondents.

B276316

(Los Angeles County  
Super. Ct. No. BC518517)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Law Offices of Michael J. Rand, Michael J. Rand for  
Plaintiff and Appellant.

Edison, McDowell & Hetherington, Charan M. Higbee and  
Amy Boyea for Defendant and Respondent American General  
Life Insurance Company.

Lewis Brisbois Bisgaard & Smith, Hellar-Ann Hancock,  
Dana Alden Fox and Dawn Flores-Oster for Defendant and  
Respondent EPS Settlement Group, Inc.

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## INTRODUCTION

Jessica Ramirez (Jessica) was injured in an accident, and her injuries were exacerbated by the medical care she received afterward. Acting through her mother as guardian ad litem, Jessica sued her medical care providers for malpractice. In February 2010, a jury returned a verdict in Jessica's favor. While the appeal in that case was pending, Jessica and the medical malpractice defendants reached a settlement, which provided for a lump sum payment, guaranteed monthly payments over a period of five years to be paid into a trust for Jessica's benefit, and additional monthly payments to be paid to the trust during Jessica's lifetime, beginning on October 1, 2015.

Jessica passed away in September 2010, before the settlement could be approved by the court as required by Code of Civil Procedure, section 372.<sup>1</sup> Jessica's attorney asked the court to approve a modified agreement based on the change of circumstances, including asking the court to send the lump sum and guaranteed payments to probate. Her attorney acknowledged that Jessica and her estate were not entitled to the non-guaranteed payments scheduled to begin on October 1, 2015. The court approved a modified settlement, and the settlement proceeds—more than \$3 million—were distributed through a probate proceeding to Jessica's mother and father, her sole heirs.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Jessica's father, plaintiff Benjamin Ramirez (Ramirez), was not involved in the medical malpractice case. More than two and a half years after the modified medical malpractice settlement was approved, and nearly a year after the probate case was complete, Ramirez filed the instant action against defendants American General Life Insurance Company and EPS Settlement Group, Inc. Ramirez alleged that the defendants were required to provide the annuity for the lifetime payments set to begin on October 1, 2015, and Jessica paid a premium for that annuity but she never received a benefit because of her death. Ramirez asserted causes of action for negligence, rescission of contract, and negligent misrepresentation. Defendants demurred, and the court sustained the demurrers. Ramirez appealed.

We affirm. Ramirez's allegations, in essence, come down to his dissatisfaction with the terms of the settlement agreement that provided for certain payments to be made only during Jessica's lifetime. Defendants here did nothing more than provide an annuity as requested by the parties to the medical malpractice action. Ramirez, a non-party to that action, may not now collaterally attack the terms of the settlement agreement by purporting to challenge the terms of the annuity. His second amended complaint fails to allege facts sufficient to state a cause of action against defendants.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Background**

Ramirez and Ofelia Reynaga were married, and in 1987 they had a daughter, Jessica. Ramirez and Reynaga later divorced; Jessica lived with Reynaga and maintained a relationship with Ramirez.

On September 4, 2007, Jessica suffered an accidental BB gunshot wound to her temple. She was transported to a hospital, where her condition worsened. According to one summary included in the record on appeal, Jessica “walked into the Emergency Room at Greater El Monte Hospital complaining that she had been shot in the right temple by a BB gun. The triage nurse did not consider that Jessica could have a bullet lodged in her brain and did not triage [Jessica] until 45 minutes later. She was not examined by a doctor until 1-1/2 hours after her admission and was not transferred to a higher level of care until 4 hours after she had walked into the ER. Defendant Greater El Monte Community Hospital[,] in failing to appropriately evaluate the extent of [Jessica’s] injuries at triage and in unnecessarily delaying her transfer to a higher level of care[,] caused irreversible brain injury.” Jessica underwent surgery on her brain and suffered numerous complications. She was left in a persistent vegetative state, and became “unable to hear, speak, ambulate, process information, or to care for her own needs.”

In May 2008, Jessica filed suit against her medical care providers<sup>2</sup>; Reynaga was appointed as her guardian ad litem. In February 2010, a jury found in favor of Jessica and against the hospital where Jessica was treated. After trial, the parties stipulated that the present cash value of the future medical expenses award was \$6,980,955, the “future value of future medical expenses” was \$9,273,477, and Jessica’s noneconomic damages were \$250,000 pursuant to section 3333.2, subdivision (b).

