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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROBERT WRIGHT et al., Plaintiffs and Appellants, v. SANTA ROSA MEMORIAL HOSPITAL et al., Defendants and Respondents.	A123721 (Sonoma County Super. Ct. No. SCV-238361)

This action arises from the death of Robin Wright (decedent) on March 19, 2003. Almost three years after decedent's death, her siblings (appellants) sued Santa Rosa Memorial Hospital (Hospital) for wrongful death. Pursuant to section 597 of the Code of Civil Procedure,[1] the issue of standing was tried first. The trial court concluded that appellants lacked standing to sue for decedent's wrongful death and subsequently that appellants' complaint did not plead a survivor cause of action for damages under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code § 15600, et seq. (Elder Abuse Act)). Appellants now seek review of the judgment entered in Hospital's favor and the order denying their motion for new

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

trial,[2] arguing that they have standing to sue for decedent's wrongful death and that the trial court abused its discretion by denying leave to amend the complaint to plead a cause of action for elder abuse. We affirm the judgment.

I. LEGAL BACKGROUND

In *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256 (*Quiroz*), the court provided the following overview of the types of claims at issue here:[3] "At common law, personal tort claims expired when either the victim or the tortfeasor died. [Citation.] Today, a cause of action for wrongful death exists only by virtue of legislative grace. [Citations.] The statutorily created 'wrongful death [cause of] action does not effect a survival of the decedent's cause of action[. Instead,] it "gives to the representative a totally new right of action, on different principles."] [Citation.]' [Citation.]" (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424 [].) The cause of action "for wrongful death belongs 'not to the decedent [or prospective decedent], but to the persons specified' [by statute]. [Citation.]" (*Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 860–861 [], fn. omitted.) It is a new cause of action that arises on the death of the decedent and it is vested in the decedent's heirs. (*Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864 [].)

A cause of action for wrongful death is thus a statutory claim. ([] §§ 377.60–377.62.) Its purpose is to compensate specified persons—heirs—for the loss of companionship and for other losses suffered as a result of a decedent's death. (*Jackson v. Fitzgibbons* (2005) 127 Cal.App.4th 329, 335 [].) Persons with standing to bring a wrongful death claim are enumerated at [] section 377.60, which provides

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[2] An order denying a motion for new trial is not a separately appealable order, but may be reviewed on appeal from the underlying judgment. (§ 906; *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

[3] This section of our opinion quotes extensively from *Quiroz, supra*, 140 Cal.App.4th at pp. 1263–1265, footnote omitted. Quotation marks in this section are the marks as they appear in the *Quiroz* opinion. Empty brackets [] indicate deletions from that opinion. Brackets with material enclosed and marked with an asterisk indicate matter added by this court, otherwise bracketed material appears in the original.

in pertinent part: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: [¶] (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession."

[]

Damages awarded to an heir in a wrongful death action are in the nature of compensation for personal injury to the heir. [Citation.*] "A plaintiff in a wrongful death action is entitled to recover damages for his own pecuniary loss, which may include (1) the loss of the decedent's financial support, services, training and advice, and (2) the pecuniary value of the decedent's society and companionship—but he may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss. [Citations.]" (*Nelson v. County of Los Angeles* [(2003)*] 113 Cal.App.4th [783,*] 793; see [] § 377.61.) "The damages recoverable in [wrongful death] are expressly limited to those *not* recoverable in a survival action under [] section 377.34. [Citations.]" (*Wilson v. John Crane, Inc., supra*, 81 Cal.App.4th at p. 861; see Code Civ. Proc., § 377.61.)

[]

Unlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event. (*Grant v. McAuliffe, supra*, 41 Cal.2d at p. 864.) The survival statutes do not create a cause of action. Rather, "[t]hey merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased." (*Ibid.*)

A cause of action that survives the death of a person passes to the decedent's successor in interest and is enforceable by the "decedent's personal representative or, if none, by the decedent's successor in interest." ([] § 377.30.) In the typical survivor action, the damages recoverable by a personal representative or successor in interest on a decedent's cause of action are limited by statute to "the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and *do not* include damages for pain, suffering, or disfigurement." ([] § 377.34, italics added.)

