

2014 WL 7643086 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Marie A. MATTHEWS, et al,
v.
ESP **FINANCIAL** SERVICES, LLC, et al.

No. 56201300440991.
February 13, 2014.

Date: February 24, 2014
Time: 8:30 a.m.
Dept: 21
Reservation No. 1911323

**Plaintiff's Amended Opposition to Demurrer of Defendant Rod.S.
Hormel; Memorandum of Points and Authorities in Support Thereof**

Jody C. Moore, 192601, Gregory L. Johnson, 177889, Katherine A. Bowles, 287426, Johnson Moore, 1429 E. Thousand Oaks Boulevard, Suite 202, Thousand Oaks, CA 91362, Telephone: (805) 988-3661, Facsimile: (805) 494-4777, Marie E. Matthews, by and through her conservator Debra Santoro.

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To the Court and all parties and their attorneys of record:

Plaintiff MARIE E. MATHEWS by and through her conservator DEBRA SANTORO will, and hereby does, oppose the demurrer brought under [Code of Civil Procedure § 430.10\(e\)-\(f\)](#) to the First, Second, Third, Fourth and Fifth causes of action.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

ROD S. HORMELL is a felony **elder abuser** - convicted and sentenced. In December of last year, ROD S. HORMELL (“MR. HORMELL”) pled guilty in Ventura County Superior Court to 1 count of [Penal Code § 368\(d\)](#) Theft From An **Elder** Or Dependent Adult and admitted to a special enhancement because the theft was over \$50,000.¹ The **elder** he **financially abused** is Plaintiff MARIE E. MATTHEWS (MS. MATTHEWS).

The allegations of criminal misconduct were not included in the present civil complaint, because the criminal matter had not yet resolved. However, should the court consider granting this demurrer, plaintiff requests leave to amend to include the criminal conviction allegations.

Even without criminal allegations, the present complaint detailed allegations regarding **financial abuse**, fraud, wrongful taking, demand for return of property and negligence such that the demurrer must be overruled. Not only are the factual allegations specific, plaintiff included as Exhibits the forensic accountant's tracing of MS. MATTHEWS' assets, the costs of conservatorship, and tax documents to support the facts alleged by MS. MATTHEWS. As such, the causes of action are certain and demurrer should be overruled.

Legal Standard

Provided that the complaint shows some right to relief, a demurrer should be overruled. The court in *Swaner v. City of Santa Monica* set forth the difficulty a moving party faces when bringing a demurrer: A demurrer admits the truth of all factual allegations in the complaint.² Although the plaintiff may be unable to prove the allegations, he need only plead facts showing he is entitled to some relief.³ If upon consideration of all the facts stated, it appears the plaintiff is entitled to any relief against the defendants, then the complaint will be held upheld.⁴ The policy of California is to construe complaints liberally with a view towards substantial justice.⁵

Issue Statements

A. In deciding on a demurrer claiming uncertainty, the Court must look to the whole complaint. Specific facts to support each element of each cause of action were set forth in the complaint's preliminary allegations, factual background, and in the causes of action themselves. Although Mr. HORMELL argues that incorporation by reference is an improper way to plead facts, nothing could be further from the truth. Forcing Plaintiff to repeat the facts in each cause of action is nonsensical and would lead to repetitive pleading.

B. Mr. HORMELL's theory that the statute of limitations has run based on the date of hiring, rather than the date of tortious conduct, is without merit. This theory has no basis in fact or law. Defendant fallaciously asserts that the statute began to run in 2008 when MR. HORMELL was hired. But the trigger for the limitations period on **financial abuse** is 4 years *after*, for fraud is 3 years, and for negligence is 2 years *after the discovery of a wrongful or fraudulent taking of property*. The earliest that this could possibly be was September 2011, when the Plaintiff's daughter learned of her mother's diagnosis with dementia and thereafter discovered multiple insufficient funds notices and delinquent tax returns. As the complaint was filed in August 2013 (less than 2 years later), this argument fails.

