

2013 WL 6919084 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of California.  
Los Angeles County

Michelle BASMAJIAN, Trustee for the Spaugh Wife's Trust, Plaintiff,

v.

William DUNCAN and Does 1 through 30, Inclusive, Defendants.

No. SC 114677.  
August 23, 2013.

### **Plaintiff's Memorandum of Law**

[Richard J. Basmajian](#) SBN 86797, Richard J. Basmajian APC, 9750 Calvin Avenue, Northridge, CA 91324, (818) 772-0145, Attorney for Plaintiff, Michelle Basmajian, Trustee for the Spaugh Wife's Trust.

Honorable [Lisa Hart Cole](#).

Assigned to Dept. West "O"

Trial Date: 8/07/13

Plaintiff, Michelle Basmajian, Trustee for the Spaugh Wife's Trust, hereby submits her Memorandum of Law.

#### **1. STATUTE OF LIMITATIONS FOR FRAUD**

Pursuant to [Code of Civil Procedure Section 338\(d\)](#), the Statute of Limitations for a cause of action for relief on the ground of fraud is three years from the date of discovery, by the aggrieved party, of the facts constituting the fraud. Plaintiff's counsel is not aware of any case that limits in time how far back one can go on a fraud case, other than the limit imposed by [CCP Section 338\(d\)](#).

"Delayed accrual of a cause of action is viewed as particularly appropriate where the relationship between the parties is one of special trust such as that involving a fiduciary, confidential or privileged relationship" [[Moreno v. Sanchez](#) (2003) 106 CA4th 1415, 1424, 131 CR2d 684, 689--

The "discovery rule" is an exception to the general rule that an action accrues when appreciable harm occurs. The accrual of certain causes of action *is postponed* "until the plaintiff discovers, or has reason to discover, the cause of action." [Fox v. Ethicon Endo-Surgery, Inc.](#) (2005) 35 C4th 797, 807, 27 CR3d 661, 667 (emphasis added)

Estelle Spaugh was unable to discover Duncan's fraud due to his concealment and undue influence.

Michelle Basmajian picked up all of Estelle's records from Duncan after Estelle passed away. Even assuming Michelle was able to look through the voluminous records, there was nothing that would have looked unusual to her because Duncan had concealed his bank account pilfering by making phony check register entries.

The testimony from Robert Kirkelie was that he received a telephone call from Bill Duncan a few weeks (3 or 4 weeks) after Estelle passed away, requesting a meeting with Robert. At the meeting, which took place a few days later, Duncan explained

that he had been taking money out of Estelle's bank accounts. This was the first time that anyone had information that Duncan had done anything wrong.

The subject lawsuit was filed on October 27, 2011 within three years of Robert receiving notice from Duncan at the “meeting” which took place in mid-November, a few weeks after Estelle's death on October 20, 2008.

## 2. INTEREST ON DAMAGES.

In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. *CCP Section 3288*

[Civil Code Section 3289\(b\)](#) provides 10 percent per annum interest after a breach of contract if the contract does not stipulate a legal rate of interest. Certainly, in the case of fraud and **Elder Abuse**, interest damages should at least be on par with “breach of contract” interest. Accordingly, Plaintiff requests 10 percent, or at a minimum, the legal rate of 7% interest,

## 3. TIME FROM WHICH INTEREST RUNS

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day .... [Civil Code Section 3287 \(a\)](#)

## 4. PRESUMPTION OF INTEREST ON LOAN

Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing. [Civil Code Section 1914](#)

## 5. EXEMPLARY DAMAGES

[Civil Code Section 3294](#)

## 6. PUNITIVE “TREBLE” DAMAGES PURSUANT TO CIVIL CODE SECTION 3345

[Civil Code Section 3345](#) states in relevant part:

(a) This section shall apply only in actions brought by, or on behalf of, or for the benefit of senior citizens or disabled persons ... to redress unfair or deceptive acts ....

(b) Whenever a trier of fact is authorized by a statute to impose ... a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter, and the amount of the ..., penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider all of the following factors, in addition to other appropriate factors, in determining the amount of... civil penalty or other penalty, or other remedy to impose. Whenever the trier of fact makes an affirmative finding in regard to one or more of the following factors, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding:

(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

(2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, ... or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; ... or assets essential to the health or welfare of the senior citizen or disabled person.

(3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

## 7. FINANCIAL ELDER ABUSE

*Welfare and Institutions Code Section 15657,5.(a)* states in relevant part:

Where it is proven by a preponderance of the evidence that a defendant is liable for **financial abuse**, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court *shall award to the plaintiff reasonable attorney's fees and costs*. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article, (b) Where it is proven by a preponderance of the evidence that a defendant is liable for **financial abuse**, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the **abuse**, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, *the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply*, (c) ... (d) Nothing in this section affects the award of punitive damages under *Section 3294 of the Civil Code*. (e) Any money judgment in an action under this section shall include a statement that the damages are awarded based on a claim for **financial abuse** of an **elder** or dependent adult, as defined in Section 15610.30. If only part of the judgment is based on that claim, the judgment shall specify what amount was awarded on that basis, (emphasis added)

8. *CCP Section 377.34* states; In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

## 9. "FINANCIAL ABUSE" DEFINED

*Welfare and Institutions Code Section 15610,30. (a)* states as follows:

"**Financial abuse**" of an **elder** or dependent adult occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both. (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both. (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult by undue influence, as defined in *Section 1575 of the Civil Code*. (b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult. (c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal

property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult, (d) For purposes of this section, “representative” means a person or entity that is either of the following: (1) A conservator, trustee, or other representative of the estate of an **elder** or dependent adult. (2) An attorney-in-fact of an **elder** or dependent adult who acts within the authority of the power of attorney.

**10. FINANCIAL ELDER ABUSE - STATUTE OF LIMITATIONS**

*Welfare and Institutions Code Section 15657.7* states as follows:

An action for damages pursuant to Sections 15657.5 and 15657.6 for **financial abuse** of an **elder** or dependent adult, as defined in Section 15610.30, shall be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the **financial abuse**,

August 22, 2013

Respectfully submitted.

<<signature>>

Richard J. Basmajian

Attorney for Plaintiff