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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICKIE L. CHIPMAN ,
Plaintiff,
v.
MARCIA F. NELSON, M.D., et al.,
Defendants.

No. 2:11-cv-2770-TLN-EFB PS

FINDINGS AND RECOMMENDATIONS

Several dispositive motions are pending which are addressed herein.¹ Defendants Joseph Matthews and Kimberly Merrifield move to dismiss plaintiff’s wrongful death claim pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6) and 12(b)(7). ECF Nos. 412, 419. Defendants Enloe Medical Center (“EMC”), Brenda Boggs, and Marcia Nelson move for judgment on the pleadings pursuant to Rule 12(c). ECF No. 404. Defendant Merrifield has filed a second motion to dismiss pursuant to Rule 12(b)(6). ECF No. 452. Previously dismissed defendants Jane Stansell and Dirk Potter move for entry of judgment pursuant to Rule 54(b). ECF Nos. 448, 450.² For the following reasons, it is recommended that EMC, Boggs, and

¹ This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). See 28 U.S.C. § 636(b)(1).

² The court heard oral argument on the motions by Matthew and Merrifield. Attorney Brian Johnson appeared on behalf of defendant Matthews and attorney Lauren Calnero appeared on behalf of defendant Merrifield. Plaintiff appeared pro se. The court determined that oral

1 Nelson’s motion for judgment on the pleadings be granted in part and denied in part, that
2 Merrifield’s motions to dismiss be granted, and that Matthews’s motion to dismiss be denied, and
3 that Stansell and Potter’s motions for entry of judgment be denied.

4 I. Procedural History

5 This action arises out of a dispute between plaintiff Rickie Chipman (“Chipman” or
6 “plaintiff”) and defendants over the medical care provided to plaintiff’s mother, Mary A. Martin
7 (“decedent”). ECF No. 1. Numerous motions to dismiss and to strike the original complaint were
8 filed by various defendants. ECF Nos. 12, 13, 15, 16, 17, 21, 22, 25, 27, 28, 29, 32, 38, 39; *see*
9 *also* 20, 40, 41, 44. On February 29, 2012, plaintiff filed a single, consolidated opposition to the
10 multiple motions. ECF No. 49. In responding to the motions she purported to provide a “more
11 definitive statement” which the court construed as a motion to amend the complaint. *Id.* So
12 construed, the motion was granted. ECF No. 64.

13 Plaintiff then filed a first amended complaint purporting to assert several causes of action
14 against seventeen named defendants. ECF No. 74. All defendants moved to dismiss (ECF Nos.
15 76, 77, 78, 79, 80, 83, 85, 87, 94, 95, 96), and on March 28, 2013, the complaint was dismissed
16 with leave to amend, except as to claims barred by California’s litigation privilege, plaintiff’s
17 claim under California Penal Code section 471.5, plaintiff’s false imprisonment claim, and all
18 claims against three defendants (Roberts, Calkins, and O’Mahoney), which were dismissed
19 without leave to amend (ECF Nos. 151, 152).

20 Plaintiff filed a second amended complaint (ECF No. 154) and various defendants again
21 moved to dismiss (ECF Nos. 156, 157, 158, 161, 162, 163, 178). In response, plaintiff sent a
22 letter to the court (ECF No. 166) which was construed as another motion to amend. ECF No.
23 179. So construed, the motion was granted and plaintiff filed a third amended complaint. ECF
24 No. 180. Another round of motions to dismiss ensued, again resulting in plaintiff requesting
25 leave to amend her complaint. ECF No. 221. That request, too, was granted. ECF No. 245.

26 Plaintiff filed a fourth amended complaint, alleging claims on plaintiff’s behalf and on

27 argument would not materially assist in the resolution of the other motions and they were ordered
28 submitted on the briefs. *See* E.D. Cal. 230(g).

1 behalf of the decedent. ECF Nos. 246, 247. That complaint also drew various motions to dismiss
2 and/or strike. ECF Nos. 248, 249, 253, 257, 258, 259, 262, 266, 277, 294. Proposed findings and
3 a recommendation were issued that the fourth amended complaint be dismissed without leave to
4 amend due to plaintiff's failure to state any federal claims for relief. That recommendation also
5 recommended that supplemental jurisdiction over the complaint's state law claims be declined.
6 ECF No. 330. The recommendation was adopted in part and the complaint was dismissed, but the
7 dismissal was with further leave to amend.³ ECF No. 334.

8 Thereafter, plaintiff filed her fifth amended complaint, which is now the operative
9 compliant. ECF No. 336. Defendants EMC, Boggs, and Nelson filed an answer (ECF No.346),
10 and all other remaining defendants, with the exception of Kimberly Merrifield, moved to dismiss
11 that complaint (ECF Nos. 338, 340, 341, 342, 343, 344, 345, 347). On September 30, 2015, the
12 court dismissed all claims without leave to amend against seven defendants (Potter, Valcarengi,
13 Wilms, Verma, Clark-Martin, Stansell, and Kasza), and dismissed all claims, except plaintiff's
14 wrongful death claim, against defendants Kindred Hospital Sacramento ("Kindred"), Lew,
15 Avdalovic, and Matthews without leave to amend. ECF No. 408.⁴

16 EMC, Boggs, and Nelson now move for judgment on the pleadings under Rule 12(c)
17 (ECF No. 404); Matthews moves, for a second time, to dismiss plaintiff's wrongful death claim
18 under Rule 12(b)(6) and 12(b)(7) (ECF No. 412); and Merrifield-- through two separate motions--
19 moves to dismiss all claims against her pursuant to Rule 12(b)(6) (ECF Nos. 419, 452).

20 Finally, previously dismissed defendants Jane Stansell and Dirk Potter seek immediate
21 entry of judgment pursuant to Rule 54(b). ECF Nos. 448, 450.

22 ³ Plaintiff's objections to the findings and recommendations claimed that she just
23 discovered that she could not allege claims on behalf of the decedent without defeating diversity
24 jurisdiction. ECF No. 333 at 2. She further indicated that she wanted to abandon all claims on
25 behalf of the decedent and proceed in this court only with claims that are personal to her, which
26 would provide complete diversity in this action. Based on those representations, the court granted
27 plaintiff leave "to submit an amended complaint that states a state law cause of action personal to
28 her that is based on diversity jurisdiction." ECF No. 334 at 4.

27 ⁴ That order also denied plaintiff's motion for default judgment against defendant
28 Merrifield—an individual that was not named as a defendant until the filing of the fifth amended
complaint—and granted Merrifield's motion to set aside her default. ECF No. 408.

1 II. Motions to Dismiss and Motion for Judgment on the Pleadings

2 A. Factual Allegations

3 Plaintiff, Rickie Chipman, states that she is a registered nurse residing in Washington
4 State, and is the daughter and heir of Mary A. Martin (“the decedent”). Fifth Am. Compl., ECF
5 No. 336 at 4.⁵ Prior to 2006, the year the decedent began to suffer from dementia, plaintiff was
6 designated to make medical decisions for the decedent. *Id.* In May 2010, the decedent was
7 admitted to Enloe Medical Center (“EMC”) after plaintiff had concerns that the decedent had
8 sepsis. ECF No. 336 at 19. The decedent initially improved upon admittance to EMC. *Id.*
9 However, plaintiff claims that the decedent eventually began to suffer from a lower gastro-
10 intestinal bleed, which was due to administering unnecessary anticoagulants. *Id.* The complaint
11 alleges that plaintiff “witnessed physicians and staff at defendant EMC commit one medical
12 mistake after another and then defendants . . . attempted to cover the mistakes up by performing
13 unnecessary mutilating surgeries and procedures” by falsifying records, committing perjury, and
14 eventually initiating proceedings for a temporary restraining order (“TRO”) against plaintiff and
15 her family and for the appointment of a temporary guardian to make medical decisions on the
16 decedent’s behalf. *Id.* at 20-21. Plaintiff claims that the TRO and conservatorship were obtained
17 by perjury and false information. *Id.* at 21.