But there is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met. Specifically, Welfare and Institutions Code section 15657 provides for heightened remedies, including recovery for the decedent's predeath pain, suffering, and disfigurement, to a successor in interest to a decedent's cause of action "[w]here it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse . . . in addition to all other remedies provided by law." (See Welf. & Inst. Code, § 15657, subds. (a) & (b).) [Quotation from *Quiroz* ended.*]

II. PROCEDURAL BACKGROUND

The factual circumstances of decedent's death were not litigated below and are not relevant to the issues on appeal. Thus, we do not address them here. However, because of the rather convoluted procedural history below, we outline the proceedings before the trial court in some detail.

A. The Pleadings

On March 16, 2006, appellants, Robert Wright (in his individual capacity and as personal representative of decedent's estate), Roland Wright, and Cathlyn

Wright,[4] filed, through counsel, a form complaint[5] against Hospital and 20 doe defendants. On the face of the form complaint, appellants checked the boxes marked "Wrongful Death" and "Other Damages," specifying the latter as "Dependant Adult Abuse." The complaint describes the "plaintiffs" as "the natural siblings of decedent." The form complaint instructs: "Use a separate cause of action form for each cause of action." Appellants' pleading included only a single cause of action attachment—titled "General Negligence." The factual allegations provide: "Defendants, and each of them, negligently and unreasonably failed to timely and appropriately diagnose and treat and refer for timely diagnosis and treatment, all in breach of the standard of care leading to the untimely and unnecessary death of [appellants'] decedent . . . on or about March 19, 2003. [¶] Defendants, and each of them, are all agents and ostensible agents and acting in the course and scope of their employment. [¶] [Appellants] had no reason or basis to suspect malpractice until within one year of filing this complaint due to defendants, and each of their failure to disclose and document the negligent care and treatment causing and leading to [appellants'] decedent Robyn [sic] Wright's death, which matters were only recently discovered following retention and review of decedent's medical records."[6]

Hospital answered, raising the statute of limitations and the complaint's failure to state facts sufficient to constitute a cause of action as defenses.

B. Hospital's Motion for Summary Judgment

Hospital moved for summary judgment, arguing that appellants lacked standing to bring the wrongful death action. Specifically, Hospital argued: "[U]nder

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[4] We will refer to members of the Wright family by their first names for clarity without intending any disrespect.

[5] Judicial Council Forms, form 982.1(1).

[6] Appellants successfully sought leave to amend their complaint to substitute the true names of four individual doe defendants. The trial court would later grant summary judgment motions brought by three of the four individual defendants. Appellants do not challenge that ruling on appeal.

§ 377.60, the person or persons entitled to assert a wrongful death action following [decedent's] death were the persons entitled to her property under the laws of intestate succession. Those laws are set forth at Probate Code § 6402(b), which states that where there is no surviving spouse or issue, the intestate estate passes to the decedent's parent or parents. The estate only passes to a decedent's siblings (and the siblings therefore only have standing to assert a wrongful death claim) if there is no surviving parent. Probate Code § 6402(c). [¶] . . . Because [decedent] was survived by a parent, under . . . § 377.60 and Probate Code § 6402(b), that parent was the only person who had standing to assert a wrongful death claim." Finally, Hospital argued that the complaint was barred by the applicable statute of limitations, section 340.5.

