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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SYLVIA WACHTEL etc., et al.,

Plaintiffs and Appellants,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA et al.,

Defendants and Respondents.

B221419

(Los Angeles County
Super. Ct. Nos. SC098974 &
LC082313)

COURT OF APPEAL - SECOND DIST.

FILED

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JOSEPH A. LANE

Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Harry Wachtel for Plaintiffs and Appellants.

Maranga & Morgenstern, John F. Peterson; Greines, Martin, Stein & Richland, Martin Stein and Barbara S. Perry for Defendant and Respondent Regents of the University of California.

Fonda & Fraser, Kristen J. Heim and Craig R. Donahue for Defendant and Respondent Suman A. Patel.

Cole Pedroza, Kenneth R. Pedroza, Cassidy E. Cole; MacRill & MacRill, John R. MacRill, Jr. and John R. MacRill, III for Defendant and Respondent Ashwani Bhardwaj.

Reback, McAndrews, Kjar, Warford & Stockalper, Robert C. Reback and Fayth D. Mendelsohn for Defendant and Respondent Babji Mesipam.

Law Offices of Kenneth W. Drake & Associates, Inc., Kenneth W. Drake and Kenneth R. Myers for Defendant and Respondent Encino-Tarzana Regional Medical Center.

Plaintiffs Sylvia,¹ Steven, and Marilyn Wachtel, appeal from a judgment entered after the trial court sustained a demurrer without leave to amend on the sixth attempt to amend their complaint to state a viable cause of action against health care entities and physicians that treated Leonard Wachtel (the decedent). Plaintiffs' second amended consolidated complaint (consolidated complaint) alleged causes of action for negligence/wrongful death, loss of consortium, and for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (the Elder Abuse Act). The consolidated complaint clarified the uncertainty in the other iterations of the pleadings as to whether Sylvia intended to assert a survivor action for negligence on behalf of the decedent or a wrongful death cause of action. The trial court ruled that the wrongful death claim was untimely, and did not relate back to the prior pleadings, the loss of consortium cause of action failed because it was derivative, and the cause of action for a violation of the Elder Abuse Act was not sufficiently alleged. We affirm, after considering the proposed allegations to amend the cause of action for a violation of the Elder Abuse Act.

BACKGROUND

The circumstances surrounding the decedent's death gradually were revealed in six pleadings. The decedent was admitted to Encino-Tarzana Regional Medical Center (Tarzana) in January 2007, and readmitted in February 2007, after suffering a stroke. He

¹ Sylvia Wachtel sues in her individual capacity and as the successor in interest to Leonard Wachtel, her deceased husband. Because the plaintiffs share the same last name, we refer to them by their first names for convenience and clarity, and mean no disrespect. (*Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 188, fn. 13.)

was transferred to the University of California Los Angeles Medical Center (UCLA), later transferred to Barlow Respiratory Hospital (Barlow) where he was treated by Drs. Ashwani Bhardwaj and Suman Patel, among others, before being transferred to Goleta Valley Cottage Hospital (Valley Cottage) where he was treated by Dr. Babji Mesipam. The decedent died in July 2007. Sylvia filed two separate lawsuits in two different courts. The allegations in the initial complaints were identical, with the exception of the named defendants. The plaintiffs made five attempts at pleading a cause of action before the sixth attempt in the consolidated action.

1. *Wachtel v. UCLA (Santa Monica Complaint)*

a. *Initial Complaint*

On July 11, 2008, Sylvia, Leonard, and “Sylvia Individually and as Successor in Interest,” filed a complaint against UCLA,² asserting causes of action for negligence, loss of consortium, and a violation of the Elder Abuse Act (Welf. & Inst. Code, § 15610 et seq.). The complaint was filed in the West District of the Los Angeles Superior Court (Santa Monica). (*Wachtel v. University of California at Los Angeles Medical Center* (Super. Ct. L.A. County, 2008, No. SC098974).)