18 On September 21, 2010, the decedent was transferred to Kindred Hospital Sacramento
19 (“Kindred”). *Id.* at 22. The complaint alleges that Kindred did not have the diagnostic equipment
20 and physicians to properly evaluate and treat the decedent, so plaintiff requested that the decedent
21 be transferred to Mercy Medical Center in Folsom. *Id.* at 22-23. The transfer was denied by the
22 court-appointed guardian, and on October 20, 2010, the decedent died. *Id.* at 22-23. Plaintiff
23 claims that the decedent’s death was due to receiving unnecessary anticoagulants, falsified
24 discharge assessments and failure to transfer the decedent to an appropriate facility. *Id.* at 24-26.

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⁵ Page numbers cited herein refer to the page numbers assigned by the court’s case
28 management and electronic case filing system (CM/ECF) and not those assigned by the parties.

1 Plaintiff further contends that the care provided to the decedent by the defendant physicians fell
2 below the applicable standard of care.

3 B. Legal Standards

4 To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint
5 must contain more than a “formulaic recitation of the elements of a cause of action”; it must
6 contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell*
7 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more . .
8 . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of
9 action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp.
10 235236 (3d ed. 2004)). “[A] complaint must contain sufficient factual matter, accepted as true, to
11 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)
12 (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads
13 factual content that allows the court to draw the reasonable inference that the defendant is liable
14 for the misconduct alleged.” *Id.* Dismissal is appropriate based either on the lack of cognizable
15 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
16 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

17 In considering a motion to dismiss, the court must accept as true the allegations of the
18 complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe
19 the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in
20 the pleader’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

21 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
22 *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Unless it is clear that no amendment can cure its
23 defects, a pro se litigant is entitled to notice and an opportunity to amend the complaint before
24 dismissal. *Lopez v. Smith*, 203 F.3d 1122, 1127-28 (9th Cir. 2000); *Noll v. Carlson*, 809 F.2d
25 1446, 1448 (9th Cir.1987). However, although the court must construe the pleadings of a pro se
26 litigant liberally, *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985), that liberal
27 interpretation may not supply essential elements of a claim that are not plead. *Pena v. Gardner*,
28 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268

1 (9th Cir. 1982). Furthermore, “[t]he court is not required to accept legal conclusions cast in the
2 form of factual allegations if those conclusions cannot reasonably be drawn from the facts
3 alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994). Neither need
4 the court accept unreasonable inferences, or unwarranted deductions of fact. *W. Mining Council*
5 *v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

6 In deciding a Rule 12(b)(6) motion to dismiss, the court may consider facts established by
7 exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.
8 1987). The court may also consider facts which may be judicially noticed, *Mullis v. U.S. Bankr.*
9 *Ct.*, 828 F.2d at 1338, and matters of public record, including pleadings, orders, and other papers
10 filed with the court. *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

11 Rule 12(c) provides that “[a]fter the pleadings are closed—but early enough not to delay
12 trial—a party may move for judgment on the pleadings.” “For purposes of a motion under Rule
13 12(c), the allegations of the non-moving party must be accepted as true, and the allegations of the
14 moving party that have been denied are presumed false.” *Hal Roach Studios v. Richard Feiner &*
15 *Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). A “judgment on the pleadings is appropriate when,
16 even if all allegations in the complaint are true, the moving party is entitled to judgment as a
17 matter of law.” *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993).
18 Thus, a motion under Rule 12(c) is “functionally identical” to a motion to dismiss pursuant to
19 Rule 12(b)(6). *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

20 C. Successive 12(b)(6) motions

21 Matthews and Merrifield have each filed two motions to dismiss the fifth amended
22 complaint under Rule 12(b)(6).⁶ See ECF Nos. 345, 412, 419, 452. The multiple motions raises

23 ⁶ Matthews previously moved to dismiss all claims under Rule 12(b)(6). ECF No. 345.
24 His motion was granted in part and, with the exception of the wrongful death claim, all claims
25 against him were dismissed without leave to amend. ECF Nos. 403, 408. Matthews again moves
26 to dismiss under 12(b)(6), arguing that the complaint does not contain sufficient allegations to
state a claim against him for wrongful death.⁶ ECF No. 412.

27 As for Merrifield, she erroneously believed that the court *sua sponte* dismissed all claims
28 against her, with the exception of plaintiff’s wrongful death claim, prior to her appearance in this
action. Thus, her initial Rule 12(b)(6) motion only sought dismissal of plaintiff’s wrongful death
claim. ECF No. 419. Her mistake was addressed at oral argument, and thereafter Merrifield

1 the threshold question of whether their successive 12(b)(6) motions should be permitted.

2 Rule 12(g) places a limit on a party's ability to bring successive motions to dismiss. That
3 rule provides that: "Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under
4 this rule must not make another motion under this rule raising a defense or objection that was
5 available to the party but omitted from its earlier motion." Rule 12(h)(2) states that the issues of
6 "[f]ailure to state a claim upon relief can be granted, to join a person required by Rule 19(b), or to
7 state a legal defense to a claim may be raised: (A) in any pleading allowed or ordered under 7(a);
8 (B) by a motion under rule 12(c); or (C) at trial." Fed. R. Civ. P. 12(h)(2). Rule 12(h)(3)
9 provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the
10 court must dismiss the action."

11 District courts in the Ninth Circuit have found that a waiver under Rule 12(g) applies
12 where successive motions are filed for the sole purpose of delay. *Kilopass Tech. Inc. v. Sidense*
13 *Corp.*, No. C 10-02066 SI, 2010 WL 5141843, at *3 (N.D. Cal. Dec. 13, 2010) (citing *Abarca v.*
14 *Franklin County Water Dist.*, No. 1:07-CV-0388, 2009 WL 1393508, at *2 (E.D. Cal. May 18,
15 2009)); see also *Allstate Ins. Co. v. countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1175 (C.D.
16 Cal. 2011) ("Rule 12(g) is designed to avoid repetitive motion practice delay, and ambush
17 tactics."). Furthermore, a court has discretion to consider arguments presented in a successive
18 motion for the purpose of expediting final disposition on particular issues. *Davidson*, 2011 WL
19 1157569, at *4 ("[T]he court has discretion to consider the arguments [in successive motion] to
20 expedite a final disposition on the issue").

21 Here, there is nothing to suggest that either Matthews or Merrifield filed their successive
22 motion for the purpose of delay. Merrifield's initial motion to dismiss failed to seek dismissal of
23 all claims due to her erroneous assumption that the only claim remaining against her was
24 plaintiff's wrongful death claim. Although she was clearly mistaken, after learning of her
25 mistake she timely moved to dismiss the other pending claims. There is also no indication in the
26 record that Matthews is attempting to delay these proceedings. See, e.g., ECF No. 430 (Def.'s

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28 moved to dismiss all other claims alleged against her. ECF No. 452.

1 Opp'n to Pl.'s Mot. to Continue Hearing) (“This case has now been pending for over four years,
2 and granting Plaintiff’s request would merely drag it out for another month or two without any
3 intelligent purpose.”).

4 Adjudicating the merits of the motions at this time will also avoid further delay of this
5 action. Declining to decide the successive motions would likely result in Matthews and
6 Merrifield filing answers to the complaint, followed by motions for judgment on the pleadings or
7 for summary judgment raising the same issues currently before the court. *See* Fed. R. Civ. P.
8 12(h)(2) (permitting defendant to raise failure to state a claim in a Rule 12(c) motion).
9 Accordingly, the court addresses the merits of the successive motions.