C. Mr. HORMELL's demurrer to preliminary allegations, rather than causes of action, is misplaced. A request to strike preliminary allegations, such as the one made here, is the proper subject of a motion to strike, not a demurrer. Similarly, a request that punitive damages be stricken is not a proper argument in a demurrer. As no motion to strike has been filed, these allegations should remain intact.

Argument

A. Each element of each cause of action is pled with sufficient facts.

1. Financial elder abuse.

Financial elder abuse is defined under [Welfare & Institutions Code § 15610.30\(a\)](#) as occurring when a **person or entity** takes, secretes, appropriates, obtains, or retains, any interest in real or personal property, for wrongful use, or with intent to defraud or both; or assists in the above described acts, or does any of the above through undue influence. Subsection (c) goes on to define "takes" etc. **as deprivation of the elder's right to the property by any means** of an agreement, transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of the **elder**.

Plaintiffs alleges facts to support these elements, including that MS. MATTHEWS was at all relevant times an **elder** within the meaning of [Welfare & Institutions Code § 15610.27](#), as she was 90 years old when the complaint was filed.⁶ Starting in 2008, MR. HORMELL was the **Financial** Planner in charge of all of MS. MATTHEWS' assets, including the 462,292.23 in proceeds from the sale of her home.⁷ He owed MS. MATTHEWS a fiduciary duty of honesty good faith, and fair dealing under [Insurance Code § 785](#).⁸ He made misrepresentations to MS. MATTHEWS concerning the value, consequences, and costs of his **Financial** Planning services.⁹ For example, he convinced her to write two checks to a fake company named RR Villas and he asked her to write a \$20,000 check to his **financial** planning company ESP **FINANCIAL** SERVICES, LLC

(“ESP **Financial**”) for unspecified **financial** planning services.¹⁰ He failed late and/or failed to file every tax return of MS. MATTHEWS between 2008 and 2011.¹¹

Complaint Paragraphs 30 through 35 discuss wrongful taking, intent to defraud, causation and damages: He wrongfully took MS. MATTHEWS' property and intended to defraud her by concealing that he was making unauthorized withdrawals, rollovers, and investments for personal gain and MS. MATTHEWS' expense and thereby breached his fiduciary duty. Examples of improper rollovers, ATM and credit card withdrawals and oil and gas partnerships are in paragraphs 16 and 21. In engaging in this wrongful conduct, he took, secreted, appropriated, obtained and retained the property of MS. MATTHEWS, an **elder**, to a wrongful use and/or with intent to defraud within the meaning of **Welfare & Institutions Code § 15610.30**. In engaging in such conduct, defendant knew or should have known that it was likely harmful to MS. MATTHEWS within the meaning of the same. As a legal and proximate result of this wrongful conduct, MS. MATTHEWS was deprived of the use of her property and she incurred economic harms and losses, which are listed in detail in paragraphs 21 and 23. She also sustained mental distress, her daughter had to seek conservatorship to gain control of her **finances**, and she incurred and continues to incur attorney's fees and costs.

Based on these allegations, both clear and factually specific, a claim for **financial elder abuse** has been pled and supported against moving party, ROD S. HORMELL

2. Fraud

The elements of intentional misrepresentation of actual fraud are: (1) misrepresentation (false representation, concealment or nondisclosure), (2) knowledge of falsity, (3) intent to defraud (i.e. induce reliance) and (4) justifiable reliance.¹²

Facts demonstrating intentional misrepresentations and knowledge of falsity (elements 1 and 2) are alleged in paragraph 9. Intent to defraud and concealment (elements 1 and 3) are alleged in paragraphs 30 through 35 set forth above. Justifiable reliance (element 4) is alleged in paragraphs 37 and 38 set forth below. Causation and damages are in paragraphs 39,40 and 41 are also set forth below.