The Regents, the proper entity, filed a demurrer to the complaint on the grounds that it was uncertain as to whether Sylvia was asserting a survivor action for negligence or a wrongful death action, and the cause of action for a violation of the Elder Abuse Act did not meet the heightened pleading standards. The trial court sustained the demurrer with leave to amend.

b. *First Amended Complaint*

In April 2009, plaintiffs Sylvia, individually, and as successor in interest to Leonard, Steven, and Marilyn Wachtel filed the first amended complaint. The complaint alleged causes of action for negligence-wrongful death, loss of consortium, and elder abuse. The elder abuse cause of action alleged that UCLA recklessly neglected Leonard,

² The proper designation is the Regents of the University of California (the Regents).

which “resulted in the growth and infection of pressure ulcers, development of aspiration pneumonia, and the development of E-Coli disease.”

Before any subsequent challenges to the first amended complaint, this case was consolidated with a parallel case filed in the Northwest District of the Los Angeles Superior Court.

2. *Wachtel v. Barlow Respiratory Hospital, et al. (Van Nuys Complaint)*
 - a. *Initial Complaint (Drs. Patel and Bhardwaj)*

On August 7, 2008, just three weeks after the Santa Monica complaint was filed, a similar complaint was filed in the Northwest District of the Los Angeles Superior Court (Van Nuys), naming different doctors and health care entities. (*Wachtel v. Barlow Respiratory Hospital, et al.* (Super. Ct. L.A. County, 2008, No. LC082313).)

Barlow and Patel filed demurrers, but before the hearing on the motion, Sylvia filed a first amended complaint.

- b. *First Amended Complaint (Drs. Patel, Bhardwaj, Mesipam and Tarzana)*

On September 24, 2008, Sylvia, individually, and as a successor in interest to Leonard, filed a first amended complaint asserting causes of action for medical malpractice, loss of consortium, and a violation of the Elder Abuse Act.³ Leonard was no longer a plaintiff in this action, and two additional defendants were named, Tarzana and Mesipam. Mesipam allegedly treated the decedent at Valley Cottage.⁴

Barlow and Patel filed demurrers to the first amended complaint. The demurrers challenged the complaint on the grounds that it was uncertain as to whether the cause of action entitled “medical malpractice” was a survivor action for negligence or a wrongful death claim. Additionally, the demurrers contended that all three causes of action failed to state facts sufficient to state a cause of action.

³ The caption on the first amended complaint states: “complaint for negligence and violation Welf & Inst Section 15610 et al.” (Capitalization omitted.)

⁴ Neither Valley Cottage nor Barlow are parties to this appeal.

On January 21, 2009, the demurrers were sustained, and the trial court granted leave to amend.

c. *Second Amended Complaint*

In February 2009, Sylvia, individually, and as successor in interest to Leonard, filed a second amended complaint. The caption stated causes of action for a violation of the Elder Abuse Act, loss of consortium, and “negligence violation of Bus & Prof Code section 17200 et seq.” The body of the complaint asserted causes of action for medical malpractice (first cause of action), loss of consortium (second cause of action), and violation of the Elder Abuse Act (third cause of action).

Barlow and Patel separately filed demurrers on the grounds that the causes of action again failed to allege sufficient facts. Specifically, Barlow and Patel contended the latest complaint again failed to allege whether the medical malpractice cause of action was a survivor action for negligence or a wrongful death claim. Additionally, Barlow and Patel contended the second amended complaint did not cure the previous pleading defects to state a violation of the Elder Abuse Act.

The case was transferred to Santa Monica and the demurrers were heard in that court.⁵ Patel’s demurrer was sustained with leave to amend.⁶ The minute order states: “[i]f any claim is a survival claim or wrongful death claim it is to be clearly identified/labeled as such.” Additionally, the court stated: “Plaintiff’s counsel should carefully review/consider the Third Amended Complaint prior to filing same; the Court is not inclined to grant any further opportunity to amend.” Plaintiffs did not file a third amended complaint because the Wachtel cases were consolidated.

⁵ Based upon the Van Nuys court’s directive, plaintiffs’ counsel filed a notice of related cases on March 17, 2009, and the case was transferred to Santa Monica.

⁶ Barlow’s demurrer was taken off calendar after it settled the action.