Although appellants conceded that decedent's mother, Miriam Wright (Miriam), had survived decedent, appellants opposed summary judgment, arguing that "[a]t the time the action was filed the . . . siblings were the sole heirs for purposes of filing a wrongful death action." Hospital's motion was denied. With respect to standing, the trial court acknowledged that Miriam undisputedly survived decedent by at least 120 hours[7] and concluded: "[I]t would appear that the only proper plaintiff among the relatives who survived the decedent would be the estate of the decedent's mother. However, in this action, [Robert] has filed suit, in addition to himself individually, as the personal representative of the [decedent's] estate . . . . Under . . . section 337.60 the decedent's personal representative is a proper plaintiff." With respect to the statute of limitations, the trial court denied summary judgment because of the existence of a factual issue regarding the date appellants discovered, or through their use of reasonable diligence should have discovered, the injury.

C. Stipulation to Bifurcated Trial

On June 16, 2008, the trial court made the following order, based on the parties' stipulation: "Pursuant to . . . §§ 597 and 597.5, the issues of (a) the

[7] See Probate Code § 6403, subd. (a), discussed *post*.

[appellants'] standing to bring this action, and (b) the applicability of any and all relevant statutes of limitations to the claims asserted herein, shall be tried separately and before the trial of any other issues in this case. . . . [¶] . . . After the first phase of the bifurcated trial is concluded and a decision has been rendered thereon, if judgment is entered in favor of [Hospital], this action shall be deemed completed and the judgment shall be a final, appealable judgment. If, following the first phase of the bifurcated trial, the action is not completely resolved in favor of [Hospital], this Court shall set a new date for the trial of all remaining issues, to be set at least three months after the conclusion of the first phase. The second phase of trial shall be tried before a separate jury . . . ."

D. Court Trial on Standing

The parties submitted trial briefs on the issue of standing. Hospital asserted that none of the plaintiffs had standing to sue for decedent's wrongful death because Robert had not been appointed personal representative of decedent's estate and the complaint included no claim by the executor or administrator of Miriam's estate. Hospital also argued that appellants had not pleaded facts sufficient to state a survivor cause of action for damages under the Elder Abuse Act, that appellants did not have standing to bring such a survivor cause of action, and that, in any event, any newly asserted claim under the Elder Abuse Act would be barred by the statute of limitations.

Appellants conceded that Robert had not been appointed decedent's personal representative.[8] However, appellants argued that "a cause of action for [decedent's] wrongful death is specifically statutorily authorized to be brought by the persons who would be entitled to the property of decedent . . . by intestate succession. This is

[8] Robert filed a declaration stating that no proceeding was then pending in California for administration of decedent's estate but that he was "authorized to act on behalf of [decedent's] estate as her successor-in-interest as defined in . . . § 377.11 with respect to [decedent's] interest in the action. [Citation.]" He asserted no authority to act on behalf of *Miriam's* estate.

[decedent's] siblings, her only heirs at the time this cause of action accrued." Alternatively, appellants requested leave to amend their complaint to substitute plaintiffs who could assert standing on behalf of Miriam's estate.

The trial court's order on standing reads: "Pursuant to the stipulation of all parties, the trial was bifurcated to first conduct a hearing on the issue of standing. Both parties hereto have acknowledged and agreed that this is an issue not requiring determination of any issues of fact and therefore appropriate to be tried directly to the court. [¶] . . . [¶] This court has previously ruled that the only proper plaintiff able to bring a wrongful death action is the Estate of Miriam Wright, the mother of [decedent.] Not included among the named plaintiffs is any person purporting to be a representative of the Estate of Miriam Wright. [Appellants] are now suggesting that the court determine that [Robert], named only as an individual and as a representative of the Estate of Robin Wright,[9] now be somehow found to be either the personal representative of the Estate of Miriam Wright or a successor in interest to that estate. However, as the statute of limitations has passed, the only way such a change in designation, if properly requested, could be successfully accomplished would be by application of the relation[-]back doctrine. . . . However, the acknowledgement of a claim by the Estate of Miriam Wright at this late stage in the litigation would impose a new and additional claim against the defendants. This acknowledgement would not be to correct a mere misnomer in the description of the parties, but would add a new claimant exposing defendants to additional potential damages. The relation[-]back doctrine cannot be utilized to accomplish the inclusion of a new claimant after the expiration of the statute of limitations. *San Diego Gas & Electric Company v. Superior Court* (2007) 146 Cal.App.4th 1545. Therefore, the

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9 The trial court later clarified that Robert "is not the duly appointed personal representative of the Estate of Robin Wright and cannot bring a wrongful death claim on behalf of the Estate of Miriam Wright . . . ."

court finds that the Estate of Miriam Wright is not currently a plaintiff in this action and cannot be added at this time."