10 D. Claims on Behalf of the Decedent

11 As previously observed by this court, the fifth amended complaint purports to assert
12 several survival claims belonging to the estate of the decedent, and not plaintiff personally. ECF
13 No. 403 at 6-7; *see Dela Torre v. City of Salinas*, 2010 WL 3743762, at *7 (N.D. Cal. Sept. 17,
14 2010) (“Unlike a wrongful death cause of action, a survival cause of action is not a new cause of
15 action that vests in heirs on the death of the decedent, but rather is a separate and distinct cause of
16 action which belonged to the decedent before death but, by statute, survives the event.”). Under
17 California law, a survival action may be prosecuted by the decedent’s personal representative or
18 successor in interest. Cal. Civ. Proc. Code § 377.30.

19 Although plaintiff alleges that she is the personal representative and successor in interest
20 for the decedent, she is not an attorney and cannot represent the estate. Thus, to pursue claims on
21 behalf of the estate she must do so through a licensed attorney. *See Simon v. Hartford Life, Inc.*,
22 546 F.3d 661, 664 (9th Cir. 2008) (“[C]ourts have routinely adhered to the general rule
23 prohibiting *pro se* plaintiffs from pursuing claims on behalf of others in a representative
24 capacity.”). This was previously explained to plaintiff in the context of earlier motions.

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28 The court also previously explained to plaintiff that she cannot proceed in this court with

1 claims on behalf of the decedent because such claims would defeat diversity jurisdiction.⁷ ECF
2 No. 334. While plaintiff is a resident of Washington, the decedent was a resident of Butte
3 County, California at the time of her death, and “the legal representative of the estate of a
4 decedent shall be deemed to be a citizen only of the same State as the decedent.” 28 U.S.C.
5 1332(c)(2). Accordingly, any claims brought by plaintiff on behalf of the decedent would render
6 this court without subject matter jurisdiction. Notwithstanding the court’s admonishments,
7 plaintiff continues to assert several claims on behalf of the decedent.

8 E. Plaintiff’s Claims

9 Plaintiff’s fifth amended complaint purports to assert the following causes of actions: (1)
10 willful misconduct; (2) elder abuse and negligence; (3) medical battery;⁸ (4) perjury; (5)
11 malicious prosecution/S.L.A.P.P; (6) interference with contract for economic advantage; (7)
12 fraudulent concealment; (8) constructive fraud; (9) conspiracy; (10) violation of California CCP
13 patient’s rights; (11) intentional infliction of emotional distress; and (12) wrongful death. ECF
14 No. 336 at 26-49.

15 i. Willful Misconduct

16 Plaintiff’s complaint purports to assert a claim for willful misconduct against all
17 defendants. ECF No. 336 at 26.

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23 ⁷ Plaintiff’s previous complaints alleged claims for violation of federal law. However, all
24 of plaintiff’s federal claims have been dismissed without leave to amend, and plaintiff was only
25 granted leave “to submit an amended complaint that states a state law cause of action personal to
26 her that is based on diversity jurisdiction.” ECF No. 334 at 4. While the fifth amended complaint
does not allege any federal claims, it does purport to allege state law claims on behalf of the
decedent.

27 ⁸ Plaintiff’s medical battery claim is not alleged against defendants Merrifield, EMC,
28 Boggs, or Nelson. ECF No. 336 at 33.

1 Willful misconduct is not a separate tort, but is an aggravated form of negligence.⁹
2 *Berkley v. Dowds*, 152 Cal. App. 4th 518, 526 (2007). Plaintiff alleges that each defendant owed
3 a duty of care to the decedent, that they should have known the perils posed by failure to comply
4 with the applicable standards, and that the defendants disregarded the perils and high probability
5 of injury and death to the decedent. ECF No. 336 at 27. She further claims that the defendants
6 “failed to follow the health care decisions of Decedent’s health care agent, Plaintiff, Rickie L.
7 Chipman.” *Id.* at 27.

8 As the court concluded on the earlier motion, plaintiff’s willful misconduct claim is
9 predicated on defendants’ alleged breaches of duty owed to the decedent, and not to plaintiff.
10 This claim is not personal to plaintiff but rather one that belonged to the decedent before her
11 death. As plaintiff can only assert claims personal to her and cannot proceed in this court on
12 claims on behalf of the decedent, she fails to state a claim for willful misconduct against
13 Merrifield, EMC, Nelson, and Boggs.

14 ii. Elder Abuse and Negligence

15 Plaintiff also alleges claims for elder abuse and negligence against Merrifield, EMC,
16 Nelson, and Boggs. ECF No. 336 at 31–33. These claims, again, stem from alleged injuries to
17 the decedent. The complaint alleges that the decedent was over the age of 65, that all defendants
18 committed neglect, and that as a result the decedent sustained injuries, elder abuse, and wrongful
19 death. *Id.* at 31. These allegations clearly demonstrate that the injured party was the decedent
20 and therefore these claims belong to the decedent’s estate and not plaintiff personally. Plaintiff
21 does allege that she “sustained Intentional Infliction of Emotion Distress from the witnessing and
22 knowledge” of defendants’ conduct. *Id.* at 31–32. However, intentional infliction of emotional

23
24 ⁹ Although the pleading requirements for willful misconduct are similar to a negligence
25 claim, they require more specific facts to state a claim for willful misconduct. *Berkley*, 152 Cal.
26 App. 4th at 526 (citing *Snider v. Whitson*, 184 Cal. App. 2d 211, 214-215 (1960) (plaintiff is
27 required to “state facts more fully than in an ordinary negligence claim.”)). “[T]he well-known
28 elements of any negligence cause of action [are] duty, breach of duty, proximate cause and
damages.” *Id.* at 526, 7 Cal.Rptr. 353. In addition, “three essential elements must be present to
raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the
peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed
to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.” *Id.* at 528.

1 distress is a separate cause of action from elder abuse and negligence, and plaintiff's allegation
2 that she sustained emotional injuries on account of defendants' conduct cannot transform claims
3 belonging to the decedent's estate into claims personal to plaintiff.

4 Furthermore, the complaint does not contain any allegations to support a claim for
5 negligence belonging to plaintiff. To assert a claim for professional malpractice, plaintiff must
6 allege that defendants breached a duty of care owed to her. *Avivi v. Centro Medico Urgente*
7 *Medical Center*, 159 Cal. App. 4th 463, 468 n. 2 (2008). While plaintiff generally alleges that
8 defendants owed a "duty of honesty," she has failed to allege any facts demonstrating that these
9 defendants owed her, as the decedent's daughter, a duty of care. *See Rainer v. Grossman*, 31 Cal.
10 App. 3d 539, 543 (1973) ("In the usual case of medical malpractice the duty of care springs from
11 the physician-patient relationship which is basically one of contract.").

12 Accordingly, plaintiff fails to state a claim for elder abuse and negligence against
13 Merrifield, EMC, Nelson, and Boggs.

14 iii. Perjury

15 Plaintiff's also purports to allege a perjury claim against Nelson, EMC, Boggs, and
16 Merrifield. However, California law does not recognize a civil action for perjury. *Carden v.*
17 *Getzoff*, 190 Cal. App. 3d 907, 915 (1987) (citing *Taylor v. Bidwell*, 65 Cal. 489, 490 (1884)).
18 Plaintiff therefore may not maintain her claim for perjury against these defendants.

19 iv. Malicious Prosecution/S.L.A.P.P

20 Plaintiff's fifth cause of action, which is asserted against Nelson, EMC, Boggs, and
21 Merrifield, is entitled malicious prosecution/Strategic Lawsuit Against Public Participation
22 (S.L.A.P.P.), and appears to be a claim for malicious prosecution. This claim arises out of the
23 moving defendants' involvement in seeking a TRO and the appointment of a conservatorship to
24 make medical decisions on behalf of the decedent. *Id.* at 38-40.

