2013 WL 7790842 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California,
West District.
Los Angeles County

Marilyn SCHLESINGER, by and through her Attorney in Fact, Carol Friedman, Plaintiff,
v.
GRANDVIEW PALMS, LLC dba Grandview Palms, a California limited liability company; and Does 1 through 100, inclusive, Defendants.

No. SC117763.
July 15, 2013.

**Plaintiff's Brief re: Statute of a Limitations**

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Hon. Allan J. Goodman.

Dept. P

Action Filed: July 16, 2012

Trial Date: May 6,2013

Plaintiff, MARILYN SCHLESINGER, by and through her Attorney in Fact Carol Friedman, hereby files this brief regarding the applicable statute of limitations.

**MEMORANDUM OF POINTS AND AUTHORITIES**

I. *INTRODUCTION*

In this case, the statute of limitations reaches back to at least March 21, 2009, the date of Marilyn Schlesinger's second fall at Grandview Palms which resulted in a fractured femur. Marilyn Schlesinger's daughter and attorney-in-fact Carol Friedman did not become aware that her mother's injuries were caused by misconduct of Defendants until at the earliest June 6,2012, because she relied on the representations of Teresa Guill that Teresa Guill's ongoing appraisals and reappraisals of Marilyn Schlesinger ensured that Mrs. Schlesinger was suitable to be a resident of Grandview Palms. In fact, as late as *April 23, 2012*, Ms. Guill stated in the Appraisal/Needs and Services Plan relating to Mrs. Schlesinger that "[w]e believe this person is compatible with the facility program and with other clients/residents in the facility, and that we can provide the care as specified in the above objective and plan." (Trial Ex. 1, at Bates No. 001-0281.) Thus, under the delayed discovery rule, Plaintiff's cause of action did not accrue until June 6,2012, when Mrs. Friedman became aware that Defendants' negligence caused her mother's injuries.

**II. *THE DELAYED DISCOVERY RULE EXPANDS THE STATUTE OF LIMITATIONS IN THIS CASE TO INCLUDE MRS. SCHLESINGER'S FALL ON MARCH 21, 2009***

Ordinarily, a cause of action accrues when, under the substantive law, the wrongful act is committed and the liability arises, e.g., the date of the injury. *See Norgart v. Upjohn Co.* (1999)21 Cal.4th 383,397.

However, under the delayed discovery rule applicable in this situation, although plaintiff was aware of injury, the cause of action accrues when plaintiff first became aware, or through reasonable diligence *could have become aware*, that the defendant's negligence was a cause of such injury. *See Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 408; *Scott v. County of Los Angeles* (1977) 73 Cal.App.3d 476,482-484. "The belated discovery rule protects the plaintiff... when, despite diligent investigation, he is *blamelessly ignorant* of the cause of his injuries. It also protects the defendant, who is spared precipitous litigation." *Bastian v. San Luis Obispo County* (1988) 199 Cal.App.3d 520, 529 (emphasis added).

To raise the issue of belated discovery, plaintiff must state: (1) when the discovery was made; (2) the circumstances behind the discovery; and (3) facts showing the failure to discover earlier was *reasonable* (rather than the result of a failure to investigate or act diligently). *See Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397; *Bastian v. San Luis Obispo County, supra,* 199 Cal.App.3d at 527.

To a large extent, this so-called "delayed discovery rule" virtually swallows up the general rule measuring accrual from the date the wrongful act occurred. *See Norgart v. Upjohn Co., supra,* 21 Cal.4th at 397-398. Specifically, the delayed discovery rule postpones accrual of the cause of action until plaintiff suspects or reasonably should suspect 1) that he or she has been injured, 2) the cause of injury, and 3) the tortuous nature of the conduct causing the injury. Plaintiff's knowledge is measured both subjectively and objectively; that is, plaintiff is held to his or her actual knowledge, as well as knowledge that could be discovered through reasonable investigation after being put on inquiry. *Norgart v. Upjohn Co., supra,* 21 Cal.4th at 398; *Jolly v. Eli Lilly & Co.* (1988)44 Cal.3d 103,1109-1111.

In addition, accrual of the statute of limitations is also delayed where the defendant fraudulently concealed facts that would have led plaintiff to discover a potential cause of action. Here, the cause of action accrues when plaintiff actually discovers or is put on "inquiry notice" of the operative facts. *See Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900-902.

Thus, because Carol Friedman relied on the assessments and reassessments of Teresa Guill that Mrs. Schlesinger was suitable for residency at Grandview Palms, the delayed discovery rule applies and the cause of action did not accrue until June 6,2012, when Mrs. Friedman became aware that her mother was not suitable to be a resident of Grandview Palms based on her medical condition, and that Defendants' conduct was the cause of her mother's injuries.

**II. *CODE OF CIVIL PROCEDURE SECTION 338* *PROVIDES FOR A THREE YEAR STATUTE OF LIMITATIONS FOR STATUTORY CAUSES OF ACTION SUCH AS ELDER ABUSE***

Defendants will likely erroneously argue that this action is subject to the two-year statute of limitations under *Code of Civil Procedure §335.1*. However, in reality this case is subject to the three-year statute of limitations for statutory causes of action under *Code of Civil Procedure* §338.