With respect to damages under the Elder Abuse Act, the trial court concluded: "[Robert] has standing to assert this claim. [Hospital] has raised other challenges to the prosecution of this claim which shall be resolved in the future. [¶] [I]t is the court's opinion that the only viable plaintiff remaining in this action is [Robert], acting as a 'successor in interest' and the only claim he has standing to pursue is the survival action based upon the alleged violation of Welfare & Institution Code section 15657."

E. Proceedings Regarding Existence of a Survivor Cause of Action

Hospital then submitted an additional trial brief on whether appellants had actually pled a survivor cause of action for damages under the Elder Abuse Act. Hospital's brief noted that, other than a checked box on the first page of the complaint, appellants' complaint failed to include any allegations of specific facts that could support a dependent adult abuse claim. Hospital further argued that the complaint "alleges only one cause of action, for wrongful death arising out of the alleged professional negligence of a healthcare provider. The Complaint does not allege a survivor cause of action or make any claim under the Act, and it is too late to make such a claim now." The appellate record contains no responsive brief from appellants.

On July 11, 2008, the trial court held a hearing on the issue, at which appellants requested leave to amend their complaint. At the conclusion of the hearing, the trial court stated: "[I]n viewing this as I think the Court must, as, is there a cause of action for the survival damages to [decedent], the Court finds that that is not alleged in the complaint. [¶] We do have a named plaintiff [Robert] individually, and as personal representative of the estate of [decedent] . . . . [¶] The Court does not believe that that gives specific notice that there is a survival action being attached."

On July 21, 2008, the trial court filed its order, which reads: "This matter came on regularly for court trial, jury trial having been waived, on July 9 and July

11, 2008. . . . [¶] . . . [¶] The court then heard the instant motion as to the adequacy of the complaint to allege a cause of action for elder abuse, pursuant to Welfare & Institutions Code section[] 15600 et seq. Counsel agreed that this was a motion to be determined solely upon the applicable law and therefore to be tried to the court prior to the empanelment of a jury. [¶] . . . [¶] . . . The recitals of the factual allegations in the numbered paragraphs 1-15 contain no mention of a reference to the enhanced remedies provided by the 15600, et seq. cause of actions. Therefore, the court finds that a cause of action for elder abuse is not alleged. [¶] . . . [¶] . . . There is no mention whatsoever of any allegation describing or complaining about the treatment of [decedent] prior to her death. [¶] . . . Nowhere in the answers to any interrogatories was there any mention made whatsoever of any alleged suffering by decedent . . . . As it is only the suffering of the decedent which could form the damages sought in a survival action, these answers to interrogatories, most particularly [Robert] as the personal representative of [decedent] clearly show that [appellants] were not seeking any survival action damages. As [appellants] were not seeking damages attributable to a survival action, [appellants] cannot now contend that they were seeking a survival action, the only action to which the enhanced remedies of Welfare & Institutions Code section[] 15600 et seq. could attach. [¶] . . . [¶] The court having previously found that the only viable plaintiff to bring an action for wrongful death would be the Estate of Miriam Wright and that there is no plaintiff in this action able to make a claim on behalf of the Estate of Miriam Wright, the only possible claim which could be presented at trial would be a survival claim on behalf of [decedent], if properly pled. [¶] The court, now finding that a survival claim has not been pled in the complaint, finds that [appellants] may take nothing from [Hospital] in this action. Therefore, the court finds for [Hospital.]"[10]

[10] Procedurally, the court's actions are somewhat confusing. The trial court appears to have construed Hospital's trial brief to be seeking judgment on the pleadings. (See *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 701–702 [trial court may construe motion in limine as a motion for judgment on the pleadings]; *Lucas v. County of*

Accordingly, the trial court entered judgment in Hospital's favor, ordered that appellants take nothing by way of their complaint, and decreed that Hospital recover costs.