3. *Consolidation of the Wachtel Cases*

Following a finding that the Wachtel cases were related, on May 14, 2009, the court ordered the cases consolidated. Thereafter, plaintiffs filed what is entitled the “Second Amended Complaint,” which we refer to as the “consolidated complaint.”⁷

THE CONSOLIDATED COMPLAINT

1. *The Allegations in the Consolidated Complaint*

On June 4, 2009, plaintiffs Sylvia, individually, and as a successor in interest to Leonard, along with Steven and Marilyn, filed the consolidated complaint against, among others, the Regents, Patel, Bhardwaj, Tarzana, and Mesipam. Harry Wachtel, also an heir (and the plaintiffs’ attorney), “decline[ed] to be a party in this action at this time.” Sylvia alleged she was Leonard’s successor in interest, but did not file a successor in interest declaration until August 25, 2009.

Since this case comes before us after the entry of a judgment following the sustaining of a demurrer, we accept as true the material allegations of plaintiffs’ consolidated complaint. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 7.) The following events allegedly led to Leonard’s death.

The decedent was admitted to Tarzana in January 2007, and he was readmitted in February 2007. Tarzana “failed to detect problems that led to a serious stroke within about three weeks of his discharge.” Upon his readmission, Tarzana failed to care for the decedent “by holding him in the emergency room for almost three days after his stroke, while failing to adequately care for his physical needs, failing to adequately provide for food and hydration and to properly maintain him, and did so recklessly.”

The decedent was transferred to UCLA. Upon transfer to UCLA, the complaint alleges, based upon information and belief, “that the care and treatment of patient

⁷ After consolidation, on July 10, 2009, plaintiffs filed another complaint in the Van Nuys court for wrongful death, loss of consortium, and violations of the Elder Abuse Act against Tarzana, Pfizer, Inc., Goleta Valley Cottage Hospital, and Dr. Babji Mesipam. (*Wachtel v. Tarzana Medical Center* (Super. Ct. L.A. County, 2009, No. LC086165).)

[Leonard] was below the standard of appropriate care[.]” UCLA allegedly failed to “advise Plaintiffs of all available options, and failed to obtain informed consent for the operation performed on [the decedent].” While at UCLA, the decedent was “recklessly neglected,” “allowing the growth of pressure ulcers,” which because of “their reckless neglect” became infected. The decedent also developed aspiration pneumonia and *e-coli* infectious disease.

The decedent was transferred from UCLA to Barlow, where he was treated by Patel and Bhardwaj. The doctors allegedly failed to use reasonable care and neglected the decedent, who was “racked by infectious diseases, such as E-Coli,” that was “never cleared up” until he was transferred from the facility. Based upon information and belief, the complaint further alleges the defendants neglected to “clear his lungs from fluid buildup,” for about one month, which prevented the decedent from being “weaned off the ventilator,” and during his second month, “he was transferred to a lower level of care facility before completing the process[.]” While under their care, the decedent suffered from fluid overload, had infectious subcutaneous ulcers, and based upon information and belief, suffered from dehydration. The doctors also failed to respond and recklessly neglected a “serious rise in [Leonard’s] blood urea nitrogen levels,” “creating serious discomforts and medical complications, yet Defendants did nothing about it,” and concealed these matters from the decedent’s family.

Mesipam was allegedly the decedent’s treating doctor at Valley Cottage. The defendants (which also included Valley Cottage) allegedly failed to clear up the decedent’s infectious diseases, failed to make reasonable efforts to get him off the ventilator, and failed to properly monitor and control his medications.

The decedent died in July 2007.⁸

⁸ The consolidated complaint does not allege the actual date that Leonard died. Sylvia’s declaration states Leonard died on July 11, 2007.

Based upon these allegations, the consolidated complaint alleges three separately labeled causes of action for (1) negligence/wrongful death, (2) loss of consortium, and (3) violations of the Elder Abuse Act.

