

Filed 9/20/22

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**COURT OF APPEAL, FOURTH APPELLATE DISTRICT**

**DIVISION ONE**

**STATE OF CALIFORNIA**

CAROL ANN HOWARD, Individually  
and as Trustee,

Plaintiff and Appellant,

v.

KEELEY C. LUHNOW et al.,

Defendants and Respondents.

D078467

(Super. Ct. No. 37-2019-  
00021040-CU-PN-CTL)

APPEAL from judgments of the Superior Court of San Diego County,  
Ronald F. Frazier, Judge. Affirmed.

The Law Firm of Steven M. Green and Steven M. Green for Plaintiff  
and Appellant.

Lewis Brisbois Bisgaard & Smith, Corinne C. Bertsche for Defendant  
and Respondent Jack L. Oatman, Jr.

Noon & Associates, Timothy S. Noon, and Julia M. Dalzell for  
Defendant and Respondent Keeley C. Luhnnow.

In 2014, Carol Ann Howard filed a petition to obtain a conservatorship over her step-father, Andrew Mills. Mills opposed the conservatorship and disinherited Howard by removing her as trustee and beneficiary of his trust. Howard then sued Mills and his two nieces, who along with Howard's daughter had been made equal one-third beneficiaries of Mills's trust, alleging claims for fraud, undue influence, intentional infliction of emotional distress (IIED), and elder abuse. Mills passed away in 2018 at the age of 103. In 2019, the civil lawsuit was settled with an agreement between the nieces and Howard that vacated Mills's 2014 trust amendments disinheriting Howard.

Howard then brought this current litigation by filing a civil complaint against Jack L. Oatman, Mills's estate planning attorney, and the attorneys who represented Mills in the conservatorship proceeding initiated by Howard, Albence & Associates, APC, Keeley C. Luhnnow, and Christopher Albence (collectively, the Albence attorneys). In her complaint, Howard alleged Oatman improperly amended Mills's trust and caused Mills to litigate her conservatorship petition to "run up attorney's fees," knowing that Mills was not competent because he suffered from dementia. Howard alleged the Albence attorneys were negligent, asserted undue influence over Mills, breached their fiduciary duty to Mills, and committed legal malpractice by defending Mills against her conservatorship petition.

Oatman and the Albence attorneys filed separate motions for summary judgment or, in the alternative, summary adjudication. The court granted the motions for summary judgment in favor of Oatman and Luhnnow, and granted summary adjudication in favor of Albence & Associates, APC and Albence individually. After the court's rulings, only Howard's claim for

declaratory relief against Albence & Associates, APC and Albence individually remains.

On appeal from the subsequent judgments entered against her and in favor of Oatman and Luhn timer, Howard first challenges the trial court's order sustaining the defendants' objections to her expert's declarations. With respect to the merits of her claims, Howard argues triable issues of material fact remain concerning Oatman's and Luhn timer's duties to Mills, her, and the trust, and as to the tolling of the statute of limitations on her claims. Howard also contends she has standing as Mills's "successor in interest" to assert claims for elder abuse on his behalf. As we shall explain, we reject Howard's arguments and affirm the judgments.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Background*

After Mills's wife of 56 years, Bette, passed away in 2006, Mills hired Oatman to perform estate planning services for him. Oatman met Mills as a kid, when Mills worked for Oatman's family business. Oatman prepared a trust for Mills, which named Howard, Bette's daughter from a prior relationship, as the sole beneficiary and successor trustee.

Mills, who lived in a condominium he owned in downtown San Diego, would stop by Oatman's office periodically with coffee for Oatman and his staff. Oatman considered Mills a friend. Oatman performed additional services for Mills over the next several years. In 2011, at Mills's request, Oatman amended the trust to add Howard's daughter, Staci Moore, as an equal beneficiary. Then, in 2013, Mills asked Oatman to help him transfer his vacation timeshare in Florida to Howard and Moore.

In July 2014, Oatman received a call from Mills's neighbor, who told Oatman that Mills was living in a memory care facility, Plaza Village, and

was unhappy and wanted to speak with Oatman. Oatman spoke with Mills on July 17, 2014. Mills told Oatman he did not want to stay at Plaza Village, but Howard was preventing him from leaving by refusing to give him his wallet, identification card, keys, and checkbook. Mills asked Oatman to send a letter to Howard demanding the return of his personal items.

On July 19, 2014, Oatman sent the requested letter to Howard. In addition to demanding the return of Mills's things, Oatman also explained that Mills had given his niece, Carolyn Coleman, general power of attorney and health care power of attorney, and that Coleman had arranged for in-home care for Mills. Howard, through her attorney Steven M. Green, responded to Oatman with a letter asserting that any documents appointing Coleman as his power of attorney were void because Mills lacked legal capacity. The letter also stated that Howard had been in the process of finding full-time, in-home care for Mills so that he could move back to his condominium. On July 30, 2014, Green filed a petition on behalf of Howard seeking a conservatorship over Mills. Mills opposed the petition and hired the Albence attorneys to represent him in the proceeding.