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<sup>2</sup> Greater El Monte Community Hospital was apparently sued under the name AHMC HealthCare, Inc.

The judgment following the jury trial, dated April 30, 2010, stated, “Plaintiff shall be entitled to immediate payment of \$2,433,357.21, representing her past medical expenses, past and future non-economic damages, the cost of a home, the first year non-recurring medical care costs, pre-judgment interest to the date of the judgment (April 30, 2010), and the amount necessary to pay attorney fees . . . .” The judgment continued, “Plaintiff shall further be entitled to payment, in twelve (12) equal monthly installments (periodic payments) in the amount of \$40,732.86, starting February 1, 2010, and increasing at a rate of 4% per year, for 144 months (12 years), pursuant to the schedule attached hereto. Plaintiff is further entitled to separate lump sum payments of \$71,156 on Nov. 1, 2015, \$73,925 on Nov. 1, 2018, and \$37,810 on Nov. 1, 2019. Post judgment interest shall accrue from the date of judgment on the amount of \$2,186,829.39, until that amount is paid. Post judgment interest shall accrue on periodic payments incurred on May 1, 2010 and each monthly payment thereafter as the payment comes due, until paid.”

**B. Settlement agreement**

Following the judgment, Jessica and hospital defendant AHMC HealthCare, Inc., reached a settlement.<sup>3</sup> The total value of the settlement agreement was \$7,250,000, and called for the creation of the Jessica Ramirez Special Needs Trust. The settlement agreement included the following: (1) \$3,032,000 up front to Jessica, part of which would be allocated to expenses including litigation costs, attorney fees, and a Medi-Cal lien. (2) \$250,000 to Reynaga for the release of any future claim for wrongful death relating to Jessica’s death. (3) Periodic payments

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<sup>3</sup> A defendant doctor had been dismissed from the case following summary judgment in the doctor’s favor.

of \$30,000 per month for Jessica's lifetime, guaranteed for five years beginning October 2, 2010, to be paid by Symetra Life Insurance Company (the Symetra payments). Any guaranteed payments after Jessica's death would be paid to Jessica's estate.

(4) The right to periodic payments of \$33,942.25 per month for Jessica's lifetime, to begin October 1, 2015. These payments were to be made by American General Life Insurance (the AGLI payments or AGLI annuity).

In August 2010, Jessica filed a petition to approve disposition of proceeds of judgment pursuant to the parties' settlement agreement. The court signed an order approving the planned disposition on August 17, 2010.

On September 27, 2010, before the settlement arrangements had been implemented, Jessica died. Jessica's attorney informed the court of Jessica's death. The attorney's declaration stated, "In view of the fact that Jessica Ramirez is now deceased, the creation of a Special Needs Trust appears to be moot. The heirs of Jessica Ramirez request that the entire net proceeds from the settlement be probated . . . ." The declaration set out plaintiffs' attorney fees and costs, as well as liens for Jessica's medical care. The declaration requested that all remaining funds, including the funds intended for the Jessica Ramirez Special Needs Trust and the guaranteed Symetra payments, be probated. There was no mention of the AGLI payments. The declaration concluded, "The total amount requested to be probated is \$3,107,054.31."

The court approved the settlement on December 9, 2010. A probate proceeding was initiated in Los Angeles Superior Court. On September 4, 2012, the probate court issued an order dividing

the estate evenly between Jessica's parents, Reynaga and Ramirez.

**C. Ramirez's allegations in this case**

On August 16, 2013, Ramirez filed a complaint naming as defendants Reynaga, American General, EPS, and AHMC HealthCare, Inc. In their respective respondents' briefs, American General states that it was never served with the original complaint, and EPS states that it demurred to the complaint and the demurrer was sustained with leave to amend. The demurrer and related ruling are not included with the record on appeal.

Ramirez filed a first amended complaint on June 18, 2014, naming only American General and EPS as defendants. American General and EPS demurred, and the court sustained the demurrers with leave to amend.