2. Demurrers to the Consolidated Complaint

Respondents, the Regents, Bhardwaj, Patel, Tarzana, and Mesipam filed demurrers. The demurrers contended that the wrongful death cause of action was time barred and did not relate back to the initial pleadings (in Santa Monica or Van Nuys) because the wrongful death claim alleged different injuries brought by different plaintiffs. All parties contended the allegations in the consolidated complaint did not sufficiently allege a violation of the Elder Abuse Act, Sylvia failed to plead the requirements to establish standing as a successor in interest, and the claim was time barred because Sylvia failed to establish her status as successor in interest before the statute of limitations had expired. As for the loss of consortium claim, it failed because it was derivative.

3. Opposition to Demurrers

The combined opposition to the demurrers asked for leave to amend, but presented no proposed amendment. In addition, plaintiffs presented arguments opposing the grounds for demurrer, which are repeated in their appellate briefs, and discussed *post*.

4. Demurrers to the Consolidated Complaint Sustained Without Leave to Amend

In a written tentative ruling, which became the order of the court, the trial court emphasized that these demurrers raised deficiencies that had been the subject of previous demurrers. The trial court sustained the demurrers without leave to amend, concluding: (1) the first cause of action for wrongful death was time barred, uncertain, and failed to join Harry, the decedent's son and omitted heir; (2) the second cause of action for loss of consortium failed because it was derivative; and (3) the third cause of action for a violation of the Elder Abuse Act was not pleaded with the requisite specificity.

The trial court also concluded that its order applied to bar any potential claims or actions (concerning the same primary rights asserted in this action) by Harry, who was deemed a nominal defendant.⁹

The plaintiffs filed, and later withdrew, a motion for reconsideration, which included a draft of a proposed amended complaint that presented additional allegations to cure the defects in the cause of action for a violation of the Elder Abuse Act.¹⁰ The trial court, however, issued a minute order stating that it would have denied the motion under Code of Civil Procedure section 1008 because the proposed complaint did not constitute new or different facts, and the plaintiffs “failed to provide a satisfactory explanation as to why they did not plead such facts earlier.” The trial court went so far as to call the motion “frivolous,” and “yet another bad faith tactic by Plaintiffs’ counsel,” but did not impose sanctions. The trial court further questioned plaintiffs’ counsel’s tactics, which included filing yet another lawsuit in Van Nuys, “in an apparent attempt to circumvent prior rulings of the Court, and perhaps to obtain a (perceived) more favorable forum for the very claims being litigated in this action.”

Judgment of dismissal was entered and this timely appeal followed.

DISCUSSION

Appellants contend the trial court erred in sustaining the demurrers to the consolidated complaint without leave to amend. According to appellants, they properly alleged timely and viable causes of action, and should have been given leave to amend to cure any deficiencies. We independently review the consolidated complaint to determine if it alleges facts sufficient to constitute a cause of action under any possible legal theory.

⁹ A wrongful death action is considered to be joint, single, and indivisible. This means only one action for wrongful death may be brought, whether in fact it is brought by all or only one of the heirs. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 807.)

¹⁰ The proposed complaint alleged causes of action for a violation of the Elder Abuse Act, loss of consortium, battery, fraud, constructive fraud, and violation of Business and Professions Code section 17200 et seq.

We must take as true all material facts properly pleaded, but do not assume the truth of contentions, deductions, or conclusions of law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; *Blank v. Kirwan, supra*, at p. 318.) A request for leave to amend and the showing necessary to cure the defects may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) Appellants have presented and cited to allegations that appear in what is entitled “Third Amended Complaint” (proposed complaint), which they contend states a viable cause of action for a violation of the Elder Abuse Act.¹¹ As shall be shown, these allegations do not cure the previously noted defects to that cause of action.

1. *The Trial Court Properly Sustained the Demurrers to the Wrongful Death Cause of Action Without Leave to Amend*

Appellants contend the trial court erred in sustaining without leave to amend the demurrers to the wrongful death cause of action. They maintain Sylvia properly and timely alleged a wrongful death claim in the initial complaints (Santa Monica and Van Nuys), and despite it being mislabeled as “negligence” or “medical malpractice,” the named defendants understood the cause of action was a wrongful death claim even though there was no allegation that the decedent died. In any event, even if Sylvia had alleged a negligence cause of action, appellants contend the relation-back doctrine applies to save this time-barred claim. These arguments are unavailing.