After the petition was filed, in August, Mills asked Oatman to prepare a general durable power of attorney appointing Coleman as his general and health care power of attorney. The following month, Mills met with Oatman to discuss revising his trust. Mills told Oatman he was upset with Howard for pursuing the conservatorship over him and wasting his money in the process. Mills told Oatman he wanted to eliminate Howard as a beneficiary and successor trustee, and to make Coleman and her sister, Debbie Mills, equal one-third beneficiaries with Moore. To effectuate Mills's request, Oatman prepared the second amendment to, and complete restatement of,

the trust, and updated Mills's will. Oatman sent the revised documents to Mills on September 13, 2014.

Oatman then met with Mills on September 16, 2014 to review the documents. Mills again told Oatman he was angry with Howard for pursuing expensive litigation against him and that he wanted to remove Howard from the trust. Mills also told Oatman he believed that Howard and her attorney were using his money against him. Oatman believed that Mills, who was then 98 years old, was lucid, understood what he was doing, and had testamentary capacity to execute the amendments to his trust and will. Oatman charged Mills \$350 for his services, which Mills paid in October 2014.

In September 2014, Howard filed a "Petition to Remove Trustee and Substitute herself as Successor Trustee, Invalidate Power of Attorney, Fraud and Elder Abuse against Andrew Mills, Carolyn Coleman and Debbie Mills." Mills opposed the petition. The petition was eventually dismissed by the probate court in March 2016 after the court ruled that Howard lacked standing to assert the claims.

The conservatorship matter proceeded to trial in June 2015. Howard hired Dr. Dominic Addario to evaluate Mills, who testified at trial that Mills suffered from dementia and that a conservatorship was appropriate because Mills lacked the capacity to care for himself. Mills's regular physician, Dr. Vincent Paul Kater, who had treated Mills since the 1980s, also testified. Dr. Kater stated that Mills, for his age, was in good health and had good mental function.

Dr. Kater also explained that Mills had fallen in late 2013, and had suffered a subdural hematoma that caused significant impairment to Mills's cognitive health. After spending around 10 days in the hospital, Mills was

moved first to a skilled nursing facility, and then to Plaza Village. As a result of the injury, Dr. Kater diagnosed Mills with dementia. Dr. Kater explained that Mills's condition improved in the months following his fall and that when the time came to determine whether Mills needed to continue to reside in a memory care facility, Dr. Kater found that the dementia diagnosis was no longer accurate, and instead determined that Mills suffered only from mild cognitive decline.

After the four and a half day trial, the trial court issued a statement of decision denying Howard's petition to impose a conservatorship over her step-father. The court credited Dr. Kater's and Oatman's testimony that Mills was able to make decisions and that he did not suffer from any severe cognitive loss. The court found Mills "lacks sufficient deficits to require a conservator of the person or estate." The court's order also stated that it was on notice of Howard's pending petition to invalidate Mills's 2014 amendments to his trust and will, but that the court was "not rendering any decision as to the validity of the" documents.

The court, however, went on to state that "[a]lthough not before me, this Court finds that undue influence was executed on Andrew Mills by his niece." Further, "[a]s a result of undue influence of Carolyn Coleman and Debbie Mills, the court finds that Andrew did not possess the requisite capacity to execute the 2014 instruments," which "should be declared void, and of no force and effect, but this matter was not referred to me."

On July 18, 2015, Mills executed a deed of trust in favor of Albence & Associates to secure attorney's fees of \$69,389.50 that Mills owed to the firm for defending him in the conservatorship proceedings. At Mills' request,

Oatman reviewed the billing and found it fair, and Oatman notarized Mills's execution of the deed of trust, which was recorded on July 20, 2017.<sup>1</sup>

On August 31, 2015, Oatman met with Mills again to review Mills' September 16, 2014 will and second amendment to his Trust. Mills confirmed that the documents accurately stated his wishes. Oatman stated that Mills was definite that he did not want Howard as a beneficiary or trustee, and that he felt she and her attorney had taken a lot of his money. Mills told Oatman he wanted Debbie Mills to act as his trustee because he trusted her, and wished to add her to his health care power of attorney. Oatman prepared an advanced health care directive nominating both his nieces, Debbie Mills and Coleman, as co-health care agents, and sent it to Mills for review. Mills returned to the office to sign the document on September 29, 2015.