Additionally, in support of Plaintiff's fraud cause of action, Plaintiff alleges the **establishment a fiduciary or confidential relationship** based on law¹³ and fact.¹⁴

In the factual context, the general rule is that the essence of a confidential relationship depends only on whether the plaintiff actually reposed trust and confidence in the other, and whether the other “accepted” such trust and confidence.¹⁵ The essential elements are: (1) the vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself.¹⁶ A key factor in the existence of a confidential relationship lies in control by a person over the property of another.¹⁷ And the test is subjective - it is not whether a reasonable person would have been vulnerable, but whether the victim was in fact vulnerable.

Complaint Paragraph 8: After attending a **Financial** Seminar hosted by MR. HORMELL, MS. MATTHEWS hired him in 2008 to be her **Financial** Planner for these monies (her roughly \$500,000 benefit from the sale of her house), as well as her pension and social security income totaling \$6,000 per month.

Complaint Paragraph 9: At the same time, MS. MATTHEWS replaced her Certified Public Accountant Julia Terada-Hallisey with **Financial** Planner MR. HORMELL.

As a result, MR. HORMELL had control over a substantial amount, if not all, of MS. MATTHEWS' **financial** assets and income, satisfying that key factor of control over property.

The complaint goes on to provide facts to support each essential element:

Complaint Paragraph 37: In this case, Plaintiff alleges that Mr. Santoro represented to MS. MATTHEWS that he was making complex investments and **financial** planning decisions that she lacked sufficient knowledge, experience and expertise to make. (Elements 1 and 2) MR. HORMELL stated that he possessed special knowledge, experience and expertise with regard to such **financial** matters and other matters of importance to MS. MATTHEWS in planning her economic future. (Element 3) He offered to provide suitable advice and recommendations. (Element 3).

Complaint Paragraph 38: Based upon his representations of superior knowledge, experience and expertise, MS. MATTHEWS placed her trust and confidence in defendant that the actions he took would be in her best interest. (Element 4) As a result of this conduct, a confidential relationship existed between MS. MATTHEWS and MR. HORMELL by which he owed MS. MATTHEWS a fiduciary duty.

Complaint Paragraphs 39, 40, 41: Mr. Santoro breached this fiduciary duty by taking actions on behalf of MS. MATTHEWS that were not in her best interests and by which he profited at her expense (i.e. paragraphs 10-23). As a direct and proximate result of this wrongful conduct, MS. MATTHEWS sustained damages as set forth in herein (paragraphs 21-26). Defendant's conduct constituted oppression, fraud, and malice and MS. MATTHEWS is entitled to recover damages for the sake of example and by way of punishing defendant pursuant to [Civil Code § 3294](#) and treble damages pursuant to [Civil Code § 3345](#).

3. Demand for return of property.

Moving on to the next cause of action, demand for return of property, all that is required under [Welfare & Institutions Code § 15657.6](#) is that MR. HORMELL 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 (or other forms of **financial abuse** under [section 15610.30](#)) when the **elder** lacks capacity under [Probate Code § 812](#). Under the Probate Code:

A person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

- (a) The rights, duties, and responsibilities created by, or affected by the decision.
- (b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The lack of capacity of Plaintiff is alleged in paragraph 1 (plaintiff is incapacitated from age and illness and appears in the action by and through her daughter and conservator DEBRA SANTORO), as well as paragraph 14 (in September 2011 a physician diagnosed MS. MATTHEWS with **dementia** and the doctor's assessment was sent to MR. HORMELL to inform him), and in paragraph 17 (Plaintiff's daughter was granted conservatorship of her based on a **neuropsychological assessment** reporting the onset of dementia). These allegations are enough to satisfy [Probate Code § 812](#).

Facts constituting the wrongful taking, concealing and disposing of in bad faith are supported in paragraph 21 (money was taken and IRAs were rolled over into unauthorized and/or unknown accounts that MS. MATTHEWS did not have access to). MS. MATTHEWS lost a total of \$160,383.60 according to the **financial** records that were able to be recovered from MR. HORMELL (paragraph 21). The records obtained from MR. HORMELL are incomplete, which suggests that further illicit transactions took place.