A cause of action for wrongful death is a statutory claim. (Code Civ. Proc., §§ 377.60-377.62.) “The cause of action ‘for wrongful death belongs “not to the decedent [or prospective decedent], but to the persons specified” [by statute]. [Citation.]’

¹¹ At oral argument, appellants’ counsel represented that he did not intend to file the complaint, which does not state a wrongful death claim, but wanted this court to consider the allegations as his proffer of additional facts to support the cause of action for a violation of the Elder Abuse Act.

[Citation.]” (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263.) The cause of action arises on the death of the decedent and is vested in the decedent’s heirs. (*Ibid.*) Its purpose is to compensate heirs for the loss of companionship and for other losses suffered as a result of the decedent’s death. (*Ibid.*)

The elements of a cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages consisting of pecuniary losses suffered by the heirs. (*Quiroz v. Seventh Ave. Center, supra*, 140 Cal.App.4th at p. 1263.) The recoverable damages are those to compensate for personal injury to the heir, and are expressly limited to those not recoverable in a survivor action under Code of Civil Procedure section 377.34. (*Quiroz v. Seventh Ave. Center*, at p. 1264.)

A wrongful death claim must be brought against a health care entity and medical professional, based upon professional negligence, within one year of the death of the decedent. (Code Civ. Proc., § 340.5.)¹² The consolidated complaint was filed on June 4, 2009, almost two years after the decedent’s death and is time barred.

a. *The Relation-Back Doctrine Does Not Save Sylvia’s Wrongful Death Claim*

Appellants contend the untimely wrongful death claim alleged in the consolidated complaint can be saved by relating back to the initial complaints filed in Santa Monica and Van Nuys by Sylvia, as a successor in interest. The relation-back doctrine deems a later-filed pleading as having been filed at the time of the earlier complaint. An amended complaint relates back to the initial complaint, and thus avoids the statute of limitations as a bar, if the amended complaint (1) rests on the same general set of facts, (2) involves the same injury, and (3) refers to the same instrumentality (cause) as the initial complaint. (*Norgart v. Upjohn Co., supra*, 21 Cal.4th at pp. 408-409; *San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1549.) “[A]n amended pleading that

¹² Despite appellants’ arguments to the contrary, a cause of action for wrongful death against health care providers is governed by the one-year limitations period. (Code Civ. Proc., § 340.5.) A plaintiff must bring a cause of action within the limitations period after accrual of a cause of action. (Code Civ. Proc., § 312.) Accrual for a wrongful death claim is at the time of death. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404.) No tolling exceptions have been alleged. (Code Civ. Proc., § 340.5.)

adds a new plaintiff will not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater liability against the defendants.” (*San Diego Gas & Electric Co. v. Superior Court*, *supra*, at p. 1550.)

The relation-back doctrine does not save Sylvia’s untimely wrongful death claim because her previous complaints asserted a survivor cause of action for negligence. As a successor in interest, Sylvia initially sued on behalf of the decedent to recover for his predeath injuries. (Code Civ. Proc., § 377.30; *Quiroz v. Seventh Ave. Center*, *supra*, 140 Cal.App.4th at pp. 1264-1265.) The recoverable damages are those the decedent sustained or incurred before death and are distinct from the damages awarded in a wrongful death action. (Code Civ. Proc., §§ 377.34, 377.61; *Quiroz v. Seventh Ave. Center*, *supra*, at pp. 1264-1265.) As noted, a wrongful death action compensates specified heirs of the decedent for losses they suffered as a result of the decedent’s death. (*Quiroz v. Seventh Ave. Center*, at p. 1263; *San Diego Gas & Electric Co. v. Superior Court*, *supra*, 146 Cal.App.4th at p. 1551.) Thus, Sylvia’s wrongful death cause of action does not relate back to the initial complaint alleging a survivor action.