On November 30, 2017, Howard initiated a new civil lawsuit against Mills, Carolyn Coleman, and Debbie Mills. The complaint alleged claims for fraud, undue influence, IIED, and elder abuse. Mills died the following year on May 18, 2018. On February 8, 2019, Howard entered into a settlement agreement of the civil action with Coleman and Debbie Mills. As part of the settlement, the parties agreed that the 2014 estate instruments were vacated, that Howard would continue to be the trustee under the prior estate plan, and that Howard would pay Coleman and Debbie Mills each \$60,000.

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<sup>1</sup> On April 18, 2019, the Albence attorneys filed a creditor's claim in the probate case seeking the attorney fees they asserted they were owed under the deed of trust, as well as for services performed in defending Mills against Howard's appeal of the conservatorship denial order, defending Mills against the earlier civil suit, defending Mills in the probate petition seeking to remove Debbie Mills and Coleman as successor trustees, and in Mills's appeal of a Veteran's Affairs claim matter.

### *B. Underlying Litigation*

On April 23, 2019, Howard, individually and as trustee of the Andrew Mills Trust, filed this action. The operative third amended complaint asserts claims for: (1) declaratory relief against the Albence attorneys; (2) legal malpractice against the Albence attorneys; (3) legal malpractice against Oatman; (4) notary negligence against Christopher Albence; (5) breach of fiduciary duty against all defendants; (6) elder abuse against all defendants; (7) IIED against all defendants; and (8) gross negligence against all defendants. Howard alleged Mills began suffering dementia in 2013, which she alleged was confirmed by Dr. Kater's diagnosis on March 14, 2014 in a form sent to the United States Department of Veteran Affairs to obtain additional benefits for Mills. Howard alleged that Oatman improperly amended Mills's estate planning documents to remove her as a beneficiary and successor trustee, while he was aware that Mills lacked the legal capacity to do so. She also alleged that the Albence attorneys and Oatman caused Mills to litigate Howard's conservatorship petition to "run up attorney's fees," while they were aware that Mills suffered from dementia.

Thereafter, the parties conducted preliminary litigation, including a partially sustained demurrer by the Albence attorneys, and discovery. Oatman filed his motion for summary judgment, or summary adjudication in the alternative, asserting Howard's claims for legal malpractice, financial elder abuse, IIED, and gross negligence failed as a matter of law because (1) Oatman had no duty to determine that Mills had testamentary capacity, (2) Howard could not satisfy the elements of these claims, and (3) the claims were barred by the statutes of limitation. The Albence attorneys filed their motion for summary adjudication asserting (1) Howard was barred from relitigating the issue of Mills's capacity based on the denial of her



conservatorship petition, (2) her claims were barred by the statutes of limitation, (3) she had not satisfied various elements of the claims, and (4) she lacked standing to bring her claim for breach of fiduciary duty.

After briefing and oral argument, the trial court granted summary judgment in favor of Oatman and Luhnnow, and granted summary adjudication of all of the claims against Albence & Associates and Christopher Albence, except Howard's first cause of action for declaratory relief. The court found that Howard's causes of action against Oatman for legal malpractice, breach of fiduciary duty, and gross negligence were time-barred because Howard discovered the facts forming the basis for those claims, i.e., Oatman's knowledge of Mills's dementia diagnosis before amending the trust and will, in 2014. The court also found the claims should be dismissed because Oatman owed no duty to Howard, either as an individual intended beneficiary or as trustee. With respect to Howard's elder abuse claim against Oatman, the court found that Howard did not have standing to bring such a claim and the claim was time-barred. The court found Howard's claim for IIED against Oatman was barred by the statute of limitations and because the underlying conduct alleged was not "outrageous" as a matter of law.

With respect to Luhnnow, the trial court found Howard's claim for legal malpractice was not viable because she (and the Albence firm) were retained by Mills to represent him in the conservatorship proceeding, which they successfully defended, and because the claim was barred by the applicable one-year statute of limitations. The trial court concluded Howard's claims against Luhnnow for breach of fiduciary duty, financial elder abuse, and gross negligence failed as a matter of law because Howard had presented no evidence of undue influence by the Albence attorneys. As with the IIED

claim against Oatman, the court found the conduct alleged by Howard was not outrageous as a matter of law and that the claim was time-barred. The court also sustained the defendants' evidentiary objections to Howard's expert witness declarations.

Thereafter, the court entered judgments in favor of Oatman and Luhnnow.<sup>2</sup> Howard timely appealed from both judgments.

### DISCUSSION

Howard makes several arguments on appeal. First, she challenges the court's decision to sustain the objections to her expert's declarations. Howard next asserts the trial court erred by failing to toll the statutes of limitations that apply to her claims against Oatman because it "was impossible for [her] to bring her claims against ... Oatman prior to February 8, 2019." She also asserts triable issues of material fact remain as to whether Oatman owed her a duty.