First, it must be acknowledged that the court in *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, in ruling that the *Code of Civil Procedure* §340.5 three year statute of limitations applicable to medical malpractice actions did not apply to **elder abuse** actions, stated in dictum that Code of Civil Procedure §335.1 applied to **elder abuse** cases. *See Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 125-126 ("The Code of Civil Procedure section 335.1 statute of limitations (applicable to causes for "assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another") is facially

applicable to **elder** **abuse** actions and provides a two-year limitation period, and is subject to tolling for "insanity" as defined in Code of Civil Procedure section 352.")

However, the *Benun* court is wrong. The *Benun* court apparently failed to realize or consider that a cause of action for **elder** **abuse** is a statutory cause of action, and statutory causes of action have their own three year statute of limitations under Code of Civil Procedure §338 ("Within three years: (a) An action upon a liability created by statute, other than a penalty or forfeiture.") For purposes of application of Code of Civil Procedure §338, " '[a] cause of action is based upon a *liability created by statute' "* only where the liability is embodied in a statutory provision *and was of a type which did not exist at common law."* *Briano v. Rubio* (1996)46 Cal.App.4th 1167,1177. "Thus, where a cause of action is based upon a statute which did not 'create a new form of liability... but merely codified and refined existing law,' the section 338 three-year limitations period for actions based upon statutory liability does not apply." *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744,755, quoting *Briano v. Rubio, supra,* 46 Cal.App.4th at 1179.

And it is indisputable that a cause of action for **elder** **abuse** is a statutory cause of action that provides for liability that was created by statute and that did not exist at common law. In fact, in *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, the court specifically held that Welfare & Institutions Code §15657 created an independent cause of action and did not merely provide for heightened remedies. *See Perlin v. Fountain View Management, Inc., supra,* 163 Cal.App.4th 657, 666 ("We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action.")

That **elder** **abuse** is a statutory cause of action subject *Code of Civil Procedure* §338 is further supported by multiple other opinions, including California Supreme Court decisions. In *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, the Supreme Court described its then-recent decision in *Delaney v. Baker* (1999) 20 Cal.4th 23,40, as "concluding that a *cause of action* for 'reckless neglect' under the ... Act ..., is distinct from a cause of action 'based on professional negligence' within the meaning of section 15657.2." *Id.* at 116 (italics added).

In *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, the Supreme Court, citing section 15657, said, "regardless of its language, *Central Pathology* affords no basis for concluding the Legislature intended its reference in section 425.13(a) to 'professional negligence' to encompass **elder** **abuse**, let alone as yet uncreated *statutory causes of action for* ***elder*** ***abuse*** committed with recklessness, oppression, fraud or malice." *Covenant Care, Inc. v. Superior Court, supra,* 32 Cal.4th at 786 (italics added). The court also specifically referred to "**Elder** **Abuse** Act causes of action" (*id* at 788), to "an **Elder** **Abuse** Act action" (*id.* at 789), to "**Elder** **Abuse** Act claims" (*id.* at 790), and to "an action under the **Elder** **Abuse** Act" (*id.*)

The Supreme Court's language in *Barris v. County of Los Angeles, supra,* and *Covenant Care, Inc. v. Superior Court, supra,* is authority for the proposition that the **Elder** **Abuse** Act creates an independent statutory cause of action. *See also Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82 ("The elements of a cause of action under the **Elder** **Abuse** Act are statutory..."); *Wolk v. Green* (N.D.Cal.2007) 516 F.Supp.2d 1121,1133 ("A civil cause of action under the **Elder** **Abuse** statute is governed by California Welfare and Institutions Code section 15657 ..."). It is also noteworthy that when the Legislature added Article 8.5 to the Act, of which article section 15657 is a part, it labeled the article, "Civil Actions for **Abuse** of **Elderly** or Dependent Adults." (Stats, 1991, c. 774 (SB 679), § 1; *see also* CACI 3100, Directions For Use (Feb. 2008), p. 284 ("The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the **Elder** **Abuse** and Dependent Adult Civil Protection Act").

Therefore, because **elder** **abuse** is a statutory cause of action with liability created by statute that did not exist at common law, the three-year statute of limitations period set forth in *Code of Civil Procedure* §338 applies.

### III. *CONCLUSION*

Based on the foregoing, because Plaintiff's legal representative Carol Friedman relied on the assessments and reassessments of Defendants that Plaintiff was suitable for residency at Grandview Palms, Plaintiff's cause of action did not accrue until Mrs.

Friedman became aware that she was not suitable and Defendants' negligence was the cause of her mother's injuries. Thus, the statute of limitations reaches at least as far back as March 21, 2009, the date of Mrs. Schlesinger's second fall at Grandview Palms.

DATED: July 15, 2013

GARCIA, ARTIGLIERE & SCHADRACK

By: <<signature>>

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