25 This court previously concluded that plaintiff cannot pursue a claim for malicious
26 prosecution against defendants in relation to the TRO and conservatorship proceedings. In
27 plaintiff's first amended complaint, plaintiff alleged a claim for defamation against defendants
28 Clark-Martin, Boggs, Nelson, Matthews, and EMC based on their roles in filing the action

1 seeking a TRO. ECF No. 74 at 6–7. Those defendants moved to dismiss the defamation claim on
2 the ground that it was barred by California’s litigation privilege. ECF No. 76 at 12–14; ECF No.
3 80 at 11-12; ECF No. 134. The court found that the defamatory statements were all made to the
4 state court in seeking a TRO, and therefore were protected by California’s litigation privilege.
5 ECF No. 151. The court observed that the litigation privilege serves as an absolute bar, unless
6 plaintiff can allege malicious prosecution. *Id.* The record before the court established that
7 plaintiff could not succeed on a claim of malicious prosecution.

8 “In order to state a cause of action for malicious prosecution the plaintiff must allege that
9 the prior action (1) was commenced by or at the direction of the defendant and pursued to a legal
10 termination in plaintiff’s favor; (2) was brought without probable cause; and (3) was initiated
11 with malice.” *Sagonowsky v. More*, 64 Cal. App. 4th 122, 128 (1998). This court found that
12 plaintiff could not state a claim for malicious prosecution because a court transcript, submitted
13 with the first amended complaint as an exhibit, demonstrated that the conservatorship case was
14 dismissed due to the decedent no longer being a patient at EMC, and thus EMC no longer having
15 an interest in pursuing the conservatorship. ECF No. 151 at 13; *see* ECF No. 74 at 62. Based on
16 these facts, plaintiff could not show that the prior action was pursued to a legal termination in
17 plaintiff’s favor. Thus, the court concluded that “plaintiff cannot allege a malicious prosecution
18 claim here” and plaintiff’s defamation claim was dismissed without leave to amend.¹⁰

19 Although the court’s prior ruling was in relation to a claim for defamation, the court
20 nevertheless concluded that plaintiff cannot succeed on a claim for malicious prosecution.

21 v. Interference with Contract for Economic Advantage

22 Plaintiff also alleges a claim for interference with a contract for economic advantage
23 against defendants Nelson, EMC, Boggs, and Merrifield. ECF No. 336 at 40–41.

24
25 ¹⁰ The court’s March 13, 2013, findings and recommendations also found that California’s
26 anti-SLAPP statute was inapplicable here as plaintiff failed to allege that there is currently a
27 complaint against her. ECF No. 151; *see* Cal. Civ. Proc. Code § 425.16 (providing a mechanism
28 for dismissing SLAPP actions, which are pending lawsuits that “masquerade as ordinary lawsuits
but are brought to deter common citizens from exercising their political or legal rights or to
punish them for doing so,” before costly litigations ensues). The fifth amended complaint also
fails to allege that there is currently a complaint against plaintiff.

1 “The elements which a plaintiff must plead to state the cause of action for intentional
2 interference with contractual relations are (1) a valid contract between plaintiff and a third party;
3 (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a
4 breach or disruption of the contractual relationship; (4) actual breach or disruption of the
5 contractual relationship; and (5) resulting damage.” *Pacific Gas & Electric Co. v. Bear Stearns*
6 *& Co.*, 50 Cal. 3d 1118, 1126 (1990) (citations omitted). “The tort of interference with
7 prospective economic advantage protects the same interest in stable economic relationships as
8 does the tort of interference with contract, though interference with prospective advantage does
9 not require proof of a legally binding contract. The chief practical distinction between
10 interference with contract and interference with prospective economic advantage is that a broader
11 range of privilege to interfere is recognized when the relationship or economic advantage
12 interfered with is only prospective.” *Id.* (citations and fn. omitted). “To prevail on a cause of
13 action for intentional interference with prospective economic advantage in California, a plaintiff
14 must plead and prove (1) an economic relationship between the plaintiff and some third party,
15 with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of
16 the relationship; (3) the defendant’s intentional acts designed to disrupt the relationship; (4) actual
17 disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the
18 defendant’s acts.” *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152 n. 6 (2004) (citation omitted).

19 Plaintiff alleges that these defendants, in an attempt to prevent litigation for malpractice,
20 falsified court documents in order to obtain a state guardian. ECF No. 336 at 40. Plaintiff further
21 alleges that defendants billed Medicare and Blue Shield for over four million dollars. *Id.* at 41.
22 She also claims that defendants breached their fiduciary duty to disclose information and that
23 such breaches were financially motivated. *Id.*

24 Plaintiff does not, however, allege the existence of an economic or contractual
25 relationship between her and a third-party, nor has she alleged any economic damages.
26 Accordingly, she fails to state a claim for interference with a contract and/or economic advantage.

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1 vi. Fraudulent Concealment

2 Plaintiff also alleges a claim for fraudulent concealment against defendants Nelson and
3 EMC. ECF No. 336 at 41-43. “The elements of an action for fraud and deceit based on
4 concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the
5 defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must
6 have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the
7 plaintiff must have been unaware of the fact and would not have acted as he did if he had known
8 of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the
9 fact, the plaintiff must have sustained damage.” *Boschma v. Home Loan Center, Inc.*, 198 Cal.
10 App. 4th 230, 248 (2011). “In all averments of fraud . . . , the circumstances constituting fraud . .
11 . shall be stated with particularity.” Fed. R. Civ. P. 9(b). The allegations must be “specific
12 enough to give defendants notice of the particular misconduct which is alleged to constitute the
13 fraud charged so that they can defend against the charge and not just deny that they have done
14 anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). In addition to the
15 “time, place and content of an alleged misrepresentation,” a complaint “must set forth what is
16 false or misleading about a statement, and . . . an explanation as to why the statement or omission
17 complained of was false or misleading.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993, n. 10 (9th
18 Cir. 1999). The complaint must also name the persons who made the allegedly fraudulent
19 statements. *See Morris v. BMW of N. Am., LLC*, 2007 WL 3342612, at *3 (N.D. Cal. Nov. 7,
20 2007) (citing *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547–48 n. 7 (9th Cir. 1994) (en
21 banc)).

22 Plaintiff alleges that defendant Nelson falsified information about the decedent’s family,
23 home care that was provided to the decedent, and that Nelson was decedent’s primary care
24 physician prior to her being hospitalized. ECF No. 336 at 7. Plaintiff further alleges that Nelson
25 knowingly and maliciously concealed information regarding her malpractice, medical battery,
26 negligence, and self-interest and that she concealed accurate information to block decedent’s
27 transfer to another medical facility. ECF No. 336 at 42. Although plaintiff does allege specific
28 information that Nelson allegedly concealed, plaintiff provides no allegations that Nelson

1 concealed this information with an intent to defraud plaintiff. *See Boschma*, 198 Cal. App. 4th at
2 248. Plaintiff also fails to allege reliance. “Reliance can be proven in a fraudulent omission case
3 by establishing that had the omitted information been disclosed, the plaintiff would have been
4 aware of it and acted differently.” *Id.* at 250-251. Plaintiff provides no allegations demonstrating
5 that she would have acted differently had this information not been concealed.

6 Plaintiff further alleges that EMC employed the staff that caused the direct harm and
7 allowed for false charges to be alleged against plaintiff. ECF No. 336 at 10. Plaintiff generally
8 alleges that EMC knowingly and maliciously concealed information and facts ultimately having a
9 negative impact on the treatment of the decedent. *Id.* at 42. These general allegations fail to
10 comply with the enhanced pleading standard required for stating a claim for fraud under Rule 9.
11 *See Semegen*, 780 F.2d at 731. Furthermore, plaintiff fails to allege that she relied on any
12 particular false statement made by EMC’s staff. Accordingly plaintiff fails to state a claim for
13 fraudulent concealment against Nelson and EMC.