Ramirez filed a second amended complaint (SAC) on August 7, 2015, naming American General and EPS as defendants. The SAC is at issue on appeal, and therefore we focus on the allegations in that complaint.

Ramirez alleged that he was bringing his claims on behalf of himself and "in his capacity as the legal assignee of all claims, causes of action, right, title, and interest [Reynaga] has, or may have, against the defendants." Ramirez alleged that American General sells structured annuities, and guaranteed payments to claimants on behalf of non-party American General Annuity Services Corporation. Ramirez alleged that EPS was "a structured settlement company" that "acted as a structured settlement agent for American General" and "acted as a structured settlement broker and/or agent, and consultant and

representative for, and on behalf of, Jessica Ramirez and Reynaga.”

Ramirez briefly described the medical malpractice action and the settlement. He alleged that Jessica’s claims were “settled for the sum of \$7,250,000,” which included “\$2,100,000 payment through American General Life Insurance Company for monthly annuity payments to begin October 1, 2015.”

Ramirez said that pursuant to the settlement agreement, “any annuity or other payment to be made after Jessica’s death was to be made to the person designated by . . . Reynaga. If no person was so designated, such payments were to be made to Jessica’s estate. In the event of Jessica’s death, therefore, all payments to be made would inure directly to the benefit of Reynaga, or to Reynaga and Ramirez, the sole heirs of the estate of Jessica Ramirez. Reynaga and Ramirez, therefore, had a beneficial interest in the terms of the Agreement, and, in particular, in the annuities which were conditions of the Agreement.” Ramirez attached to the complaint an order from the probate court dividing Jessica’s estate equally between Ramirez and Reynaga.

Ramirez alleged that although he was in contact with Jessica and visited her at the hospital, Reynaga never told him about the medical malpractice lawsuit. Ramirez asserted that in the settlement agreement, Reynaga purported to release any future wrongful death claims by all heirs and assigns, but Reynaga’s representation was erroneous because she was not acting on behalf of Ramirez. Ramirez alleged that his location was unknown to defendants in the medical malpractice lawsuit, and that Reynaga had not contacted him regarding the lawsuit. Ramirez alleged that he first learned of the “lawsuit, the



settlement and the probate proceeding, and of each named defendant's wrongful and actionable conduct as alleged herein, or some of it, within the ten months immediately preceding the filing of the Complaint."

Ramirez asserted three causes of action: negligence, rescission, and negligent misrepresentation. In his negligence cause of action, Ramirez alleged that American General and EPS "consulted with and obtained for Reynaga" the annuity contract for the AGLI payments during Jessica's lifetime. Ramirez alleged that the AGLI payments were scheduled to begin "October 1, 2015, more than five years after the [settlement] Agreement was entered and more than five years after Reynaga, on behalf of Jessica, caused a single payment to American General to be made in the sum of \$2,100,000."<sup>4</sup>

Ramirez alleged that Reynaga had a limited education, was unsophisticated with respect to financial and medical issues, and "was emotionally distraught and extremely vulnerable" at the time the AGLI annuity was created, and "the concept of purchasing an annuity for the benefit of Jessica, its alternatives, complexities and ramifications, would be very difficult for Reynaga to fully comprehend." Ramirez alleged that American General and EPS held themselves out as experts in the field of structured annuities, and recommended and facilitated the purchase of the AGLI annuity. However, at the time defendants prepared the annuity for Jessica, "all defendants had reviewed

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<sup>4</sup> The source of this \$2,100,000 figure is unclear. The SAC cites to the structured settlement annuity contract, which is attached as exhibit 1 to the SAC, but that contract does not state that Reynaga caused a payment to be made to American General, nor does it state that the premium for the annuity was \$2.1 million.

Jessica's medical records and were generally familiar with her medical condition and life expectancy. As a result, it was reasonably foreseeable by American General [and] EPS . . . that Jessica had a very limited life expectancy, ranging from several weeks to no more than several years." The "subject annuity as a whole was entirely unsuitable for Jessica, or for Reynaga or Ramirez, as the sole heirs of Jessica." It was "reasonably foreseeable that neither Jessica nor her heirs would ever receive a tangible net benefit from the annuity, nor any annuity at all." Had Reynaga been informed that "the \$2,100,000 premium was unprotected," she would not have agreed to the annuity.