With respect to Luhnnow, Howard argues that the statute of limitations governing her legal malpractice claim was tolled until February 8, 2019, and that triable issues of material fact remain with respect to her claims for legal malpractice, breach of fiduciary duty, and gross negligence on the issue of duty. Lastly, Howard argues that, as executor and reinstated trustee of Mills's estate, she has standing to assert claims of elder abuse on behalf of Mills against both Oatman and Luhnnow.

As we explain, none of Howard's arguments has merit.

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<sup>2</sup> The case is final and appealable only as to Oatman and Luhnnow. (See *Tinsley v. Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 880 ["[W]hen there is a several judgment resolving all issues between a plaintiff and one defendant, either party may appeal from an adverse judgment, although the action remains pending between the plaintiff and other defendants."].)

## I

### *Evidentiary Objections*

Howard asserts the trial court abused its discretion by sustaining the defendants' objections to her expert's declarations. Specifically, she contends the court erred by sustaining the objections without explanation and by relying on the excluded evidence to support its decision.

## A

### *Additional Background*

The appellate record does not contain the expert declarations at issue. Instead, Howard included the documents in her request for judicial notice, which we grant solely as to the declarations.<sup>3</sup>

Howard's expert, Susanne Wilson, is an attorney specializing in trust matters. In her declarations, Wilson opines that Oatman's and Luhnnow's conduct fell below the standards of professional norms. Specifically, with respect to Oatman, Wilson states Oatman owed a fiduciary duty to Mills and breached that duty by failing to "investigate the extent of his client's diagnosed impairments prior" to revising Mills's estate planning documents.

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<sup>3</sup> We deny Howard's requests for judicial notice, filed on September 10, 2021 and April 4, 2022, as to the remaining exhibits because the documents were either not before the trial court (see *Big Lots Stores, Inc. v. Superior Court* (2020) 57 Cal.App.5th 773, 784, fn. 7), are duplicative of documents already contained in the appellate record (see *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 406, fn. 12), or are not necessary for our disposition of the issues on appeal (see *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482). We also note the disarray of the record provided by Howard on appeal. In addition to the voluminous requests for judicial notice, she submitted eight volumes of exhibits, the first two of which are labeled as requests for judicial notice, presumably that were made in the trial court. There is no indication whether these requests were granted or not and these two volumes are hereby deemed rejected.

With respect to the Albence attorneys, Wilson opines that they failed to meet the standard of care by asking Mills “to sign a deed of trust in favor of their law firm [while] on notice of Mr. Mills’[s] age and diagnosis of dementia[.]”

Both Oatman and the Albence attorneys filed detailed objections to Wilson’s declarations. Oatman argued that Wilson’s opinions were improper because they constituted legal conclusions on the issue of duty and breach, the determination of which is the sole province of the trial court. Oatman also asserted the opinions were improper because they were based on speculation and contradicted by the facts presented in support of Oatman’s summary judgment motion. Specifically, Oatman asserted that, contrary to Wilson’s declaration, he was not aware of Dr. Addario’s medical opinion until after Mills had revised his estate plan. The Albence attorneys objected to Wilson’s declaration concerning their conduct on similar grounds, asserting the opinions misstated the evidence and the law, and lacked a sufficient basis or foundation. Howard filed an opposition to the Albence attorneys’ objections. The objections were sustained by the trial court after argument.

## B

### *Legal Standards*

On appeal from summary judgment, “‘we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.’” (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1472, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Although evidence submitted in opposition to a summary judgment motion is to be liberally

construed (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556), this does not mean the trial court is free to consider inadmissible evidence.

“Admissible evidence” is required to either seek or oppose a summary judgment motion. (Code Civ. Proc, § 437c, subd. (d).<sup>4</sup>) In determining the existence of a triable issue of material fact, the trial court need not consider that evidence to which it has sustained objections (§ 437c, subd. (c)); thus, declarations containing inadmissible opinions or conclusions are properly disregarded. (See e.g., *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487 [expert declaration lacking foundation is insufficient to create triable issue of fact].) To the extent that evidentiary rulings are argued on appeal, we apply an abuse of discretion standard of review. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) Further, the appellant must show any evidentiary error was prejudicial. (*Ibid.*)

## C

### *Analysis*

Because Howard has not shown how the court’s decision to sustain the defendants’ objections to Wilson’s declaration was prejudicial, reversal on this basis is not warranted. Howard argues that the court abused its discretion because it relied on Wilson’s declaration in its ruling. This is a mischaracterization of the court’s order. In rejecting Howard’s claims for legal malpractice, breach of fiduciary duty, and gross negligence against Oatman on the grounds that Oatman owed no duty to Howard as the intended beneficiary of Mills’s trust, the court noted that Howard’s “own expert admits Mr. Oatman’s duty to ensure Mr. Mills had testamentary capacity was owed to his client, not to third parties or beneficiaries.” This

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<sup>4</sup> Subsequent undesignated statutory references are to the Code of Civil Procedure.

statement does not show the court was relying on Wilson’s declaration to find Oatman had no duty to Howard. Rather, the statement was a recognition that even Howard’s own expert did not agree with Howard’s legal assertion. Thus we reject Howard’s assertion that the court relied on evidence it excluded.