F. Motion for New Trial

Appellants moved for a new trial, arguing, in relevant part, that Hospital's delayed objection to the sufficiency of the complaint "did not give [appellants] the usual opportunity to amend and clarify the pleadings on a timely basis if need be." Appellants requested leave to amend the complaint and attached a proposed first amended complaint, which named the following plaintiffs: Robert, in his individual capacity and as personal representative of the estate and successor in interest of decedent, Roland, Cathlyn, Miriam, Cathlyn as personal representative of the estate and successor in interest to the estate of Miriam. The proposed first amended complaint includes causes of action titled (1) wrongful death; (2) negligence including survival action; and (3) dependent adult abuse. On December 2, 2008, an order denying appellants' motion for a new trial was filed. This timely appeal followed. (Cal. Rules of Court, rule 8.108(b)(1); § 660.)

III. DISCUSSION

Appellants contend on appeal that the trial court erred by concluding that decedent's siblings lacked standing to sue for her wrongful death and that the trial court abused its discretion by failing to permit the filing of an amended complaint seeking damages under the Elder Abuse Act. We disagree.

Los Angeles (1996) 47 Cal.App.4th 277, 284–285.) But, the court did not limit its analysis to the face of the pleadings. "When a trial court considers matters outside the pleadings in ruling on a motion for judgment on the pleadings, resulting judgments are reviewed as judgments arising from motions for summary judgment. [Citations.]" (*Rangel v. Interinsurance Exchange* (1992) 4 Cal.4th 1, 19, fn. 1.) In any event, appellants do not challenge the trial court's decision on this "motion," but only the court's denial of leave to amend.

A. Wrongful Death Cause of Action

A wrongful death plaintiff has the obligation to plead and prove standing under section 377.60. (*Nelson v. County of Los Angeles, supra,* 113 Cal.App.4th at p. 789.) It is undisputed that decedent was unmarried and had no children. Thus, the question on appeal is whether decedent's siblings, as individuals, had standing to sue under section 377.60, subdivision (a), as "the persons . . . who would be entitled to the property of the decedent by intestate succession."[11]

A decedent's siblings only become heirs, under the laws of intestate succession, when there is "no surviving issue or parent." (Prob. Code, § 6402, subds. (a)–(c).) Because it is undisputed that decedent's mother, Miriam, survived decedent by 120 hours, Miriam qualifies as a surviving parent, pursuant to Probate Code section 6403, subdivision (a). Appellants concede that because "[decedent] died intestate without a spouse or children, Miriam became the person 'entitled to the property of the decedent by intestate succession' . . . . Therefore, under [section] 377.60, Miriam had the right to sue for any 'cause of action for the death of' [decedent]." (See Prob. Code, § 6402, subd. (b).) Nonetheless, appellants argue that section 377.60, subdivision (a), should be read to grant them, decedent's siblings, standing because there was no evidence that Miriam knew, or should have known, of Hospital's negligence before her own death.

Essentially, appellants argue that section 377.60, subdivision (a) should be read to provide standing to those who "would be entitled to the property of the decedent by intestate succession" if the decedent had died *at the time that the cause of action is discovered.* Because appellants raise a question of statutory

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[11] Appellants do not assert on appeal that they have any right to pursue the wrongful death cause of action on behalf of Miriam's estate, or that the trial court should have granted leave to amend to substitute a plaintiff with such standing. Appellants also abandon their argument that Robert could assert the wrongful death cause of action as decedent's personal representative, having conceded below that he had not been formally appointed.

interpretation, we apply the de novo standard of review. (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484.)