Ramirez further alleged that "[i]t was unconscionable that, under the terms of the annuity contract, EPS was allowed to retain its substantial commission of \$84,000 and American General [was] allowed to retain the \$2,100,000 premium (less commission paid)." Because of Jessica's death, none of the AGLI payments would ever be made. Ramirez alleged he was damaged in the amount of \$2,100,000 plus interest.

In his second cause of action for rescission, Ramirez alleged that enforcement of the annuity contract was unconscionable due to a "mistake of fact or law resulting from Reynaga's ignorance of then present facts material to the annuity contract," or "a unilateral mistake of fact or law known to the other contracting parties," or "a mutual mistake of fact or law." The annuity's "right to cancel" provision was vague, ambiguous, and unintelligible, and therefore "the time period within which to exercise the right to cancel never began to run." By the time the annuity contract was presented to Ramirez,<sup>5</sup> "Jessica had passed

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<sup>5</sup> The SAC includes "Ramirez" here; it is unclear whether Ramirez intended to say "Reynaga."

away, rendering the then inchoate contract illusory and without consideration.” Ramirez alleged that had Reynaga known about a right to cancel following Jessica’s death, she would have exercised that option. As a result of these contract terms, American General was unjustly enriched to Ramirez’s detriment. The SAC stated, “The annuity contract should be reformed to enforce Reynaga’s notice of cancellation, or should be rescinded and the \$2,100,000 premium returned to Ramirez.”

In his cause of action for negligent misrepresentation, Ramirez alleged that defendants misrepresented facts to Reynaga about the annuity contract, and Reynaga reasonably relied on those misrepresentations to the detriment of Jessica, herself, and Ramirez. The structured settlement proposal showed that the “life expected benefits” for the settlement were valued at \$45,904,078, and the AGLI annuity was appropriate for Jessica’s situation, but these representations were false. Defendants knew Jessica’s life expectancy was limited, and it was likely that Jessica would not even live the five years until the annuity was set to begin payments. Ramirez alleged that as a result of these misrepresentations, as “third party beneficiary of the annuity contract, [he] suffered damages in the amount of \$2,100,000, plus interest thereon.”

#### **D. Demurrers to SAC**

American General and EPS each demurred to the SAC. American General contended that Ramirez lacked standing and was judicially estopped from bringing his claims, and that he failed to allege facts sufficient to state a cause of action. (§430.10, subd. (e).) American General asserted that Ramirez “sued the wrong parties concerning the wrong contract. At its core, [Ramirez’s] grievance is not with the American General annuity,

but with the underlying settlement agreement.” American General stated that there were three contracts: The settlement agreement in the medical malpractice case, the assignment through which a third party assumed the hospital’s obligation to make payments to Jessica, and the annuity created to fund those payments. Because neither Ramirez nor American General was a party to the settlement agreement, Ramirez did not have standing to assert causes of actions based on the settlement agreement—including the limitation of certain payments to Jessica’s lifetime.

American General also asserted that Ramirez was judicially estopped from asserting any errors based on the settlement agreement. Although Ramirez purported to bring claims as Reynaga’s assignee, Reynaga, as Jessica’s guardian ad litem, sought and received court approval for the settlement Ramirez challenged. American General also argued that none of Ramirez’s claims alleged facts sufficient to state causes of action, and therefore they failed as a matter of law.

EPS asserted in its demurrer that the SAC failed to allege facts sufficient to state a cause of action (§ 430.10, subd. (e)), and was uncertain. (*Id.*, subds. (f), (g).) EPS argued that although Ramirez purported to bring claims as Reynaga’s assignee, “it is unclear exactly what was assigned, or if it was legally assignable.” EPS also asserted that Reynaga waived all future claims as part of the settlement. EPS further argued that neither EPS nor Ramirez were parties to the settlement agreement or the annuity contract, and Ramirez was not a third party beneficiary of either product. EPS also asserted that Ramirez’s claims were barred by judicial estoppel, and that Ramirez lacked standing.

American General and EPS each filed a request for judicial notice, attaching documents relating to the medical malpractice action, the settlement, and the court's approval of the settlement. We discuss the requests for judicial notice in additional detail below.