Further, as we will explain, the court properly dismissed the claims on the alternative grounds that they are barred by the applicable statutes of limitations. As a result, even if the court did rely on the declarations after concluding they were not admissible, Howard has not shown prejudice because the claims were properly dismissed on alternative grounds unrelated to Wilson’s declarations. Finally, contrary to Howard’s assertion, the trial court’s failure to detail its reasons for sustaining the defendants’ objections does not alone show an abuse of discretion. (See *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146 [“reversal for a failure to state reasons is not required if the failure was harmless ‘since “ ‘[i]t is the validity of the ruling which is reviewable and not the reasons therefore’ ” ’ ”].)

## II

### *Merits of Howard’s Claims*

#### A

### *Summary Judgment Standards*

Section 437c, subdivision (c) provides that summary judgment is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant “moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a cause of

action cannot be established or by showing that there is a complete defense. (*Ibid.*) If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Aguilar*, at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261 (*Silva*).)

We review a summary judgment ruling de novo. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

## B

### *Howard's Claims for Legal Malpractice, Breach of Fiduciary Duty, and Gross Negligence Against Oatman*

Howard argues summary judgment of her claims against Oatman based on the statutes of limitations was reversible error because it "was impossible" for her to sue before she became trustee as a result of the settlement of her civil claims against Mills and his nieces. She also asserts triable issues of material fact remain as to whether Oatman owed her a duty.<sup>5</sup>

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<sup>5</sup> Howard does not discuss the court's dismissal of her claim for IIED in her opening brief, waiving her challenge to the dismissal of this claim as to both Oatman and Luhnow. (See *Humes v. Margil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 493 ["A point not presented in a party's opening brief is deemed to have been abandoned or waived."].)



Oatman responds that because Howard did not raise the “legal impossibility” argument she now asserts on appeal in the trial court, the argument is waived. Oatman also asserts Howard’s tolling argument fails on its merits. With respect to duty, Oatman contends he owed no duty to Howard to determine Mills’s competency at the time the trust was amended and, thus, Howard’s claims based on a breach of duty owed to her were properly dismissed. Further, Oatman asserts the proper avenue for Howard to challenge the amended trust was in probate court, not by suing Oatman.

We agree with Oatman that Howard waived her “legal impossibility” tolling argument by not raising it in the trial court. (See *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 548 [“ ‘ “As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.” [Citation.] “New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal.” ’ ”] (*Hewlett-Packard*).)

Even if we were to reach Howard’s tolling argument, however, we would not find it meritorious. Section 340.6 constitutes the statute of limitations for actions against attorneys arising from the breach of the attorney’s duties in rendering legal services. The statute begins to run upon the plaintiff’s discovery (actual or constructive) of facts supporting a claim and when the client begins to suffer appreciable harm as a result of the alleged malpractice. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748–751 (*Jordache*).) Section 340.6 applies to any cause of action arising out of the rendering of professional legal services other than actual fraud. (*Lee v. Hanley* (2015) 61 Cal.4th 1225,



1236–1237; *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 819.) Further, section 340.6 contains the exclusive tolling provision for claims against attorneys arising from the performance of legal services. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618.)

Subdivision (a) of section 340.6 states in pertinent part: “An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.” “Thus, ‘section 340.6(a) states “two distinct and alternative limitation periods: *one* year after actual or constructive *discovery*, or *four years* after *occurrence* (the date of the wrongful act or omission), whichever occurs first.” ’ ” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 566 (*Jocer*).)

Howard does not dispute that her claims against Oatman for legal malpractice, breach of fiduciary duty, financial elder abuse, and gross negligence are all based on the same allegation that in 2014 Oatman acted wrongfully in his provision of estate planning services to Mills by failing to realize that Mills lacked testamentary capacity. Nor does Howard dispute that she was aware of the alleged facts supporting her claims against Oatman in 2014, when she pursued a conservatorship for Mills. Given these undisputed facts, without addressing the underlying merits of Howard’s claims against Oatman, we agree with the trial court that no triable issues of material fact exist concerning whether the claims, which were filed in 2019, are time barred.