4. Wrongful taking.

In order to obtain double damages on the wrongful taking under [Probate Code § 859](#), the wrongful taking, concealing and disposing must be in bad faith or through the commission of **elder financial abuse**.

In this case, Plaintiff properly stated and supported all the elements for **financial elder abuse** as well as a bad faith taking, so the cause of action for double damages is sufficient.

5. Negligence

Finally, the tort of negligence has well-established elements of duty, breach, causation and damages.¹⁸ Paragraph 47 sets forth MR. HORMELL's duty to MS. MATTHEWS as a **financial** planner engaged in the business of **financial** planning through his company ESP **FINANCIAL** SERVICES (co-defendant). He was also a licensed insurance agent pursuant to [Insurance Code section 785](#) and owed MS. MATTHEWS a fiduciary duty. Paragraph 48 continues, in his decision to undertake the provision of **financial** planning services to MS. MATTHEWS, he had a duty to exercise the degree of knowledge and skill ordinarily possessed and exercised by other **financial** planners and **financial** planning companies engaged in said profession in the same or similar locality, including the United States.

Paragraph 49 sets forth facts to support his breach. MR. HORMELL breached the aforementioned duties by failing to exercise the degree of knowledge and skill ordinarily possessed and exercised by other **financial** planners and **financial** planning companies engaged in said profession in the same or similar locality, including the United States. Additional facts to support his breach are present in nearly every paragraph of the complaint.

Causation and damages are stated in paragraph 50. As a direct and proximate result of MR. HORMELL's aforementioned conduct, MS. MATTHEWS incurred economic harms and losses. In addition, MS. MATTHEWS sustained mental distress, anguish, upset, anxiety and related injuries.

Despite defendant's argument to the contrary, breach of agreement is not a required element of any cause of action pled. Plaintiff has tort causes of action (**elder financial abuse**, fraud, and negligence), as well as probate code causes of action (wrongful taking and demand for return of property), but Plaintiff has not alleged any contract causes of action. Therefore, defendant has no reasonable basis to assert that this is a "garden variety contractual dispute" and that Plaintiffs causes of action fail to allege breach of an agreement, causation and damages.¹⁹

In addition, defendant's moving papers improperly characterize the cause of action under [Probate Code § 859](#) as one for the tort of conversion.²⁰ As described above, the claim for double damages is dependent upon the allegations of **financial abuse** or bad faith taking, not upon the elements of conversion.

B. The statute of limitations defense fails.

There is a general tolling of the statute of limitations while an **elder** lacks capacity and this tolling continues until the **elder** regains capacity.²¹ As Plaintiff has alleged that MS. MATTHEWS lacked capacity around the time the unauthorized **financial** transaction were taking place (paragraphs 14, 17), the statute of limitations was tolled. Upon appointment of her daughter DEBRA SANTORO as conservator on July 18, 2012, the statute may have begun to run. But even if it did, the statute of limitations defense fails because the complaint was filed August 23, 2013 and the shortest statute of limitations in this case is 2 years.

Under [Code of Civil Procedure § 335.1](#) and [338\(d\)](#), the statute of limitations for MS. MATTHEWS' personal injury and fraud claims are 2 years and 3 years, respectively. These code sections govern only **negligence and fraud** causes of action, as the **Elder Abuse** and Dependent Adult Civil Protection Act (“**Elder Abuse Act**”) expressly modifies the statute of limitations for the remaining causes.

The **Elder Abuse Act** under [Welfare & Institutions Code § 15657.7](#) states that an action for **financial abuse of an elder** (as defined in [§ 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 **financial abuse**. Thus, **financial elder abuse** has a 4-year statute.