Ramirez opposed both demurrers, and objected to EPS's request for judicial notice. American General and EPS filed replies.

#### **E. Court ruling**

There is no transcript of the demurrer hearing in the record on appeal. In the minute order from the hearing the court stated, "Demurrers sustained as to all . . . . There are no charging allegations against the broker nor the payor defendant. Neither EPS nor American General has any relation to the plaintiff; neither has any contract with the plaintiff and neither made any statements or representations to the plaintiff. [¶] As to negligence, without any relation, there is no duty, and, thus, no negligence. [¶] As to rescission, without any contract between the parties, there can be no rescission and plaintiff has no standing nor cause of action to cause the rescission of any other contract. [¶] As to negligent misrepresentation, without any statements, there can be no negligent misrepresentation."

The court gave Ramirez 20 days' leave to amend his complaint. The court did not reference the defendants' requests for judicial notice, and did not decide either request.

Ramirez did not amend his complaint. The court dismissed the case, and Ramirez timely appealed.

## DISCUSSION

### A. Standard of review and judicial notice

“We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense.” (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1271.) “Ordinarily, the allegations in a pleading ‘must be liberally construed, with a view to substantial justice between the parties.’ (Code Civ. Proc., § 452.) However, this principle of liberal construction does not apply when, as in this case, a plaintiff has been granted leave to amend and elects not to do so. [Citation.] In such cases, appellate courts will construe the pleading strictly, based on the rationale that the plaintiff’s election indicates he or she believes the pleading has stated the strongest case possible.” (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 274-275.)

“[A] demurrer assumes the truth of the complaint’s properly pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts.” (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20.) We therefore must consider the issue of judicial notice of the documents included in the record on appeal that were originally filed in Jessica’s medical malpractice case.

American General and EPS each submitted requests for judicial notice to the trial court with their demurrers. Those requests included Jessica’s petition to approve the disposition of proceeds of the judgment in the medical malpractice case, a Judicial Council form that included multiple attachments. Attachment 11 set out the terms of the settlement between the parties, including the terms of the AGLI annuity. EPS’s request

also included the declaration Jessica's attorney submitted after Jessica died, which informed the court of Jessica's death. The declaration stated that the need for the Special Needs Trust had become moot, and the amount of funds to be probated pursuant to the parties' agreement was \$3,107,054.31. EPS also requested judicial notice of the court's order on the final disposition of funds, which approved the disposition of funds as stated in the attorney declaration. Ramirez filed an opposition to EPS's request for judicial notice, stating only that the documents were not relevant to the determination of the demurrer. The record on appeal does not include an opposition to American General's request for judicial notice.

No party on appeal has requested that we take judicial notice of these documents. American General asserts, with no citation to authority, that because Ramirez did not object to American General's request for judicial notice below, that "the noticed documents are properly considered as part of American General's Demurrer." We have found no authority supporting this position.

However, we may take judicial notice of relevant documents on our own motion. "An appellate court may take judicial notice of any matter of which a trial court may take judicial notice (Evid.Code, § 459, subd. (a)), and the trial court's refusal to take judicial notice does not preclude the appellate court from doing so." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1380.)

Pursuant to Evidence Code sections 459, subdivision (c) and 455, subdivision (a), we notified the parties that we were considering taking judicial notice of the following documents from *Ramirez v. AHMC HealthCare, Inc., et al.*, Los Angeles Superior

Court case no. KC053021: Petition to Approve the Disposition of Proceeds of the Judgment, including attachments, filed August 9, 2010; Order Approving Disposition of Proceeds of a Judgment, filed August 17, 2010; Declaration of Eduardo J. Ascencio, filed November 3, 2010; and Order re: Final Disposition of Settlement Funds, filed December 9, 2010. Neither party filed a response.

For reasons discussed below, these documents from the medical malpractice case are relevant to the issues on appeal, and it would promote judicial efficiency to take judicial notice of the documents. We therefore take judicial notice of the documents (Evid. Code, § 452, subds. (c) and (d)), but we do not take judicial notice of hearsay statements within those documents, nor do we assume the truth of any matter asserted within those documents. (See, e.g., *Guarantee Forklift, Inc. v. Capacity of Texas Inc.* (2017) 11 Cal.App.5th 1066, 1075; *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768.)