Howard argues, for the first time on appeal, she was “legally disabled” from pursuing her claims against Oatman under section 340.6, subdivision (a)(4) until 2019, when her settlement with Mills’s nieces gave her standing to sue as trustee. This argument is without merit. As an initial matter, Howard has sued both as trustee and in her individual capacity. To the extent the claims are brought by Howard as an individual, she makes no argument that the statute of limitations was tolled. Indeed, Howard took active legal steps to invalidate her step-father’s modification of his estate plan by pursuing a conservatorship over him, petitioning the probate court to modify the trust to reinstate her as trustee, and by filing a separate civil action against Mills and his nieces alleging fraud. Accordingly, the trial court appropriately granted summary judgment of Howard’s individual claims against Oatman.

With respect to claims brought as trustee, we agree with the trial court that no “legal disability” tolled the statute. A legal disability is one that denies a claimant access to court. (See *Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152, 160.) Neither Howard, nor the prior trustees, suffered any legal disability preventing them from suing Oatman for malpractice. (See Prob. Code, § 16249.) As the trial court noted, “[t]he powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee.” (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131.) Accordingly, and as Oatman points out, even if he represented Mills as trustee (a stretch since Oatman was hired by Mills to prepare estate documents, and never by the trust), Oatman’s legal services ended in

September 2015. Thus, the one-year statute of limitations expired by September 2016, long before Howard brought her claims against Oatman.<sup>6</sup>

Even if the claims are not time-barred, other deficiencies also support the trial court's judgments against Howard. Howard argues the court erred by dismissing her claims for legal malpractice, breach of fiduciary duty, and negligence based on her failure to establish the element of duty. Howard asserts that Oatman owed her a duty based on his duty to Mills. There is no support in the law for this assertion. First, imposing a duty on counsel for the testator that flows to a trust's beneficiaries in this situation is contrary to public policy. (See *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1298 (*Moore*) ["an attorney preparing a will for a testator owes no duty to the beneficiary of the will or to the beneficiary under a previous will to ascertain and document the testamentary capacity of the

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<sup>6</sup> In support of her legal disability tolling argument, Howard cites *Jordache, supra*, 18 Cal.4th 739 and *Jocer, supra*, 183 Cal.App.4th 559. Neither case is relevant to the issues here. In *Jordache*, the Supreme Court rejected the plaintiff's assertion that its legal malpractice claims were not barred by section 340.6 because the plaintiff did not suffer "actual injury," as required by the statute, until the insurance coverage issues animating its legal malpractice claim were finally adjudicated. (*Jordache*, at p. 751 ["The test for actual injury under section 340.6, therefore, is whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services."].) If anything, *Jordache* counsels in favor of the trial court's determination since Howard alleges she was damaged by Oatman's failure in 2014 to realize that Mills lacked capacity at the time he disinherited her. *Jocer* held that an attorney's absence from the state tolled the statute of limitations under section 340.6, subdivision (a)(4), which the court concluded incorporates section 351, the exception to application of a statute of limitation when the cause of action accrues against a person who is out of the State. (*Jocer*, at pp. 569–570.) *Jocer* does not support Howard's assertion she was legally incapacitated from bringing her claims against these defendants.

client. [¶] First and foremost, we believe the duty of loyalty of the attorney to the client may be compromised by imposing a duty to beneficiaries in these circumstances.”].) Recognizing a duty to Howard in this context would place Oatman, and other attorneys like him, in an untenable situation, contravening the attorney’s “ ‘primary responsibility to ensure that the proposed estate plan effectuates the client’s wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen.’ ”<sup>7</sup> (*Ibid.*)

Second, contrary to Howard’s assertion, Oatman’s professional duties to Mills did not create a duty to further assess his testamentary capacity. Rather, “a lawyer ‘who is persuaded of the client’s testamentary capacity by his ... own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty to the testator[, and he] should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will.’ [Citation.] We add to this our own observation that a lawyer who is persuaded of his client’s intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is not required to urge the testator to consider an

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<sup>7</sup> This case does not involve the limited exception to this general rule that may apply where a legal defect in drafting the estate planning documents prevents the will or trust from accomplishing the client testator’s intent. (See *Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 903 [attorney may be held liable to non-client testamentary beneficiaries only “if due to the attorney’s professional negligence the testamentary intent expressed in the will is frustrated and the beneficiary clearly designated by the testator lose their legacy as a direct result of such negligence”], italics omitted.) Here, there is no allegation that Mills’s intent, which the undisputed evidence shows was to disinherit Howard, was not effectuated by the 2014 amendments to the estate. Rather, Howard argues only that Mills lacked testamentary capacity to make the changes, and that Oatman failed to adequately assess that capacity.

alternative plan in order to forestall a claim by someone thereby excluded from the will (or included in the will but deprived of a specific asset bequeathed to someone else).” (*Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 1019–1020 (*Boranian*).)