Sylvia next contends the wrongful death cause of action relates back to her loss of consortium claim alleged in the initial complaints. The initial complaints were filed after the decedent’s death. In the consolidated complaint, Sylvia limited her loss of consortium claim to harm she suffered before the decedent’s death. As alleged, Sylvia’s common law cause of action is distinguishable from the spouse in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, who alleged a common law cause of action before her husband’s death and sought to recover for his premature death.

Sylvia cites *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375, for the broad proposition that a wrongful death cause of action relates back to a loss of consortium cause of action. *Lamont* was based on different facts. The husband asserted a timely loss of consortium cause of action arising from his wife’s predeath injury. (*Id.* at p. 377.) After his wife died from her injuries, and the statute had run, the trial court permitted the amendment for wrongful death. (*Id.* at p. 378.) Since the husband was the only heir, the amendment did not impose any greater liabilities on the defendants. (*Id.* at pp. 379-381.) That is not

the case here. Sylvia did not state a viable loss of consortium claim in the initial complaint. Thus, the wrongful death cause of action alleges a new cause of action seeking damages on behalf of the heirs for their injuries as a result of the decedent's death.

We also find unpersuasive the relation-back doctrine discussion in *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, a case appellants' counsel cited during oral argument. The court invoked the relation-back doctrine to save a time-barred legal malpractice action because the subsequent complaint alleged the same injury (legal malpractice) by the same parties, and merely provided specific examples of how the attorneys had allegedly breached the standard of care. (*Id.* at pp. 277-279.) Here, the heirs have asserted a new cause of action. Thus, Sylvia's wrongful death cause of action is time barred.

b. *The Relation-Back Doctrine Does Not Save the Remaining Heirs' Claim*

The relation-back doctrine does not save the untimely claims of Steven and Marilyn because their claims for wrongful death state a new cause of action. (See *Andersen v. Barton Memorial Hospital, Inc.* (1985) 166 Cal.App.3d 678, 684-685; see also *San Diego Gas & Electric Co. v. Superior Court, supra*, 146 Cal.App.4th at pp. 1551-1553.) Since a wrongful death action compensates an heir for his or her own independent pecuniary losses, it is one for "personal injury to the heir." (*Quiroz v. Seventh Ave. Center, supra*, 140 Cal.App.4th at pp. 1263-1264.) Thus, each heir has a "personal and separate cause of action," and although all heirs must be joined in a single action, the statute of limitations runs separately against each heir's cause of action. (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692-693.)

At oral argument, appellants' counsel cited to *Adams v. Superior Court* (2011) 196 Cal.App.4th 71, for what appears to be the proposition that Sylvia could pursue this cause of action as the heirs' representative. Even if Sylvia's claim were not time barred, *Adams* is inapposite. *Adams* concluded the decedent's personal representative could pursue a wrongful death claim on behalf of the heirs based upon the plain language in the wrongful death statute. (*Id.* at p. 77; Code Civ. Proc., § 377.60.) "Personal

representative,” is defined in Probate Code section 58, subdivision (a). The consolidated complaint does not allege Sylvia’s status as the personal representative of the heirs, and this position is inconsistent with the alleged facts. (See *Adams v. Superior Court, supra*, at p. 75, fn. 6.)

We also reject appellants’ contention that the respondents have waived and should be estopped from asserting a statute of limitations defense against Steven and Marilyn.¹³ A position taken to challenge the pleadings is not grounds to overrule a demurrer.

No amendment can cure this defect. The wrongful death cause of action is time barred, and the demurrers were properly sustained without leave to amend.

2. *The Trial Court Properly Sustained the Demurrers to the Loss of Consortium Cause of Action Without Leave to Amend*

Sylvia’s loss of consortium claim fails because it is a derivative tort claim, and she has not sufficiently alleged negligence or other wrongful conduct. (*Boeken v. Philip Morris USA, Inc., supra*, 48 Cal.4th at p. 796.) A loss of consortium claim cannot be maintained as a derivative claim to a cause of action asserting a violation of the Elder Abuse Act because the statutory claim only redresses injuries to the abuse victim. (*Quiroz v. Seventh Ave. Center, supra*, 140 Cal.App.4th at p. 1284.)