[Welfare * Institutions Code § 15657.5\(b\)](#) extends this 4-year limitations period to personal injury and other damages resulting from the **financial abuse**, notwithstanding the death of the **elder**.

[Welfare * Institutions Code § 15657.6](#) further modifies the rule:

A person or entity that takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining the real or personal property of an **elder** or dependent adult when the **elder** or dependent adult lacks capacity pursuant to [Section 812 of the Probate Code](#), or is of unsound mind, but not entirely without understanding, pursuant to [Section 39 of the Civil Code](#), shall, upon demand by the **elder** or dependent adult or a representative of the **elder** or dependent adult, as defined in [subdivision \(d\) of Section 15610.30](#), **return the property and if that person or entity fails to return the property, the elder or dependent adult shall be entitled to the remedies** provided by [Section 15657.5](#), including attorney's fees and costs. This section shall not apply to any agreement entered into by an **elder** or dependent adult when the **elder** or dependent adult had capacity.

Per the language of this statute, the **elder abuse** claim arises once demand is made for return of the **elder's** property. Accordingly, as the **elder** lacks capacity pursuant to [Probate Code § 812](#), counsel can start the statute of limitations running by demanded return of the property. Arguably, Plaintiff's August 2013 complaint demanding the return of property (which has not been returned) resets the statute on **financial abuse**.

While defendant's moving papers state that the statute began running upon the hiring of MR. HORMELLL and 2008, and the conservatorship was not granted until July of 2012, defendant's argument that “it is clear that Matthews was not mentally impaired from the time she retained Defendants up to the time of conservatorship”²² is inaccurate. Plaintiff's pre-conservatorship allegations that Plaintiff lacked capacity include:

Complaint Paragraph 14: In September 2011, MS. MATTHEWS was diagnosed with **dementia** and MS. SANTORO sent a doctor's assessment to MR. HORMELLL to inform him.

Mr. HORMELL's argument also side steps the real issue, which is that defendant is arguing the statute of limitations began to run upon hiring MR. HORMELL in 2008, rather than when the tortious conduct occurred and was known or knowable by the plaintiff or her representative during the time of her incapacity. To make such argument, Mr. HORMELL must misrepresent the allegations of the complaint. For example, the moving papers at page 10 lines 13-16 assert that the complaint is silent as to plaintiff's age. But plaintiff's age and status as an **elder** are set forth in paragraphs 1 and 7.

Mr. HORMELL also claims that Plaintiff did not need a conservator until 5 years after she retained Mr. HORMELL. **See moving Papers Page 10 lines 13-16.** But the complaint does not state that Plaintiff “did not need a conservator” but rather states that Plaintiff was forced to apply for conservatorship because of MR. HORMELLL's actions and refusals to cooperate.

More importantly, Plaintiff was unaware when she hired MR. HORMELLL that he was going to take her property and **financially abuse** her. It is only upon the discovery of actual information constituting grounds to sue or when a reasonably diligent person would realize there are grounds to sue that the statute begins to run.

As discussed previously, MS. MATTHEWS still is not aware of these facts because she lacks capacity. And it was not until September 2011 (at the earliest), that her daughter MS. SANTORO had cause for concern and began to take action to act on her mother's behalf as conservator.

Complaint Paragraph 14 alleges delayed discovery. The need for intervention and management of MS. MATTHEWS' **finances** only became apparent after she received multiple non-sufficient funds notices, unpaid bills dunning notices and delinquent tax notices from both the IRS and the California Franchise Tax Board. MS. SANTORO's many calls to MR. HORMELL went unreturned and her requests for copies of tax returns were ignored by MR. HORMELL and ESP **FINANCIAL**.

Even then, MS. SANTORO did not have a complete understanding of the **financial** damage that had been done as she did not have access to MS. MATTHEWS' **financial** records or accounts. Assuming, for the sake of this argument, that September 2011 is when the statute began to run, Plaintiff's complaint was filed within two years (in August 2013), which falls within the shortest statute of limitations (2 years for negligence).