“Ascertaining testamentary capacity is often difficult and the potential for liability to beneficiaries who might deem any investigation inadequate would unjustifiably deny many persons the opportunity to make or amend their wills.” (*Moore, supra*, 109 Cal.App.4th at p. 1299.) This case provides a model of why the ultimate burden of determining testamentary capacity does not fall to the testator’s counsel, but rather to the probate court.<sup>8</sup> Oatman’s duty was to his client, Mills, not the heirs competing for his estate. So long as Oatman could satisfy himself that his long-time client was competent to express his wishes and not subjected to undue influence, his obligation was to

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<sup>8</sup> As Oatman points out in his briefing, the proper forum to litigate Mills’s competency to change his trust was in probate court. (See e.g., *Munn v. Briggs* (2010) 185 Cal.App.4th 578, 591 [affirming order sustaining demurrer to tort of interference with expected inheritance where spurned heir “had an adequate remedy *in probate* to challenge the [no contest clause in will] codicil”]; *Barefoot v. Jennings* (2020) 8 Cal.5th 822, 825 [“the Probate Code grants standing in probate court to individuals who claim that trust amendments eliminating their beneficiary status arose from incompetence, undue influence, or fraud”]; and *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240 [“The claim that the amended will should be disregarded because executed as the result of undue influence can be maintained only in the probate proceedings.”].) There is no indication that Howard challenged Mills’s testamentary capacity in the probate court. Though we note this court’s decision in *Howard v. Mills* (July 15, 2022, D079478) [nonpub. opn.] which was an appeal from the denial of Howard’s petition in probate seeking an order confirming that the original estate planning documents assigning her as successor trustee and beneficiary of the estate are effective based on her settlement in her civil suit against Mills and his nieces. Although it has no bearing on this appeal, we grant Howard’s supplemental request, filed on August 10, 2022, for judicial notice of the opinion.

help Mills effectuate those wishes in his estate planning documents. The undisputed evidence before the trial court shows Oatman did just that.

“Factors which might suggest lack of testamentary capacity to some attorneys do not necessarily denote a lack of capacity. ‘... [O]ld age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.’ ... Even hallucinations and delusions do not demonstrate lack of capacity if not related to the testamentary act.” (*Boranian, supra*, 123 Cal.App.4th at p. 1020.) If such a duty were imposed, “[a]ny doubts as to capacity might be resolved by counsel by refusing to draft the will as desired by the testator, turning the presumption of testamentary capacity on its head and requiring the testator represented by a cautious attorney to prove his competency.’” (*Ibid.*) No such requirement exists in the law, and we decline to impose such a duty on these facts.<sup>9</sup>

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<sup>9</sup> To support her assertion that such a duty should be imposed on Oatman, Howard cites to the Due Process in Competence Determinations Act, Probate Code section 810, et seq. (DPCDA) and *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628. The DPCDA, however, does not create a duty on counsel to assess capacity in the manner Howard asserts. Rather the law was enacted to “clarify the legal capacity of a person who has a mental or physical disorder” and “broadly covers the capacity of such persons to perform all types of actions, ‘including, but not limited to’ contracting, conveying, executing wills and trusts, marrying, and making medical decisions. (Prob. Code, § 810, subd. (b).)” (*Greenway*, at p. 640.) Further, the DPCDA “declares there ‘exist[s] a rebuttable presumption affecting the burden of proof that *all persons have the capacity* to make decisions and to be responsible for their acts or decisions.’” (*Ibid.*) *Greenway* involves an appeal of the trial court’s finding that a husband had the mental capacity to end his marriage, and discusses the varying standards, including those set forth in the DPCDA, that apply to a judicial determination of capacity. (*Id.* at p. 631.) *Greenway* is not relevant to the issues here.



## C

### *Howard's Claims for Legal Malpractice, Breach of Fiduciary Duty, and Gross Negligence Against Luhnnow*

With respect to her legal malpractice claim against Luhnnow, Howard makes two arguments challenging the trial court's determination that the statute of limitations bars her claim. First, as she argued concerning Oatman, Howard contends the statute was tolled because she could not have asserted the claim before she was made trustee on February 8, 2019 by way of the settlement agreement with Mills's nieces. Second, Howard argues that the statute was tolled by the Albence attorneys' representation of Mills until she filed her claim on April 23, 2019, making the cause of action timely. Howard also argues Luhnnow breached a duty owed to Mills by defending him in the conservatorship proceedings while aware of his diminished capacity. She argues that material questions of fact remain concerning this breach, further supporting her claims for legal malpractice, and also her claims for breach of fiduciary duty and gross negligence.