We now turn to the substance of the demurrers.

## **B. Negligence**

Ramirez’s first cause of action is negligence. “The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury.” (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.)

Ramirez’s negligence claim presents a convoluted mixture of tort and contract concepts, and conflates Ramirez’s dissatisfaction with terms of the settlement agreement and the terms of the AGLI annuity created to comply with the settlement. At its essence, Ramirez’s claim is an attack on the medical malpractice settlement agreement in the guise of challenging the



AGLI annuity. Such allegations cannot sustain a negligence cause of action against defendants.

Ramirez alleged that defendants secured for Jessica “an annuity contract under which [ALGI] agreed to cause monthly payments to be made during the lifetime of Jessica” beginning on October 1, 2015. As noted above, this was required by the terms of the settlement agreement in the medical malpractice case: “The right to receive periodic payments . . . for the lifetime of” Jessica, and “[t]he first payment will be made on October 1, 2015.” Before her death, Jessica requested that the court approve those terms.

Ramirez alleges that by securing this annuity, defendants “breached their duty to Jessica and Reynaga” because they knew Jessica might die before payments were owed to her. The settlement agreement only provided the right to the AGLI payments during Jessica’s lifetime. And in contrast to the Symetra payments, the AGLI payments did not include a guarantee.

Ramirez therefore asserts that defendants were negligent by providing exactly what the parties to the settlement agreement requested. “[W]hen the allegations of the complaint contradict or are inconsistent with” facts that may be judicially noticed, “we accept the latter and reject the former.” (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1040.) Moreover, Ramirez himself alleged that the parties agreed to set up payments to be made only during Jessica’s lifetime, to begin on October 1, 2015. Allegations that the parties reached an agreement, and then did what they agreed to do, cannot support a cause of action for negligence. Ramirez has not alleged facts to

show that defendants had a duty to provide an annuity that did *not* adhere to the requirements of the settlement agreement.

Ramirez attempts to plead around this issue by alleging that Reynaga, acting as Jessica's guardian ad litem, was uneducated, emotionally distraught, and extremely vulnerable during the pendency of the medical malpractice action, and therefore did not understand the complexities inherent in purchasing an annuity. He asserts that defendants should have provided a different annuity, one that would confer a benefit to Jessica's heirs after she died. These arguments do not support Ramirez's claim because Reynaga was a guardian ad litem and the settlement was approved by the court.

In cases involving a party who lacks the capacity to make legal decisions, such as Jessica in the underlying medical malpractice case, the court may appoint a guardian ad litem. (§ 372, subd. (a)(1).) The guardian ad litem "shall have power, with the approval of the court in which the action or proceeding is pending, to compromise" the incapacitated party's claims. (*Ibid.*) "The purpose of section 372 is to protect [an incapacitated party] involved in litigation by adding an extra layer of scrutiny to the settlement of the [party's] claims." (*Pearson v. Superior Court* (2012) 202 Cal.App.4th 1333, 1339.) Thus, "[o]nce a guardian ad litem is appointed, the action may not thereafter be compromised, settled or dismissed without court approval, thus insuring the interests of the [incapacitated party] have been fully and fairly considered." (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1847.)

Here, by asserting that Reynaga was uneducated, vulnerable, and distraught, and therefore unable to understand the settlement agreement and the related annuity, Ramirez is

essentially asserting that Reynaga and the court in the medical malpractice case failed to properly protect Jessica’s interests. None of the parties here—Ramirez, American General, or EPS—were parties to the medical malpractice case. Ramirez nonetheless asserts that defendants had a duty to suggest alternatives to the agreed-upon AGLI payments, taking into account Jessica’s life expectancy and medical expenses. But such allegations fundamentally are a collateral attack on the terms of the court-approved settlement of the medical malpractice case. These allegations fail to establish that the non-party defendants had a duty to Jessica or her heirs to provide an annuity with different terms, or that they breached this duty by providing an annuity that complied with the settlement agreement.<sup>6</sup>

### **C. Rescission**

Ramirez’s second cause of action is for rescission. It is unclear whether Ramirez seeks rescission of the settlement agreement, or the annuity, or both. In the SAC, Ramirez alleges that “enforcement of that portion of the [settlement] Agreement respecting the American General annuity contract would be unconscionable.” He alleges that the “right to cancel” language in