14 vii. Constructive Fraud

15 Plaintiff also alleges a claim for constructive fraud against Nelson, EMC, and Merrifield.
16 ECF No. 336 at 43-46.

17 Under California law, “[c]onstructive fraud is a unique species of fraud applicable only to
18 a fiduciary or confidential relationship.” *Assilzadeh v. Cal. Fed. Bank*, 82 Cal. App. 4th 399, 415
19 (2000). Under this theory of liability, “a fiduciary is liable to his principal for constructive fraud
20 even though his conduct is not actually fraudulent.” *Salahutdin v. Valley of California, Inc.*, 24
21 Cal. App. 4th 555, 562 (1994). “[C]onstructive fraud comprises any act, omission or concealment
22 involving a breach of legal or equitable duty, trust or confidence which results in damages to
23 another even though the conduct is not otherwise fraudulent.” *Assilzadeh*, 82 Cal. App. 4th at
24 415. “Thus, constructive fraud mirrors actual fraud but replaces the requirement of scienter with
25 the requirement of a fiduciary duty.” *Beco Dairy Automation, Inc. v. Global Tech Sys., Inc.*, No.
26 CV-F12-1310 LJO SMS, 2012 WL 4052066, at *8 (E.D. Cal. Sept. 14, 2012).

27 Aside from plaintiff’s conclusory statements that defendants owed her a duty of honesty,
28 plaintiff’s complaint is completely devoid of any facts indicating that defendants Nelson, EMC or

1 Merrifield owed her a fiduciary duty. Accordingly, plaintiff has failed to state a claim for
2 constructive fraud.

3 viii. Conspiracy

4 Plaintiff's ninth cause of action is for conspiracy and is alleged against defendants Nelson,
5 EMC, Boggs, and Merrifield. ECF No. 336 at 46-47.

6 A conspiracy is not an independent cause of action, but is instead "a legal doctrine that
7 imposes liability on persons who, although not actually committing a tort themselves, share with
8 the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v.*
9 *Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994); *see also Entertainment Research Group,*
10 *Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1228 (9th Cir.1997). Thus, to properly state
11 a claim for imposing liability under a conspiracy basis, plaintiff must not only properly allege
12 facts showing the elements for the underlying cause of action, she must also satisfy the elements
13 for establishing conspiracy. Liability for civil conspiracy generally requires three elements: (1)
14 formation of a conspiracy (an agreement to commit wrongful acts); (2) operation of a conspiracy
15 (commission of the wrongful acts); and (3) damage resulting from operation of a conspiracy. *Id.*
16 at 511. A civil conspiracy is therefore activated by the commission of an underlying wrongful
17 act. *Id.*

18 Plaintiff alleges that these defendants conspired to illegally abduct the decedent from her
19 family with perjury and fraudulent statements, and conspired to circumvent plaintiff's legal right
20 to provide informed consent for her mother. ECF No. 336 at 46. She further alleges that
21 "Merrifield sent a letter, dated October 20, 2010, the day of Decedent's wrongful death, stating
22 the temporary guardians were to remain in place, thereby keeping her position in place." *Id.*
23 Plaintiff also contends that the "conspiracy set and kept in motion all other Cause of Actions [sic]
24 as aforesaid herein, including intentional infliction of severe emotional distress, elder abuse and
25 wrongful death." *Id.* at 47.

26 As is the case with the vast majority of the claims, the conspiracy claim is predicated, at
27 least in part, on an injury sustained to the decedent. Again, plaintiff cannot assert a conspiracy
28 claim on the decedent's behalf.

1 As for the contention that these defendants conspired to deprive plaintiff of her rights to
2 provide informed consent to her mother, the court has already concluded that such a conclusory
3 allegation is insufficient to state a cause of action for conspiracy. ECF No. 403 at 16. Moreover,
4 plaintiff, rather than connecting her conspiracy claim to an underlying cause of action, simply
5 concludes that the “conspiracy set and kept in motion all other” causes of action. Plaintiff also
6 does not allege any facts demonstrating an agreement between the parties, nor does she allege the
7 commission of wrongful acts in furtherance of the agreement. Rather, she concludes that
8 defendants conspired to violate her right to provide informed consent, and identifies a single letter
9 sent by Merrifield. These conclusory allegations fail to demonstrate the existence of a
10 conspiracy. Accordingly, plaintiff fails to state a claim for conspiracy against Nelson, EMC,
11 Boggs, and Merrifield.

12 ix. Violation of California CCP Patient Rights

13 Plaintiff alleges that all defendants violated California Code of Regulation, Title 22,
14 Section 70707 “when they intentionally isolated Decedent from her family . . . , and illegally
15 removed Decedent’s designated health care decision maker.” ECF No. 336 at 47-48. Plaintiff
16 also alleges that defendants violated section 70707 by committing fraud, lying, committing
17 perjury, and altering the decedent’s records. *Id.*

18 As this court previously explained, the only patient at issue in the action is the decedent,
19 and therefore any rights that were violated belonged to the decedent and not plaintiff.
20 Accordingly, plaintiff fails to state a claim for violation of California Code of Regulation, Title
21 22, Section 70707.

22 x. Intentional Infliction of Emotional Distress

23 Plaintiff’s complaint also asserts a claim for intentional infliction of emotional distress
24 against the moving defendants. ECF No. 336 at 48.

25 “In order to establish a claim for intentional infliction of emotional distress under
26 California law, [plaintiff is] required to show (1) that the defendant’s conduct was outrageous, (2)
27 that the defendant intended to cause or recklessly disregarded the probability of causing
28 emotional distress, and (3) that the plaintiff’s severe emotional suffering was (4) actually and

1 proximately caused by defendant’s conduct.” *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir.
2 2004). “Only conduct ‘exceeding all bounds usually tolerated by a decent society, of a nature
3 which is especially calculated to cause, and does cause, mental distress’ is actionable.” *Brooks v.*
4 *United States*, 29 F. Supp. 2d 613, 617-18 (N.D. Cal. 1998). Where defendant’s “conduct was
5 directed primarily at” plaintiff’s decedent, recovery is limited to “‘the most extreme cases of
6 violent attack, where there is some especial likelihood of fright or shock.’” *Christensen v.*
7 *Superior Court*, 54 Cal. 3d 868, 905 (1991) (quoting *Ochoa v. Superior Court*, 39 Cal. 3d 159,
8 165 n. 5 (1985), accord *Coon v. Joseph*, 192 Cal. App. 3d 1269 (1987)).

9 Plaintiff alleges that defendants’ conduct caused harm and the wrongful death of the
10 decedent, thereby causing plaintiff severe emotional distress. ECF No. 336 at 48. She further
11 claims that defendants’ “conduct was intentional, extreme, outrageous and beyond all possible
12 bounds of decency that is tolerated in a civilized society.” *Id.*

13 As the complained of activity is not directed towards plaintiff, but to a third-party, to
14 qualify as actionable conduct, defendants’ activity against the decedent must be among “‘the most
15 extreme cases of violent attack.’” *Christensen*, 54 Cal. at 905. Despite plaintiff’s hyperbole, the
16 complaint essentially alleges that procedures performed on the decedent were unnecessary, that
17 the care provided was deficient, and that defendants impermissibly blocked the transfer of the
18 decedent to a facility that could provide her with adequate care. Such conduct is akin to medical
19 malpractice and is not, as plaintiff in conclusory fashion suggests, tantamount to a violent attack
20 or other extreme and outrageous conduct. Accordingly, plaintiff fails to state a claim for
21 intentional infliction of emotional distress.