As with her claim against Oatman, the tolling argument Howard asserts based on the theory of "legal impossibility" was waived by her failure to assert the argument in the trial court. (*Hewlett-Packard, supra*, 65 Cal.App.5th at p. 548.) Even if not waived, as discussed, the argument lacks merit. As set forth in the operative complaint, the basis for Howard's legal malpractice claim against Luhnnow is the Albence attorneys' representation of Mills in the conservatorship proceeding and the subsequent execution of a deed of trust that was entered to delay Mills's payment for their legal services until after his death, while they were on notice Mills suffered from dementia. The record establishes, without dispute, that Howard was aware of this alleged "wrongdoing" no later than 2016, when the denial of her conservatorship petition was affirmed by this court. The one-year statute of

limitations under section 340.6 that applies to this legal malpractice claim, therefore, expired in 2017, well before this lawsuit was filed.

Howard's argument that Luhnnow continued to represent Mills beyond his death until she settled her civil suit against Mills and his nieces, thereby tolling the statute until she filed this lawsuit, is also devoid of merit. Howard bases this argument on various documents contained in her request for judicial notice, which the request describes only as "Documents Provided by Albence in Discovery," that were not before the trial court.<sup>10</sup> In addition, Howard provides no argument concerning Luhnnow's individual role in the Albence attorneys' representation of Mills. Accordingly, the trial court's dismissal of Howard's legal malpractice claim against Luhnnow as untimely was proper. (See *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 ["Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.'"] (*Nelson*).)

With respect to Howard's claims for breach of fiduciary duty and negligence against Luhnnow, Howard asserts triable issues of material fact remain because the "Albence respondents owed several duties to Mr. Mills[.]" Howard then outlines the various ways she believes the Albence attorneys harmed *her* based on their representation of Mills in the conservatorship proceeding while knowing that Mills suffered from dementia. Howard does not identify what duties were owed to her or how those duties were breached. Further, she provides no argument or information concerning Luhnnow's

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<sup>10</sup> Howard's opposed request for judicial notice contains no further explanation of these documents or argument supporting the request. As discussed at footnote 3, *ante*, Howard's request for judicial notice of these documents is denied.



individual involvement in the case to support reversal. (*Nelson, supra*, 172 Cal.App.4th at p. 862.)

Howard also does not address the trial court's finding that the claims lacked merit because she "presented no evidence Defendants exerted any undue influence over Mr. Mills." As the trial court stated, both causes of action are based on Howard's allegation that the Albence attorneys "used undue influence" to cause Mills to litigate the conservatorship and disinherit Howard. As the trial court found, however, Howard points to no evidence that supports this central allegation of her complaint. For this additional reason, Howard's causes of action for breach of fiduciary duty and negligence fail as a matter of law. (See *Silva, supra*, 65 Cal.App.4th 256, 264 ["[I]f the facts are undisputed or admit of only one conclusion, then summary judgment may be entered on issues that otherwise would have been submitted to the jury."].)

## D

### *Howard's Claim for Elder Abuse*

Lastly, Howard argues that she has standing to bring a claim for financial elder abuse against Oatman and Luhnnow on behalf of Mills as executor and trustee of his estate. This argument also lacks merit.

To establish a claim for financial elder abuse, the plaintiff must show (1) the defendant took, hid, appropriated, obtained, or retained the plaintiff's property or assisted in taking, hiding, appropriating, obtaining the plaintiff's property; (2) the plaintiff was 65 years of age or older at the time of the conduct; (3) the defendant took, hid, appropriated, obtained or retained or assisted in the same for a wrongful use or with the intent to defraud, or by undue influence; (4) the plaintiff was harmed; and (5) the defendant's conduct was a substantial factor in causing the plaintiff's harm. (Welf. & Inst. Code,

§§ 15610.27, 15610.30, subds. (a)(1), (3); *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527.) After the death of an elder victim of abuse, “the right to commence or maintain an action” under the law passes “to the personal representative of the decedent.” (Welf. & Inst. Code, § 15657.3, subd. (d)(1).) If no personal representative exists, then the right passes to additional specified individuals, including beneficiaries of the decedent’s estate. (Welf. & Inst. Code, § 15657.3, subd. (d)(1); Code Civ. Proc., § 377.11.)

Here, Oatman asserted in his statement of undisputed facts that Scott Tolstad had been appointed as Mills’s personal representative in the probate of Mills’s estate. Howard did not dispute this fact. In addition, in her briefing before this court she asserts only that “[a]s trustee of the 2007 trust and executor of the 2007 will (and 2011 amendment thereto) appellant is Mr. Mills’ successor in interest” and “[a]s successor in interest, she ha[d] the legal authority to assert her elder abuse-financial claim against all respondents on behalf of Mr. Mills.” This conclusory assertion does not negate her prior admission that Tolstad had been appointed in the probate proceeding to represent Mills’s interests. Given her admission, Howard lacks standing to pursue the financial elder abuse claim against Oatman and Luhnaw and the trial court’s dismissal of the claim was proper.

## DISPOSITION

The judgments are affirmed. Respondents are entitled to their costs of appeal.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

DO, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.



09/20/2022

KEVIN J. LANE, CLERK

By  Deputy Clerk