Appellants cite no authority holding that the intestate heirs eligible to bring a wrongful death claim should be determined as if the decedent had died on the date the cause of action is discovered or filed. Instead, appellants rely generally on the discovery rule, which provides: "[T]he accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her. [Citation.]" (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109, fn. omitted; see also § 340.5.[12])

Appellants' interpretation, however, is contradicted by both the plain language of the wrongful death statute, the laws of intestate succession, and persuasive authority. Appellants ask us to read section 377.60, subdivision (a), as if it said: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by . . . the persons . . . who would be entitled to the property of the decedent by intestate succession *if the decedent had died on the date that the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury and its negligent cause*."[13] Had the Legislature intended this to be the meaning of section 377.60, subdivision (a), it would have said so. It did not.

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[12] Section 340.5 provides in relevant part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. . . ."

[13] Such a rule raises the following question: If standing is determined at the time of discovery, whose discovery is relevant? Appellants fail to demonstrate how standing would be determined in a case involving multiple potential plaintiffs with different discovery dates. *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690 and *Andersen v. Barton Memorial Hospital, Inc.* (1985) 166 Cal.App.3d 678 are not on point.

Appellants' claim that they are now decedent's heirs is refuted by the laws of intestate succession. (Prob. Code, § 6402, subds. (a)–(c).) "[U]nder section 377.60[, subdivision] (a), standing to bring a wrongful death action remains linked to the intestacy laws. [Citation.]" (*Cheyanna M. v. A.C. Nielsen Co.* (1998) 66 Cal.App.4th 855, 865; see also *Nelson v. County of Los Angeles, supra,* 113 Cal.App.4th at p. 789, fn. 6 [section 377.60 "bars claims by persons who are not in the chain of intestate succession"]; *Mayo v. White* (1986) 178 Cal.App.3d 1083, 1087–1091 [decedent's siblings not proper plaintiffs under former wrongful death statute despite parents' disclaimer of interest in decedent's estate].) In effect, appellants ask us to deem Miriam to have predeceased decedent, which would also conflict with the laws of intestate succession. (Prob. Code, § 6403, subd. (a) ["A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly."].) The relevant date for determining a decedent's heirs under intestate succession is the date of the decedent's death. (See Prob. Code, § 7000.)[14]

The Sixth District Court of Appeal rejected a similar argument that standing be determined at a time other than the decedent's death. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1443 (*Chavez*).) In *Chavez*, parents filed a wrongful death action after their adult son was killed by a drunk driver. The decedent was survived, not only by his parents, but also by a two-year-old daughter. However, a month after the decedent's death, the daughter herself was killed. The wrongful death action was brought by the decedent's parents, suing both as individuals and as the personal representatives of the decedent's estate, and by the daughter's mother, suing as the successor in interest to her estate. Defendant successfully moved for

[14] Probate Code section 7000 provides: "Subject to Section 7001, title to a decedent's property passes *on the decedent's death* to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession." (Italics added).

summary adjudication against the parents' claim, on the ground that they lacked standing. (*Id.* at pp. 1436–1437.)

Relying on section 377.60, subdivision (a), the reviewing court rejected the parents' argument that they had standing as their son's heirs because he left no surviving issue. (*Chavez, supra,* 91 Cal.App.4th at pp. 1439–1444.) The court noted that "[u]nder the laws of intestate succession, a decedent's parents become heirs where there is no surviving issue. (Prob. Code, § 6402, subd. (b).)" (*Chavez*, at p. 1440.) Employing the plain language of the statute, the court concluded that "surviving" issue are those who outlive the decedent, rather than issue that remain living at the time suit is filed. (*Id.* at pp. 1441, 1443.) This conclusion was bolstered by Probate Code section 6403, subdivision (a), which defines a "surviving" heir by requiring that the survivor outlive the decedent by 120 hours to take by intestacy. (*Chavez*, at p. 1441.)