22 xi. Wrongful Death

23 Plaintiff’s last cause of action is for wrongful death. ECF No. 336 at 23. Defendants
24 Nelson, EMC, Boggs, Merrifield and Matthews all content that plaintiff has failed to sufficiently
25 state a wrongful death claim. Matthews, also moves to dismiss pursuant to Rule 12(b)(7) for
26 failure to join necessary parties.

27 Wrongful death actions may be brought by a decedent’s children. Cal. Civ. Proc. Code
28 § 377.60(a). “The elements of the cause of action for wrongful death are the tort (negligence or

1 other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss
2 suffered by the heirs.” *Quiroz v. Seventh Ave. Center*, 140 Cal. App. 4th 1256, 1263 (2006);
3 *Wright v. City of Los Angeles*, 219 Cal. App. 3d 318, 344, 358 (1990). For a wrongful death
4 action to survive a motion to dismiss, “the complaint must contain allegations as to all elements
5 of actionable negligence.” *Van Horn v. Hornbeak*, 2009 WL 435104 (E.D. Cal. Feb.19, 2009)
6 (citing *Jacoves v. United Merchandising Corp.*, 9 Cal. App. 4th 88, 105 (1992)). To allege
7 professional negligence, plaintiff must allege (1) the duty of the professional to use such skill,
8 prudence, and diligence as other members of his profession commonly possess and exercise; (2) a
9 breach of that duty; (3) a proximate causal connection between the negligent conduct and the
10 resulting injury; and (4) actual loss or damage resulting from the professional negligence.
11 *Fuentes v. County of Madera*, 2006 WL 3087172 (E.D. Cal. Oct. 30, 2006) (citing *Elcome v.*
12 *Chin*, 110 Cal. App. 4th 310, 317 (2003)).

13 “[I]t is a fundamental principle of tort law that there must be a legal duty owed to the
14 person injured and a breach of that duty which is the proximate cause of the resulting injury.”
15 *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1206. Although the determination as to whether an act is the
16 proximate cause of an injury is generally a question of fact, “it is a question of law where the
17 facts are uncontroverted and only one deduction or inference may reasonably be drawn from
18 those facts.” *Id.* Causation for a wrongful death claim is satisfied only where, “in the absence of
19 other reasonable causal explanations, [a defendant’s negligent act] becomes more likely than not
20 [] the injury was a result” of the negligence. *Fuentes*, 2006 WL 3087172 (citing *Jennings v.*
21 *Palomar Pomerado Health Systems, Inc.*, 114 Cal. App. 4th 1108, 1118 (2003)).

22 Defendants advance several arguments, many specific to individual defendants, as to why
23 the allegations of the current complaint fail to state a wrongful death claim. Each is addressed in
24 turn.

25 1. Merrifield

26 Merrifield argues that wrongful death claim as to her must be dismissed because: (1) the
27 claim is barred by the statute of limitation; (2) plaintiff has not complied with the California
28 Government Tort Claims Act; (3) plaintiff fails to state a claim for which relief may be granted

1 because Merrifield did not owe plaintiff a duty; (4) plaintiff cannot show that Merrifield caused
2 the decedent's death; and (5) the claim is barred by California Government Code section 821.6.
3 ECF No. 419 at 2. For the reasons discussed below, the claim is untimely.

4 The statute of limitations for a death caused by wrongful act or negligence is two years for
5 non-medical providers such as Merrifield. Cal. Civ. Proc. Code § 335.1. Decedent died on
6 October 20, 2010. Accordingly, plaintiff was required to file her wrongful death claim against
7 Merrifield by October 20, 2012. Although this action was initiated on October 20, 2011,
8 Merrifield was not named as a defendant until plaintiff filed her fifth amended complaint on
9 October 29, 2014, *four years* after the decedent died and more than two years after the expiration
10 of the limitation period. ECF No. 336.

11 Plaintiff first contends that that Merrifield's motion to dismiss is untimely and should
12 therefore be denied. ECF No. 424 at 3. Plaintiff argues that the motion was filed nearly a year
13 after plaintiff filed her fifth amended complaint. *Id.* But plaintiff overlooks that she failed to
14 properly serve Merrifield with a copy of the fifth amended complaint. That failure eventually led
15 to the court granting Merrifield's motion to set aside a clerk's entry of default. *See* ECF No. 403
16 at 27-28; ECF No. 408. Twenty-one days after her default was set aside, Merrifield timely filed
17 her motion to dismiss plaintiff's wrongful death claim. *See* Fed. R. Civ. P. 12(a)(1).

18 Plaintiff suggests that the statute of limitations should be tolled because she is "still
19 discovering" that defendant Merrifield is "at the 'crux' of all refusals, concealments, with all
20 defendants" ECF No. 424 at 5. Plaintiff's suggestion that she was not aware of Merrifield's
21 alleged involvement in the death of the decedent until she filed her fifth amended complaint is
22 belied by the record. On February 29, 2012, plaintiff filed an opposition to numerous motions to
23 dismiss the original complaint. ECF No. 49. Included among the documents appended to the
24 opposition is a transcript of a proceeding conducted before the Butte County Superior Court.
25 ECF No. 49 at 69. The transcript identifies defendant Kimberly Merrifield as counsel for the
26 appointed public guardians. *Id.* Furthermore, plaintiff's original complaint alleged defendants
27 engaged in wrongful acts, "including all harmful acts of elder abuse leading to Mary's wrongful
28 death. The State guardians, Calkins and Mahoney (who never once questioned anything the

1 physicians did to [the decedent]), *their legal representation* . . . [c]ondoned assaults of Plaintiff's
2 mother . . . and the cover up by physicians" ECF No. 1 ¶ 19 (emphasis added). Thus, on
3 February 29, 2012, prior to the expiration of the limitation period, plaintiff had notice of
4 Merrifield's alleged involvement in the death of the decedent, but failed to name as a defendant.
5 Thus, plaintiff has failed to show any basis for tolling the limitations period.

6 Plaintiff could have timely filed a wrongful death claim against Merrifield, but failed to do
7 so. Accordingly, her wrongful death claim against Merrifield is barred by the applicable statute
8 of limitations.¹¹

9 2. Nelson and Boggs

10 Defendants Nelson and Boggs argue that plaintiff's wrongful death claim must be
11 dismissed for failure to allege any facts demonstrating that their action or inaction was the
12 proximate cause of the decedent's death. ECF No. 404 at 11-12.

13 Nelson contends that the complaint establishes that she treated the decedent in "some
14 unspecified manner, during some unspecified time, at EMC," but the complaint fails to show how
15 Dr. Nelson contributed to the decedent's death. ECF No. 404 at 11. As for Boggs, she contends
16 that the complaint generally alleges that she was involved in the state court TRO and
17 conservatorship proceedings and owed a general duty to the decedent, but fails to allege any
18 specific fact that establishes Boggs's contribution to the decedent's death. *Id.* at 12.

19 The allegations in the operative complaint specific to Nelson and Boggs are scarce.
20 Although plaintiff generally alleges that Nelson and Boggs harmed the decedent, she fails to
21 allege that these defendants engaged in any specific conduct that contributed to the decedent's
22 death. Plaintiff alleges that Nelson was the decedent's primary care physician and that she treated
23 plaintiff at EMC. ECF No. 336 at 7, 18. She further alleges that Nelson blocked the decedent
24 from seeing her family and concealed information about the health and personal history of
25 decedent. *Id.* at 7. Nelson also allegedly altered medical records and submitted fraudulent
26 statements with the state court. *Id.* at 43-44.

27 ¹¹ As the claim must be dismissed as untimely, the court declines to address Merrifield's
28 additional arguments.

1 As for Boggs, plaintiff alleges that she is a Risk Management RN employed by EMC. *Id.*
2 at 10. She further alleges that Boggs submitted a declaration in relation to an ex parte application
3 to appoint a guardian to make medical decisions for the decedent. *Id.* at 20-21. The complaint
4 also alleges that Boggs and Nelson “falsified accusations of abuse and interference of a proper
5 course of medical care,” which apparently were used to support the appointment of a guardian.
6 *Id.* at 21.