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<sup>6</sup> At oral argument, Ramirez’s counsel stated for the first time that Ramirez alleges defendants’ actions affected the terms of the settlement itself, and “what was in the settlement agreement was there because of what EPS recommended to Jessica or her representatives.” This assertion is not reflected in the SAC, which does not include any allegations that the defendants impacted how the medical malpractice parties chose to settle that case. Even if such a claim had been alleged, an assertion that defendants improperly influenced the terms of the medical malpractice settlement agreement is a collateral attack on the court-approved settlement, and is not actionable for the reasons discussed herein.

the annuity contract was impermissibly vague, gave a right to cancel only to American General Annuity Service Corporation, and did not make clear to Reynaga that she could cancel the annuity. He asked that the annuity be rescinded, or that the court “allow the rescission or reformation of that part of the [settlement] Agreement” involving the annuity. In his opening brief on appeal, Ramirez states that Reynaga “should be allowed to rescind that portion of the [settlement] Agreement that related to the annuity.” But in his reply brief, Ramirez states, “The SAC alleges the right to rescission of the annuity.”

Defendants assert that Ramirez may not seek to rescind either the settlement agreement or the annuity because he was not a party to either of those agreements. A party to a contract may rescind the contract when the consent of one of the parties was obtained by mistake or fraud, or if consideration for the obligation fails or becomes void. (Civ. Code, § 1689, subd. (b).)

Ramirez has not alleged that he was party to the settlement agreement or the annuity, and acknowledges that “Reynaga did not directly contract with American General.” Indeed, neither Ramirez nor the defendants were parties to the medical malpractice action. The annuity contract attached to the SAC states that the “owner” of the annuity was American General Annuity Service Corporation,<sup>7</sup> the “measuring life” is Jessica Ramirez, and the premium was “\$10.00 and other valuable consideration.” The “beneficiary” section on the annuity application is blank, and the funds are to be paid to the “Trustee of the Jessica Ramirez Special Needs Trust, c/o Wells Fargo

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<sup>7</sup> The relationship between defendant American General Life Insurance Company and American General Annuity Service Corporation is not clear in the record.

Bank.” These statements indicate that Ramirez was not a party to the annuity contract.

Ramirez acknowledges that in general, only parties to a contract may rescind it, and “the general law of rescission is antagonistic to Ramirez’ position.” However, he asserts that Reynaga—and Ramirez as assignee of Reynaga’s claims—should nonetheless be able to rescind the contracts because “Jessica and Reynaga, through their attorneys, did ‘participate’ in the [settlement] Agreement and annuity contract. . . . They were not ‘strangers’ to the annuity contract and have a ‘legitimate interest’ in voiding it.” In his reply brief, Ramirez argues that he “expressly pled the action on several bases, including the rights of Jessica Ramirez and her estate, as intended third party beneficiaries of the annuity contract. . . .”

There is no suggestion in the record that the settlement agreement or the annuity was made expressly for the benefit of Ramirez or Reynaga.<sup>8</sup> It is clear from the pleadings and the judicially noticed documents that the annuity was created to fulfill the requirements of the settlement agreement in the medical malpractice action, which was for Jessica’s benefit, and was payable to the Special Needs Trust. Ramirez has not pointed

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<sup>8</sup> “Because ‘[t]hird party beneficiary status is a matter of contract interpretation’ [citation], a party alleging a claim for breach of contract based on that status ‘must plead a contract which was made expressly for his benefit and one in which it clearly appears that he was a beneficiary’ [citation].” (*Goonewardene v. ADP, LLC* (2016) 5 Cal.App.5th 154, 172.) To be an express third party beneficiary, a person need not be named or identified individually in the contract, as long as the contract shows that the person is a member of a class of persons for whose benefit the contract was made. (*Ibid.*)

us to any authorities (and we have found none) that hold that a party's heirs, without more, may be deemed third-party beneficiaries to a party's contract.

Even if Ramirez or Reynaga could be considered third party beneficiaries, the Civil Code "grants a third party beneficiary the right to enforce the contract, not rescind it." (*Schauer v. Mandarin Gems of California, Inc.* (2005) 125 Cal.App.4th 949, 959.) "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before *the parties thereto* rescind it." (Civ. Code, § 1559 [italics added].)