The court specifically rejected the parents' assertion that standing must be determined as of the date the wrongful death suit is filed. (*Chavez*, *supra*, 91 Cal.App.4th at p. 1443.) The court stated: "[T]he child's status as a survivor and her consequent right to sue do not depend on whether or when an action was filed on her behalf. Rather, the pivotal question is whether she owned a cause of action for her father's wrongful death at the time she died, and, if so, whether that cause of action survived her." (*Ibid.*) The court answered both questions affirmatively. First, the court noted that "[a] claimant's cause of action for wrongful death arises when the decedent dies. [Citations.]" (*Ibid.*) Thus, the daughter owned a cause of action for her father's wrongful death before she died. (*Ibid.*) The court also held that the daughter's cause of action survived her own death pursuant to the survival statute, section 377.20, and that suit could be brought thereafter on behalf of her estate.[15]

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[15] Section 377.20 provides: "(a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period. [¶] (b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have

(*Id.* at pp. 1443–1444.) The court concluded that only the daughter's successor in interest had standing, pursuant to section 377.60, subdivision (a), to sue for decedent's wrongful death. (*Id.* at p. 1444.)

We see no reason to reach a different result here. That *Chavez* involved surviving issue, rather than a surviving parent, makes little difference. Section 377.60, subdivision (a), does not provide differing times to measure standing depending on who survives the decedent. Appellants are correct that *Chavez* did not address any assertion that discovery of negligence had been delayed until after the daughter's death. (*Chavez, supra,* 91 Cal.App.4th at pp. 1436, 1443 ["in this case . . . [the daughter's] right to sue for her father's wrongful death had fully ripened into a viable cause of action before she died"].) However, the *Chavez* court itself noted that "[i]n some cases, even rights that 'have not yet ripened into an actionable claim' may give rise to a survival action. (*Carr v. Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 890 [(*Carr*)].)" (*Chavez,* at p. 1443.) *Carr* held that "a complete cause of action need not exist at the time of the injured party's death in order for rights to survive which later may mature in an actionable claim." (*Carr, supra,* 152 Cal.App.3d at p. 891 [third-party claimant's administrator could sue insurer for bad faith failure to settle despite fact cause of action had not accrued at time of third-party claimant's death].)

Appellants mistakenly assert that the trial court's ruling means that section 377.60 "provide[s] no remedy at all for *any* of the members of the family of a victim of defendant's negligence." Contrary to appellants' suggestion, the trial court did not rule that the wrongful death cause of action could only be brought by Miriam during her lifetime. Nor did the trial court rule that the wrongful death cause of action could only be brought by Miriam's estate if the alleged injury and its negligent cause had been discovered during Miriam's lifetime. The trial court merely ruled that, under

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been liable if the person's death had not preceded or occurred simultaneously with the loss or damage."

the statute, only Miriam's estate possessed standing to sue for wrongful death. Appellants have not shown, on the record before the court, that Miriam's estate was prevented from filing a timely wrongful death cause of action. Appellants are not entitled to a reversal because that claim was not pursued.

The statutory language does not allow us to stray from the rule that standing to bring a cause of action under section 377.60, subdivision (a), is determined at the time of the decedent's death. (See *Chavez, supra,* 91 Cal.App.4th at pp. 1442–1443 [wrongful death actions are "creatures of statute" and courts cannot "recognize standing that does not exist under the statute"].) Accordingly, we conclude that the trial court did not err when it concluded that decedent's siblings lacked standing to sue for her wrongful death.