7 As noted, to succeed on her wrongful death claim, plaintiff must establish that defendants
8 owed a legal duty to the decedent and that their breach of that duty was the proximate cause and
9 cause in fact of the decedent’s death. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1206. The complaint is
10 devoid of any allegations that, if accepted as true, would allow a trier of fact to conclude that
11 Boggs or Nelson caused or contributed to the decedent’s death. Accordingly, plaintiff fails to
12 state a claim for wrongful death against defendants Boggs and Nelson.

13 3. Matthews

14 Defendant Matthews moves to dismiss the wrongful death claim against him, the only
15 remaining claim directed at him. Matthews argues that this claim must be dismissed for (1)
16 failure to allege facts demonstrating that he caused the decedent’s death and (2) failure to join
17 necessary parties. ECF No. 412-1 at 3-13.

18 a. Causation

19 The fifth amended complaint alleges that Matthews was a licensed physician, contracted
20 by EMC to provide care to the decedent. ECF No. 336 at 7. Plaintiff alleges Matthews “falsified
21 information about the decedent’s state of health on multiple occasions, blocking legal transfer,
22 and promoting the cruel isolation and abduction” of the decedent. *Id.* at 8. Plaintiff further
23 alleges that Matthews mismanaged the decedent’s “nutrition, coccyx, and newly formed wound
24 care, and maliciously removed portions of uncompromised bowel . . . while he knew and
25 concealed from Plaintiff and family [that] she was on anticoagulants.” *Id.*

26 On May 13, 2010, Matthews allegedly performed a colonoscopy on the decedent, which
27 revealed “bleeding from more than fifty sites, that had stopped bleeding and a small colonic polyp
28 near the cecum, which Matthews removed without consent.” *Id.* at 25 (internal quotations

1 omitted). On May 19, 2010, Matthews placed a “G-tube” in the decedent without informed
2 consent. *Id.* at 23. On the same date, Matthews also allegedly re-started the decedent on
3 anticoagulants and then performed an unnecessary surgery that involved removing a section of
4 the decedent’s bowel. *Id.* at 25, 32. Plaintiff contends that the surgery caused massive bleeding
5 and aspiration of blood. *Id.* at 25.

6 Unlike the other defendants, plaintiff provides extensive allegations regarding Matthews
7 treatment. Significantly, she specifically alleges that his treatment resulted in the death of the
8 decedent. Plaintiff’s allegations include that Matthews “performed surgery without informed
9 consent leading to the worsening of decedent’s health ultimately resulting in decedent’s death.”
10 *Id.* at 29. She alleges that the decedent “was subject to multiple debridements by Defendant
11 Matthews that exacerbated Decedent’s minor decubitus to a large, gaping wound extending to the
12 bone.” *Id.* at 33.

13 Matthews points out that plaintiff also alleges that the decedent survived the procedure. In
14 hyperbolic fashion, plaintiff’s allegations are that the decedent “had survived the mal-practice of
15 the intestinal bleed that was noted to be due to blood thinners (anticoagulants) on day 5. She
16 survived the butchered, fraudulent and malicious removal of a large portion of her
17 uncompromised intestines, an illegal G-tube placement, when she could still drink fluids and eat
18 real food by mouth.” ECF No. 336 at 49. She also alleges that the decedent died receiving
19 anticoagulants at defendant Kindred Hospital Sacramento based on falsified discharge assessment
20 and transfer orders. *Id.* at 23-24. Matthews essentially argues that these factual allegations
21 actually establish that Matthews was not the cause of the decedent’s death. ECF No. 512-1 at 5.

22 The motion before the court is brought under Rule 12(b)(6), and is not a motion for
23 summary judgment under Rule 56. Thus, this motion does not test the sufficiency of plaintiff’s
24 evidence but rather that of her factual allegations, which must be taken as true at this point.
25 Further, all reasonable inferences from those alleged facts must be drawn in favor of plaintiff in
26 evaluating the sufficiency her complaint. As indicated above, causation is generally a question of
27 fact and is only “a question of law where the facts are uncontroverted and only one deduction or
28 inference may reasonably be drawn from those facts.” *Ileto*, 349 F.3d at 1206. While plaintiff

1 does allege that the decedent survived the surgery performed by defendant Matthews, she also
2 specifically alleges that the surgery worsened the decedent's condition and ultimately contributed
3 to the decedent's death. Liberally construing plaintiff's allegations, as this court must, plaintiff
4 has sufficiently alleged that Matthews's treatment contributed to the decedent's death.
5 Accordingly, the court finds that plaintiff sufficiently alleges a wrongful death claim against
6 Matthews.

7
8 b. Rule 12(b)(7) Motion

9 Matthews continues to press an argument that plaintiff's nonparty siblings are
10 indispensable parties which require dismissal of this action under Rule 12(b)(7). ECF No. 412-1
11 at 6-11. Matthews contends that plaintiff was required to join all absent heirs, and her failure to
12 do so warrants dismissal. *Id.*

13 In determining whether a case can proceed without a necessary party, a court must look to
14 Rule 19, which governs joinder of parties. Rule 19 sets forth three-step inquiry:

15 1. Is the absent party necessary (i.e., required to be jointed if
16 feasible) under Rule 19(a)? 2. If so, is it feasible to order that the
absent party be joined? 3. If joinder is not feasible, can the case
proceed without the absent party, or is the absent party
indispensable such that the action must be dismissed?"

17 *Salt River Project Agr. Imp. And Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012).

18 This inquiry is informed, in part, by the procedural and substantive law as to a wrongful
19 death claims. In California, the general rule is that "there may be only a single action for
20 wrongful death, in which all heirs must join. There cannot be a series of suits by individual
21 heirs." *Gonzales v. Southern California Edison Co.*, 91 Cal. App. 4th 485, 489 (1999). This
22 policy is generally referred to as the one action rule. *Id.* "One of its effects is that settlement of a
23 wrongful death case instituted by only some of the heirs will bar others from prosecuting another
24 action against the same defendant." *Id.* "Because a wrongful death cause of action may not be
25 split, the case must be tried in a single forum." *Herbert v. Super. Ct.*, 169 Cal. App. 3d 718, 722
26 (1988). "Any heir who does not consent to be joined as a plaintiff in the wrongful death action
27 must be named as a defendant pursuant to [California Code of Civil Procedure] section 382.
28 *Ramero v. Pacific Gas & Elec. Co.*, 156 Cal. App. 4th 211, 216 (2007). However, "[a] person

1 named as a nominal defendant and properly joined is in reality, a plaintiff in the case.” *Id.*
2 (quotation marks omitted).

3 This court rejected Matthews’ argument in an earlier motion which argued that the
4 siblings are indispensable parties. *See* ECF No. 403 at 19-20. The court noted that “Although
5 federal courts have held that for purposes of a wrongful death claim absent heirs are ‘necessary’
6 parties, courts have also found that where an absent heir’s claim would be barred by the statute of
7 limitations, the absent heir is not indispensable.” *Id.* at 20 (citing *Backer v. United States*, 2014
8 WL 4267500, at *2-3 (E.D. Cal. Aug. 29, 2014); *A.D. v. California Highway Patrol*, 2009 WL
9 733872, * at 4-5 (N.D. Cal Mar. 17, 2009); *Estate of Burkhart v. United States*, 2008 WL
10 4067429, * 7-8 (N.D. Cal. Aug. 26, 2008)).