The settlement agreement included the settlement of any future wrongful death claim by Reynaga, and Reynaga received a payment as a result. Even if Reynaga could be considered a third party beneficiary to the settlement agreement, Ramirez's cause of action for rescission would not be supported by this fact. Ramirez's allegations pertain to the payments relating to the annuity set to begin on October 1, 2015—not Reynaga's wrongful death claim or the payment made to settle that claim. Ramirez's request for rescission of the AGLI annuity or the portion of the settlement agreement relating to the annuity cannot be supported by the fact that Reynaga's future claims were included as part of the settlement agreement.

In short, Ramirez acknowledges that the law of rescission does not support his position, and he has not convinced us that this case warrants an exception to those limitations. The demurrer was properly sustained for this cause of action.

#### **D. Negligent misrepresentation**

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to

induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

In his cause of action for negligent misrepresentation, Ramirez alleged that defendants misrepresented material facts to Jessica and Reynaga by stating that the "life expected benefits" to Jessica for the annuity totaled \$45,904,078, when in fact it was clear that Jessica's expected life span was limited and she would not receive payments totaling that amount. Ramirez also alleges that defendants "impliedly represented to Reynaga that this was the optimal, or at least best suited, annuity contract for this situation. The express representations, and the implied representations, were false."

Defendants assert that Ramirez has failed to allege any express misrepresentation. As American General states in its brief, "[T]he Annuity's material term—that it would provide payment *only during Jessica's lifetime*—was plainly and expressly disclosed to Ms. Reynaga, her legal counsel, and the Underlying Court as a material term of the agreement." Indeed, the "structured settlement proposal" attached to the SAC, which Ramirez cites to demonstrate defendants' misrepresentation, states that the benefits provided include "\$33,942.25 per month, guaranteed payable for the life of Jessica Ramirez, compounding at 2.5% per year, beginning October 1, 2015." There are no representations that Jessica, Reynaga, or Ramirez were guaranteed payments of \$45,904,078. To the contrary, the structured settlement proposal states that the *guaranteed* benefits through the structured settlement were \$1,892,278.

Moreover, as discussed above, these terms complied with the requirements of the settlement agreement reached in the medical malpractice case. Ramirez alleges that “the claimed \$45,904,078 in benefits could be achieved, if at all, only if Jessica lived to be 80 years old,” and that defendants “negligently suppressed, concealed and obscured the fact that it was unlikely Jessica or her heirs would garner any return of the \$2,100,000 premium paid.” But the settlement agreement itself called for payments to be made only within Jessica’s lifetime beginning October 1, 2015, and Reynaga, as Jessica’s guardian ad litem, requested that the court approve this settlement. The documents therefore contradict the allegation that defendants made misrepresentations about benefits to be paid in Jessica’s lifetime with the intent that Reynaga rely on those misrepresentations.

Defendants also point out that Ramirez’s allegations about “implied” misrepresentations cannot support a cause of action. To state a cause of action for negligent misrepresentation, “a positive assertion is required; an omission or an implied assertion or representation is not sufficient.” (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, *supra*, 158 Cal.App.4th at p. 243; see also *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984 [“negligent misrepresentation requires a false statement of a past or existing material fact”]; *Goonewardene v. ADP, LLC*, *supra*, 5 Cal.App.5th at p. 175 [negligent misrepresentation requires a “positive assertion.”].) Ramirez’s allegation that defendants impliedly represented that the annuity was optimal for the settlement therefore cannot support a negligent misrepresentation cause of action. The demurrer to this cause of action was properly sustained.



**E. Additional grounds for demurrer**

Defendants assert a number of additional challenges to Ramirez's ability to assert causes of action against them. For example, both defendants argue that Ramirez lacks standing to sue them, and that Ramirez cannot act as an assignee because Reynaga released all future claims as part of the settlement agreement. Because we have found that the SAC failed to state facts sufficient to allege causes of action for the reasons discussed above, however, we do not address these additional arguments.

**DISPOSITION**

The judgment is affirmed. American General and EPS are entitled to their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.