B. Survivor Cause of Action

Appellants do not challenge the conclusion that their complaint failed to allege a survivor cause of action, other than to suggest that Hospital's challenge to the sufficiency of their complaint was not timely.[16] Rather, appellants argue that the trial court abused its discretion by denying leave to amend the complaint to allege a survivor cause of action for damages under the Elder Abuse Act. Although the trial court never explicitly denied appellants' requests to amend to allege a survivor claim,

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[16] We reject this argument. First, there is no indication in the record that appellants objected to the procedure used below, before filing their motion for new trial, other than to claim that the objection was waived by Hospital's failure to file a demurrer. Second, failure to file a demurrer does not waive the contention that a pleading does not state facts sufficient to constitute a cause of action. (§§ 430.80, subd. (a); 438, subd. (g)(2).) Finally, appellants' claim of surprise is contradicted by the fact that Hospital raised, in its answer, the complaint's failure to state sufficient facts. The authority relied on by appellants, *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, recognizes the trial court's inherent authority to use nonstatutory procedural motions, such as in limine motions, to dispose of a claim at the time of trial. (*Id.* at p. 1595 ["[c]ourts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice"]; see also *Coshow v. City of Escondido, supra,* 132 Cal.App.4th at pp. 701–702 [trial court may construe motion in limine as a motion for judgment on the pleadings]; *Lucas v. County of Los Angeles, supra,* 47 Cal.App.4th at pp. 284–285.)

we address the merits of appellants' argument because the trial court implicitly denied the requests. (See *Galligan v. City of San Bruno* (1982) 132 Cal.App.3d 869, 875–876.)

A trial court " 'has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]' [Citation.]" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486, only final citation omission added.) However, no abuse of discretion is shown when the statute of limitations would bar the proposed amendment. (*Quiroz, supra,* 140 Cal.App.4th at pp. 1281–1282; *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1429.)

We conclude that the trial court did not abuse its discretion in denying the requests for leave to amend to allege a dependant adult abuse claim. The applicable statute of limitations is two years. (§ 335.1 [actions for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another to be brought within two years]; *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 125–127.) As the statute of limitations had passed, the only way an amended complaint, filed in July 2008 or thereafter, could be considered timely would be by application of the relation-back doctrine. In order for the relation-back doctrine to apply, "the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408–409.)

We conclude that the relation-back doctrine does not apply because the proposed first amended complaint, brought by Robert in his asserted capacity as successor in interest to decedent, pleads a different injury (one to decedent occurring prior to her death) than the initial complaint (alleging loss suffered by heirs). "[A] court is not bound by the captions or labels of a cause of action in a pleading. The nature and character of a pleading is to be determined from the *facts alleged*, not the

name given by the pleader to the cause of action." (*Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281.)

For the first time, appellants' proposed first amended complaint alleges injury to decedent occurring before her death.[17] The original complaint rests solely on the siblings' own injuries resulting from decedent's death. As noted above, a wrongful death cause of action and a survivor cause of action seek compensation for separate and distinct injuries. (*Quiroz, supra,* 140 Cal.App.4th at p. 1263–1265, 1279.) Thus, the original complaint was insufficient to put Hospital on notice that appellants were seeking damages on behalf of decedent, as well as for their own wrongful death damages. None of the factual allegations hint that appellants intended to seek damages for decedent's injuries suffered before her death. In a very similar situation, it has been held that a survivor cause of action, pleading a different injury than a wrongful death cause of action, does not relate back to a timely-filed wrongful death action.[18] (*Quiroz, supra,* 140 Cal.App.4th at pp. 1262, 1278–1279, 1281–1282 ["these distinct claims are technically asserted by different plaintiffs and they seek compensation for different injuries"].) Appellants make no attempt to distinguish *Quiroz* on this point.

Appellants have failed to identify how they could amend their complaint to cure the statute of limitations problem. Accordingly, we conclude that the trial court did not abuse its discretion by denying the requests for leave to amend.[19]

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[17] Appellants' interrogatory responses had also apparently failed to set forth any damages based on pre-death suffering of decedent.

[18] We assume, but do not decide, that the original complaint was timely.

[19] For the same reasons, we reject appellants' argument that leave to file an amended complaint should have been granted after they moved for a new trial.

IV. DISPOSITION

The judgment is affirmed. Hospital is to recover costs on appeal.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.