3. *Appellants Concede the Demurrers to the Elder Abuse Cause of Action were Properly Sustained, but the Proposed Complaint Does Not Cure the Defects*

Appellants’ brief cites facts from their proposed complaint to contend they can state a viable cause of action for a violation of the Elder Abuse Act. By focusing their argument on these additional facts, our task is to determine whether the proposed allegations would cure the pleading defects previously noted by the trial court.

¹³ Appellants’ estoppel argument also suggests that Steven and Marilyn would not have been added as plaintiffs but for the trial court’s ruling on the previous demurrer in the Santa Monica action. If the pleadings were always intended as a wrongful death cause of action, as appellants maintain, Steven and Marilyn would have been named plaintiffs in both of the initial complaints. (See *Ruttenberg v. Ruttenberg, supra*, 53 Cal.App.4th at p. 807.) Although eventually named as plaintiffs in the Santa Monica action against the Regents, these heirs were never named in the Van Nuys action.

As an initial matter, the trial court did not abuse its discretion in denying leave to file the proposed complaint. The demurrers to the consolidated complaint raised issues that were challenged in previous demurrers and had not been cured by subsequent amendments. In addition, the opposition to the demurrers did not contain any proposed amendments to cure the defects. Instead, the proposed complaint was presented as a motion for reconsideration, and later withdrawn. At that point, there was no statutory basis for the trial court to reconsider its order under Code of Civil Procedure section 1008.

a. *The Pleading Requirements to Assert a Violation of the Elder Abuse Act*

The Elder Abuse Act makes certain enhanced remedies available to a plaintiff who proves abuse of a person that is 65 years of age or older. (Welf. & Inst. Code, §§ 15610.27, 15657.) A plaintiff must prove by “clear and convincing evidence” that a defendant is liable for physical abuse, neglect, or financial abuse (as defined by the Elder Abuse Act) and the defendant acted with “recklessness, oppression, fraud, or malice” while committing the abuse. (Welf. & Inst. Code, §15657.)

Neglect, as defined in the Elder Abuse Act, includes the failure “to exercise that degree of care that a reasonable person in a like position would exercise.” (Welf. & Inst. Code, § 15610.57, subd. (a)(1).) Neglect includes, failure to assist in personal hygiene or in the provision of food; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration. (*Id.*, subd. (b).) The “statutory definition of ‘neglect’ speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care.” (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783.) Thus, acts of negligence in the rendition of medical services are not governed by the Elder Abuse Act. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34.)

Recklessness is not defined in the Elder Abuse Act, but in this context it is “a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur[.]” (*Delaney v. Baker, supra*, 20 Cal.4th at p. 31.) “Recklessness, unlike negligence,

involves more than ‘inadvertence, incompetence, unskillfulness, or failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’ [Citation].” (*Id.* at pp. 31-32.)

To recover for enhanced remedies under the Elder Abuse Act from an employer for the acts of one or more employees, a plaintiff must plead and prove facts that would permit imposition of punitive damages against an employer pursuant to Civil Code section 3294, subdivision (b). (Welf. & Inst. Code, § 15657, subd. (c).) Civil Code section 3294 imposes punitive damages on a corporate employer if (1) “the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others”; or (2) the employer “ratified the wrongful conduct”; and (3) the conduct described above was “on the part of an officer, director, or managing agent of the corporation.” (Civ. Code, § 3294, subd. (b).)

The court in *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, reviewed the cases applying the foregoing legal principles as construed in case law to determine the pleading requirements sufficient to state a cause of action for a violation of the Elder Abuse Act. The plaintiff must allege facts establishing that the defendant: “(1) had responsibility for meeting the basic needs of the elder or dependent adult,” including nutrition, hydration, hygiene, or medical care; “(2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs”; and “(3) denied or withheld goods or services necessary to meet the elder or dependent adult’s basic needs, either with knowledge that injury was substantially certain . . . or with conscious disregard of the high probability of such injury” (*Id.* at pp. 406-407.) The plaintiff must also allege that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering, and the causal link between the neglect and injury must be specifically alleged. (*Id.* at p. 407.) The proposed complaint does not meet these pleading requirements.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