C. The remainder of the moving papers, which demur to preliminary allegations and punitive damages is without merit.

A demurrer is not the proper way to strike allegations regarding punitive damages or to strike the preliminary allegations. Yet, defendant's moving papers make both of these arguments.²³

As it states in [Code of Civil Procedure § 436](#), the court may, on motion, strike out irrelevant, false or improper matter inserted in any pleading or strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

In contrast, one demurs to a cause of action for failure to state facts sufficient to constitute a cause of action or to state a cause of action is uncertain.²⁴ As the preliminary allegations do not contain a cause of action, they are not the proper subject of a demurrer.

And as to the statement that plaintiff may not recover punitive damages, according to *Grieves v. Superior Court*, a motion to strike, rather than a demurrer, is the proper procedure for testing claims for punitive damages.²⁵

An additional procedural defect is present in defendant's Notice of Demurrer. It states that "Defendant ROD S. HORMELL will move this Court for an order sustain this demurrer to the Plaintiff's Complaint."²⁶ As the Notice does not list co-Defendant ESP **Financial**, any ruling in this demurrer must be limited to MR. HORMELL.

D. Plaintiff respectfully requests leave to amend.

Given that defendant MR. HORMELL has now been convicted of felony theft from an **elder** under [Penal Code § 368\(d\)](#) with a special enhancement because the theft was over \$50,000, if this Court is inclined to sustain any part of the demurrer, Plaintiff respectfully requests leave to amend with additional factual allegations concerning defendant's associated criminal misconduct.

Date: February 11, 2014

JOHNSON MOORE

By:

Katherine A. Bowles

Attorneys for Plaintiff

Footnotes

- 1 Case number 2013005499.
- 2 [Swaner](#), 150 Cal. App. 3d 789, 797 (1984).
- 3 *Id.*
- 4 *Id.* See [Wong v. Regents of Univ. of Cal.](#), 15 Cal. App. 3d 823 (1971).
- 5 [Code of Civil P. § 452](#); [C & H Food Co. v. Hartford Ins. Co.](#), 163 Cal. App. 3d 1055, 1062 (1984).
- 6 Complaint ¶¶1, 7.
- 7 Complaint ¶3.
- 8 Complaint ¶¶ 3, 28.
- 9 Complaint ¶ 29.
- 10 Complaint ¶¶11, 12.
- 11 Complaint ¶18.
- 12 [Civ. C. § 1572](#); [Anderson v. Deloitte & Touche](#), 56 Cal. App. 4th 512, 515 (1997).
- 13 Complaint ¶¶ 3,28.
- 14 Complaint ¶¶ 37, 38.
- 15 [Person v. Smart Inventions, Inc.](#), 125 Cal. 4th 1141,1161 (2005).
- 16 [Richelle L. v. Roman Catholic Archbisho](#) 106 Cal 4th 257, 272 2003
- 17 [Vai v. Bank of Amer. Nat'l Trust & Sav. Ass'n](#), 56 Cal. 2d 329, 337-38 (1961).
- 18 [Civil Code § 1714\(a\)](#); [Ladd v. County of San Mateo](#), 12 Cal. 4th 913, 917 (1996).
- 19 Defendant's moving papers, page 9, lines 1-7, page 10, lines 17-19, page 14, lines 4-16, page 16, lines 22-28.
- 20 Defendant's moving papers, page 15, line 28 and page 16, lines 1-9.
- 21 [Code of Civil Procedure § 352](#).
- 22 Defendant's moving papers, page 7, lines 20-21.
- 23 Defendant's moving papers, page 9, lines 1-15, page 15, lines 13-15.
- 24 [Code of Civil Procedure §§ 430.10\(e\)-\(f\)](#).
- 25 [157 Cal. App. 3d 159,163-64 \(1984\)](#).
- 26 Defendant's Notice of Demurrer.

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