11 The court concluded that “[p]laintiff’s siblings are necessary parties, but as previously
12 observed, their joinder would defeat diversity and therefore joinder is not feasible.” *See* ECF No.
13 403 at 20. Thus, the next question was whether the inability to join them warrants dismissal, thus
14 making them indispensable parties. The court concluded that the absent heirs were not
15 indispensable as it appears that any wrongful death claims brought by plaintiff’s siblings would
16 be barred by the applicable statute of limitations. *Id.* Nothing Matthews presents on this motion
17 alters that conclusion. Plaintiff’s claim for wrongful death against the medical provider
18 defendants is predicated on their alleged malpractice. Thus, California Code of Civil Procedure
19 section 340.5 provides the applicable statute of limitations. That section states:

20 In an action for injury or death against a health care provider based
21 upon such person’s alleged professional negligence, the time for the
22 commencement of action shall be three years after the date of injury
23 or one year after the plaintiff discovers, or through the use of
24 reasonable diligence should have discovered, the injury, whichever
25 occurs first. In no event shall the time for commencement of legal
action exceed three years unless tolled for any of the following: (1)
upon proof of fraud, (2) intentional concealment, or (3) the
presence of a foreign body, which has no therapeutic or diagnostic
purpose or effect, in the person of the injured person.

26 Cal. Civ. Proc. Code § 340.5.

27 The complaint alleges that the decedent died on October 20, 2010. ECF No. 336 at 23.

28 ////

1 Thus, this court concluded that any wrongful death claim brought by the absent heirs would be
2 barred by the three year statute of limitation and therefore plaintiff can proceed with her claim in
3 their absence.

4 Matthews now argues that the court failed to properly consider whether the statute of
5 limitations for the absent heirs' claim would be subject to tolling. But it clearly would not.
6 According to Matthews "an allegation that Dr. Matthews never committed fraud or intentional
7 concealment is necessary to support the conclusion that the claims of the omitted heirs are time-
8 barred." ECF No. 412-1 at 9. Matthews insists that "[a]bsent such an allegation, any conclusion
9 that the claims of omitted heirs are time-barred would be based on pure speculation." *Id.* Rather
10 ironically, defendant Matthews insists that plaintiff's multiple allegations of fraud and
11 concealment subject the wrongful death claim to tolling. Matthews urges that "for purposes of
12 this motion the Court must accept as true that Dr. Matthews was involved in a conspiracy to
13 fraudulently conceal his wrongdoing, which conspiracy "continues to this day." *Id.* (citing ECF
14 No. 336 at 19). Thus, argues Matthews, allowing this action to proceed without joining the other
15 heirs would open the possibility that Matthews would have to litigate other actions brought by the
16 absent heirs, thereby subjecting him to additional liability.

17 The argument is unavailing. "Even fraudulent or intentional concealment by defendant of
18 facts upon which the causes of action are based will not toll the applicable statutes if such actual
19 or constructive discovery has occurred, for at that time the one-year periods commence to run."
20 *Tresemmer v. Barke*, 86 Cal. App. 3d 656, 666 (1978). Here, despite any alleged fraud or
21 concealment by defendants, plaintiff was able to bring this wrongful death action against
22 Matthews in 2011. There is absolutely no reason why the absent heirs could not have also
23 brought an action at that time. They did not. Nearly six years have elapsed since the decedent's
24 death and nothing precluded the siblings from pursuing a wrongful death claim.

25 There is no basis for Matthews' contention that the statute of limitations would be tolled
26 for a wrongful death claim brought by absent heirs. Accordingly, Matthews's Rule 12(b)(7)
27 motion must be denied.

28 ////

1 opportunities to address the arguments raised by defendants, she continues to submit pleadings
2 that are disorganized, in several parts unintelligible, and lacking sufficient allegations to support
3 most of her purported causes of action. Further, she persists in presenting claims that are simply
4 barred as a matter of law. There has been ample opportunity to cure the deficiencies in the claims
5 discussed above and she is simply not able to do so. Accordingly, the court finds that further
6 leave to amend would be futile. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (while
7 the court ordinarily would permit a pro se plaintiff to amend, leave to amend should not be
8 granted where it appears amendment would be futile).

9 III. Entry of Judgment Pursuant to Rule 54(b)

10 Stansell and Potter request immediate entry of judgment pursuant to Federal Rule of Civil
11 Procedure 54(b). ECF Nos. 448, 450.

12 “When an action presents more than one claim for relief . . . or when multiple parties are
13 involved, the court may direct entry of a final judgment as to one or more, but fewer than all,
14 claims or parties only if the court expressly determines that there is no just reason for delay.”
15 Fed. R. Civ. P. 54(b). In evaluating whether entry of judgment under 54(b) is appropriate, a court
16 “must first determine that it is dealing with a ‘final judgment.’” *Curtiss-Wright Corp. v. Gen.*
17 *Elec. Co.*, 446 U.S. 1, 7 (1980). It must then “determine whether there is any just reason for
18 delay.” *Id.* at 8. In evaluating whether there is just reason for delay, the court should consider
19 “whether the claims for review were separable from the others . . . and whether the nature of the
20 claims already determined was such that no appellate court would have to decide the same issues
21 more than once.” *Id.*

22 The court granted Stansell and Potter’s motions to dismiss all claims against them without
23 leave to amend on September 30, 2015, ECF No. 408, and they argue that there is no just reason
24 to delay entry of a final judgment. ECF No. 448-1; ECF No. 450. Stansell argues that there is no
25 danger of piecemeal appeals because “the sole issue before the Ninth Circuit would be whether
26 [plaintiff] stated any claims against Stansell in Stansell’s unique capacity as court-appointed
27 counsel for” the decedent. ECF No. 448-1 at 7. She further contends that plaintiff’s claims
28 against the remaining defendants are based largely on medical malpractice, and that “any

1 remaining claims against non-medical defendants have no bearing as to adjudication of the claims
2 against Stansell as court-appointed counsel for” the decedent. *Id.* Potter similarly argues that the
3 claims brought against him sound in legal malpractice, while the claims against the other
4 defendant are based on medical malpractice and have no bearing on the claims against him. ECF
5 No. 450. Thus, these defendants contend that any appeal of the claims against them would not
6 involve the same issues as an appeal involving the claims alleged against the other defendants,
7 and therefore the appellate court would not have to decide the same issues more than once.

8 Stansell and Potter are mistaken. This court dismissed the vast majority of the claims
9 against Stansell and Potter because they belonged to the decedent and are now claims of the
10 estate. Plaintiff could not assert claims on behalf of the decedent’s estate because such claims
11 would defeat diversity jurisdiction and because plaintiff, proceeding pro se, is not permitted to
12 represent the interest of the estate without first obtaining counsel. ECF No. 403, 408. As
13 illustrated above, the same reasoning justifies the dismissal of several claims against other
14 defendants in this action. Accordingly, an immediate appeal of claims against Stansell and Potter
15 would likely involve the same issue—whether plaintiff could proceed in this court with her
16 claims brought on behalf of the decedent—as any subsequent appeal regarding the claims against
17 other defendants.

18 As this would require the appellate court to decide the same issue more than once,
19 defendants Stansell and Potter’s motions for entry of judgment under Rule 54(b) must be denied.

20 IV. Conclusion

21 Accordingly, it is hereby RECOMMENDED that:

22 1. Defendant Merrifield’s motions to dismiss (ECF Nos. 419, 452) be granted and all
23 claims against her be dismissed without leave to amend.

24 2. Defendant Matthew’s motion to dismiss plaintiff’s wrongful death claim (ECF No. 412)
25 be denied.

26 3. Defendants EMC, Boggs, and Nelson’s motion for judgment on the pleadings (ECF No.
27 404) be granted in part and denied in part as follows:

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- a. The motion be granted as to all claims against Nelson and Boggs; and
- b. The motion be granted as to all claims against EMC, except plaintiff’s wrongful death claim based on defendant Matthews’s conduct.

4. Defendants Stansell and Potter’s motions for entry of judgment (ECF Nos. 448, 450) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 15, 2016.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE