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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ELIZABETH B. GREEN et al., Plaintiffs and Appellants, v. LIFE GENERATIONS HEALTHCARE, LLC, Defendant and Respondent.	H044624 (Santa Clara County Super. Ct. No. 1-16-CV293972)

This action concerns claims arising out of the April 2013 discharge of Richard Burrell from a nursing home facility. Burrell was released into the care of two family members, Shervandalin Washington and Sharon Crews, and he was transported to Louisiana. Burrell passed away in March 2014.

In April 2014, Elizabeth Green (Elizabeth),[1] Burrell's daughter, filed a complaint against Washington, Crews, the nursing home, Life Generations Healthcare LLC, doing business as Cedar Crest Nursing (hereafter Cedar Crest), and two of its employees, Tracie E. Murray and Lydia Rangle. Elizabeth thereafter amended the complaint to correct a misspelling. The claims against Cedar Crest and its employees were based upon their alleged wrongful discharge of Burrell in April 2013 from the Cedar Crest nursing home

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[1] Since appellants share the same surname, we will refer to them by their first name for purposes of clarity and not out of disrespect. (See *Rubenstein v. Rubenstein* (2002) 81 Cal.App.4th 1131, 1136, fn. 1.)

facility, which discharge, Elizabeth claims, eventually led to his death. (Hereafter this 2014 lawsuit is referred to as the first action.) The demurrer of Cedar Crest, Murray, and Rangle to Elizabeth's first amended complaint was sustained without leave to amend, and the court filed a judgment of dismissal in August 2014. No appeal was taken from that judgment.

In April 2016, Elizabeth filed a second lawsuit (hereafter the second action) against Cedar Crest, Murray, and Rangle, again asserting claims arising out of the alleged wrongful discharge of Burrell from the Cedar Crest nursing home facility. In July 2016, Elizabeth filed a first amended complaint, joining her husband, George Green (George), as a plaintiff. (Hereafter Elizabeth and George are collectively referred to as the Greens.) Cedar Crest, Murray, and Rangle filed a demurrer to the first amended complaint in the second action, asserting, inter alia, that it was barred based upon the final adjudication of the first action. The court sustained the demurrer to the first amended complaint without leave to amend, concluding that the claims of the Greens were barred through application of the doctrines of res judicata and collateral estoppel. A judgment of dismissal was filed on November 23, 2016. The Greens appeal the judgment.

Based upon our application of the law to this case, we must conclude that the court did not err in sustaining the demurrer to the first amended complaint without leave to amend, and we will therefore affirm the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

"[O]n appeal, we independently review the allegations on the face of the complaint and matters subject to judicial notice to determine whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.]" (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132.) The facts alleged in the complaint for purposes of demurrer are admitted to be true. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*),

superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227, 228.)

A. The First Action[2]

On April 18, 2014, Elizabeth filed a complaint captioned: "conspiracy, coercion, fraud, abduction, inappropriate transfer/discharge, malicious/intentional infliction of emotional distress, alienation of affection." (Capitalization omitted.) She named as defendants Cedar Crest, Murray, Rangle, Washington, and Crews. On May 1, 2014, she filed a first amended complaint to correct a misspelling in the original complaint.

In the first amended complaint, Elizabeth alleged that Burrell "was abducted/transferred/ discharged from [the] Cedar Crest" nursing home facility in Sunnyvale at approximately 4:00 a.m. on April 20, 2013. She alleged that Cedar Crest employees Murray and Rangle, together with Washington and Crews, "conspired, coersed [*sic*] and fraudulently enticed [Burrell, who suffered from dementia, was 87 years old, and was disabled] . . . to leave Cedar Crest thinking he would temporarily live at the Northeast Louisiana War Veterans Home in Monroe, Louisiana and then return to his own home to live." Elizabeth alleged that she had a power of attorney for her father signed in approximately February 2005, and that she took care of all of his financial and medical matters. The power of attorney provided that in Elizabeth's absence, George would be her alternate. Elizabeth alleged further that Burrell had relocated to California in 2008 to live with her, George, and George's daughter. After Burrell had undergone hip surgery, Elizabeth arranged for Burrell to be placed in Cedar Crest. Elizabeth signed the appropriate

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[2] In their demurrer to the first amended complaint in the second action that is the subject of this appeal, Cedar Crest requested that the court take judicial notice of the complaint, first amended complaint, and judgment of dismissal filed in the first action (*Green v. Cedar Crest Nursing and Rehabilitation Center, etc., et al.*, Santa Clara Superior Court No. 1-14-CV264069). The court properly granted the request. (Evid. Code, § 452, subd. (d)(1); see *In re Martin L.* (1986) 187 Cal.App.3d 534, 539.) We therefore take judicial notice of these documents. (Evid. Code, § 459, subd. (a)(1).)

papers and arranged for timely payments to be made under the contract. Elizabeth alleged that the April 2013 discharge of Burrell into the care of Washington and Crews was "a malicious and intentional breach of the contract to provide care to a disabled and demented patient." She alleged further that as a result of this action, Burrell suffered "gross abuse and neglect" leading to his "purposeful, hastened death."

In July 2014, Cedar Crest, Murray, and Rangle filed a demurrer to the first amended complaint. The court sustained the demurrer without leave to amend. On August 19, 2014, the court filed a judgment of dismissal. The record does not reflect that Elizabeth appealed that judgment.

B. The Second Action

On April 15, 2016, Elizabeth filed a Judicial Council form complaint against Cedar Crest, Murray, and Rangle in the second action, the litigation involved in the present appeal. She alleged claims for intentional tort and general negligence.

Elizabeth alleged that she had admitted Burrell to the Cedar Crest nursing home facility in September 2011, and she had signed all documents and provided a copy of a power of attorney to the facility. Elizabeth alleged that Cedar Crest employees Murray and Rangle conspired with Washington and Crews to have Burrell relocated from Cedar Crest to another facility in Louisiana without notice to, or approval by, Elizabeth or George. She alleged further that Burrell's "removal-discharge . . . to a facility that was not suitable for proper care and maintenance caused [Burrell's] physical and mental health to decline and deteriorate," and he passed away on March 14, 2014.

On July 14, 2016, Elizabeth and George filed a first amended complaint, naming Cedar Crest as the sole defendant. The Greens alleged eight causes of action: (1) breach of contract by Elizabeth; (2) breach of contract by George as a third party beneficiary; (3) negligence; (4) negligence per se—violation of California law; (5) negligence per se—violation of federal law; (6) tortious breach of contract; (7) intentional infliction of emotional distress; and (8) negligent infliction of emotional distress.

The Greens alleged at the beginning of their first amended complaint—identified as a "summary of plaintiffs' claims" (bold and capitalization omitted)—that they are married, and that, under a general power of attorney, Elizabeth (with George as successor) was the attorney-in-fact for her elderly and disabled father, Burrell. The Greens alleged that in September 2011, they placed Burrell—who had developed dementia, had neurological deficits, had undergone leg surgeries, and had fallen and sustained a hip fracture—in the Cedar Crest nursing home facility. They alleged further that in April 2013, Cedar Crest, without their knowledge or consent, unlawfully released Burrell to unauthorized persons in violation of applicable law. The Greens alleged that "Burrell suffered severe 'transfer trauma' and died within a year," resulting in the Greens suffering "severe emotional distress and economic damages."

The Greens alleged that in September 2011, Elizabeth, acting as attorney-in-fact for Burrell, and Cedar Crest entered into a written agreement that constituted "a 'continuing care contract' " to provide for Burrell's health care and rehabilitation. Elizabeth provided Cedar Crest at the time with a copy of the power of attorney, which became part of Burrell's file in Cedar Crest's records. Elizabeth informed Cedar Crest at the time of Burrell's admission—and Cedar Crest came to its own conclusion after a medical evaluation—that Burrell had dementia and "lacked capacity over his affairs." The Greens alleged that Burrell's April 2013 unauthorized discharge from the facility was a breach of the agreement and a violation of federal law. They sustained economic damages, as well as severe mental anguish and emotional distress as a result of Cedar Crest's breach of contract.

The Greens alleged further in three causes of action of the first amended complaint that Cedar Crest acted negligently in releasing Burrell without their knowledge or consent. They alleged a breach of duty of care in a general negligence claim in the third cause of action. The Greens alleged further in the fourth cause of action that Cedar Crest's unauthorized discharge of Burrell constituted negligence per se in that Cedar Crest violated applicable state laws governing long-term health care facilities (Health & Saf.

Code, § 1417 et seq.; Cal. Code Regs., tit. 22, § 72527). And they alleged in the fifth cause of action that Cedar Crest violated applicable federal laws governing the confidential treatment of financial and health records (Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq.), and federal regulations regarding the transfer and discharge of patients (42 C.F.R. § 483.12).

The Greens alleged in the sixth cause of action that Cedar Crest's unauthorized discharge of Burrell, and its subsequent refusal to provide the Greens with information about Burrell's discharge constituted a tortious breach of the admission agreement. They alleged in the seventh cause of action that Cedar Crest's unauthorized discharge of Burrell, its subsequent refusal to provide the Greens with information about Burrell's discharge, and its submission of a fraudulent application to the Social Security Administration to become the payee of Burrell's social security benefits, constituted extreme and outrageous conduct supporting a claim for intentional infliction of emotional distress. Lastly, the Greens alleged in the eighth cause of action for negligent infliction of emotional distress that Cedar Crest's unauthorized discharge of Burrell caused them to suffer anxiety, emotional distress and physical injury, and economic loss.

C. Demurrer to First Amended Complaint in Second Action

On August 17, 2016, Cedar Crest filed a demurrer and separate motion to strike challenging the sufficiency of the first amended complaint in the second action.[3] The demurrer was brought pursuant to subdivisions (e) and (f) of Code of Civil Procedure section 430.10.[4] Cedar Crest argued that the first amended complaint was demurrable

[3] Cedar Crest's demurrer and accompanying motion to strike were also filed on behalf of Murray and Rangle. Because the first amended complaint named Cedar Crest as the sole defendant—a fact admitted by the Greens in their opposition to the demurrer—the court below addressed the demurrer and motion to strike only as they pertained to defendant Cedar Crest.

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

because (1) the Greens lacked standing to bring a survivor action on behalf of Burrell; (2) the claims were barred by principles of res judicata and collateral estoppel; (3) the negligence, negligence per se, and intentional and negligent infliction of emotional distress claims (third, fourth, fifth, seventh and eighth causes of action) were barred by the applicable statutes of limitations; (4) the third and fourth causes of action failed to state claims for negligence per se; (5) the seventh cause of action failed to state a claim for intentional infliction of emotional distress; (6) the eighth cause of action failed to state a claim for negligent infliction of emotional distress; and (7) the first, second, and sixth causes of action were uncertain. In its motion to strike, Cedar Crest sought to remove allegations in the first amended complaint concerning the Greens' requests for punitive damages, prejudgment interest, and attorney fees.

The Greens opposed the demurrer and motion to strike. After hearing argument, on September 23, 2016, the court sustained the demurrer to the first amended complaint without leave to amend. The court concluded that by reason of the final determination of the first amended complaint in the first action, the claims alleged in the first amended complaint in the second action were barred under the doctrines of res judicata and collateral estoppel. Because of this decision, the court declined to address the remaining arguments raised by Cedar Crest in its demurrer, and the court ruled that the motion to strike was moot. A judgment and order of dismissal was filed on November 23, 2016.

The Greens filed timely notices of appeal.

II. DISCUSSION

A. Applicable Law

1. Demurrers

A party against whom a complaint or cross-complaint has been filed may file a demurrer to the pleading on particular grounds specified by statute, including the ground that the challenged pleading fails to allege facts sufficient to constitute a cause of action. (§ 430.10, subd. (e).) A demurrer does not "test the truth of the plaintiff's allegations or the

accuracy with which he [or she] describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.]" (*Committee on Children's Television*, *supra*, 35 Cal.3d at p. 213.) As such, "the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075.)

A demurrer to a complaint may be sustained in an appropriate case where, as a matter of law, the plaintiff is collaterally estopped from asserting the claim. (See *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 48 [affirming general demurrer sustained on grounds of collateral estoppel established by judicial notice of prior proceedings]; see also *Buesa v. City of Los Angeles* (2009) 177 Cal.App.4th 1537, 1548 [judgment on pleadings proper where police officers' action for violation of their rights was precluded by final judgment denying their prior petition for administrative mandamus].) Thus, "[w]here 'all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general

demurrer. [Citation.]' [Citation.]" (*Shine v. Williams-Sonoma, Inc.* (2018) 23 Cal.App.5th 1070, 1076-1077.)

On appeal, we will affirm a "trial court's decision to sustain the demurrer [if it] was correct on any theory. [Citation.]" (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Thus, "we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself. [Citations.]" (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.)

An appellate court reviews the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 39.) The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

2. Res Judicata and Collateral Estoppel

We identify legal principles concerning the doctrine of res judicata (including one aspect of that doctrine, collateral estoppel), noting that the Supreme Court has acknowledged some prior confusion in the use of terminology. (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823-824 (*DKN Holdings*).) The term " 'res judicata' [has frequently been used] as an umbrella term encompassing both claim preclusion and issue preclusion, which [the Supreme Court has] described as two separate 'aspects' of an overarching doctrine. [Citations.] Claim preclusion, the ' " 'primary aspect' " ' of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. [Citations.] Issue preclusion, the ' " 'secondary aspect' " ' historically called collateral estoppel, describes the bar on relitigating issues that were

argued and decided in the first suit. [Citation.]" (*Ibid.*) Because courts have alternatively referred to issue preclusion as "collateral estoppel" and "res judicata," the Supreme Court, in its discussion in *DKN Holdings*, elected to use the terms "claim preclusion" and "issue preclusion." (*Id.* at p. 824.)

There are distinct differences between claim preclusion and issue preclusion. "*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) Res judicata "is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811; see also § 1908.)

In contrast, "[*i*]*ssue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. [Citation.] . . . [¶] Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit. [Citation.]" (*DKN Holdings*, *supra*, 61 Cal.4th at pp. 824-825.) Issue preclusion, or collateral estoppel, "precludes relitigation of issues argued and decided in prior proceedings. [Citation.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted (*Lucido*).)

The doctrine of res judicata (claim preclusion) is not so limited as to apply only where the claim alleged in the current suit is identical to the claim alleged and decided in the prior suit. " 'If the matter [in the current action] was within the scope of the [prior] action, related to the subject-matter and relevant to the issues [in the prior action], so that it *could*

have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.' [Citations.]" (*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755, original italics (*Thibodeau*).)

Collateral estoppel (i.e., issue preclusion) will be applied only if five requirements are satisfied: "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]" (*Lucido*, *supra*, 51 Cal.3d at p. 341; see also *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 (*Hernandez*).) The correctness of the prior decision is not material to the application of collateral estoppel, since " 'collateral estoppel may apply even where the issue was wrongly decided in the first action.' [Citations.]" (*Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1270.) The burden of proving each of these elements of collateral estoppel rests with the party asserting it. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.)

In applying principles of collateral estoppel, "an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. [Citation.] In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts. [Citations.] 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.

[Citation.]' [Citation.]" (*Hernandez*, *supra*, 46 Cal.4th at pp. 511-512; see also *Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1231["collateral estoppel depends on what issues are adjudicated, not the nature of the proceeding or the relief requested"].) The doctrine will apply to bar previously litigated issues if they " 'were involved in the prior case even though some *factual* matters or *legal* arguments which could have been presented in the prior case in support of such issues were not presented. [Citation.] Thus, where two lawsuits are brought and they arise out of the same alleged factual situation, and although the causes of action or forms of relief may be different, the prior determination of an issue in the first lawsuit becomes conclusive in the subsequent lawsuit between the same parties with respect to that issue and also with respect to every matter which might have been urged to sustain or defeat its determination. [Citation.]' " (*Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1301, original italics (*Frommhagen*).)

B. No Error in Sustaining Demurrer to the Complaint

In reviewing the propriety of the trial court's order sustaining the demurrer, we determine whether—as the trial court found—the first amended complaint in the second action is barred under the principles of claim preclusion and issue preclusion.

Addressing first the question of claim preclusion (res judicata), we note at the outset—as did the trial court—that the central matter common to both the first action and the second action was the claimed unauthorized discharge of Burrell by Cedar Crest in April 2013. Elizabeth alleged in the first action intentional tort claims, as well as a breach of contract claim. Although the first amended complaint in the first action was not clearly pleaded, she specifically identified a claim for intentional infliction of emotional distress as well as one for "malicious and intentional breach of the contract." These claims are common to four claims alleged in the first amended complaint in the second action—the first, second, sixth, and seventh causes of action. Although the first amended complaint contained four additional claims that were not present in the first action—three negligence claims and a negligent infliction of emotional distress claim—it is clear that the additional

claims arose out of the same nucleus of facts that were the basis for the first action. Under *Thibodeau*, because " 'the matter [in the current action] was within the scope of the [prior] action, related to the subject-matter and relevant to the issues [in the prior action], so that it *could* have been raised [in the prior action], the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.' " (*Thibodeau*, *supra*, 4 Cal.App.4th at p. 755.) The first amended complaint in the second action was barred upon application of the doctrine of res judicata, i.e., claim preclusion. (See, e.g., *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 187 [current claims for defamation and violation of Bus. & Prof. Code, § 17200 were barred by final determination of prior action, because, while causes of action were "not expressly pleaded in [prior action, they] were within the original scope of that action and were related to the same subject matter"].)

We turn our attention to whether the first amended complaint is barred under principles of collateral estoppel (issue preclusion). Our analysis is governed by the Supreme Court's identification of the five requirements of issue preclusion that must be satisfied. (*Lucido*, *supra*, 51 Cal.3d at p. 341.)

First, we assess whether the issue involved in the second action is identical to the one litigated in the first action. (*Lucido*, *supra*, 51 Cal.3d at p. 341.) We answer this question in the affirmative. Comparing the two actions, it is clear that the overarching common issue in both is the claimed unauthorized discharge of Burrell by Cedar Crest in April 2013. In both actions, it was alleged that (1) Elizabeth was Burrell's attorney-in-fact under a power of attorney signed in 2005; (2) George was the successor or alternate to Elizabeth under that power of attorney; (3) in 2011, Elizabeth placed Burrell into the Cedar Crest nursing home facility, and she signed formal documents to accomplish this purpose; (4) in April 2013, Cedar Crest transferred or discharged Burrell without the Greens' knowledge or consent; (5) this transfer or discharge was in breach of Cedar Crest's contract to provide care to Burrell; and (6) Burrell suffered severe harm as a result of this discharge, and he passed

away within a year of defendant's action. Given the commonality of the allegations in the two cases, we conclude that the identical-issue element is satisfied.

Second, we determine whether the issue was "actually litigated" in the first action. (*Lucido*, *supra*, 51 Cal.3d at p. 341.) In deciding whether the issue was "actually litigated" there need not have been a trial adjudicating the matter. The absence of the presentation of evidence on the issue in the first action does not prevent a finding that it was "actually litigated." (See *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 401 [party asserting issue preclusion "need not establish that oral testimony, or any particular type of evidence was presented"].) Rather, " '[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated . . . . An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment . . . a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.' [Citations.]" (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226.) Thus, the fact that the issue of the unauthorized transfer or discharge of Burrell by Cedar Crest in April 2013 was decided in the first action by demurrer—the functional equivalent of either a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings—means that it was "actually litigated" to establish issue preclusion. We therefore disagree with the Greens' contention on appeal that collateral estoppel cannot be applied here because the first action was not actually litigated.

Third, we determine whether the issue was "necessarily decided" in the first action. (*Lucido*, *supra*, 51 Cal.3d at p. 341.) "The ' "necessarily decided" ' requirement generally means only that the resolution of the issue was not ' "entirely unnecessary" to the judgment in the initial proceeding.' [Citation.]" (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 83.) Since the issue here—the unauthorized discharge of Burrell in April 2013 from the nursing home facility—was at the core of the first amended complaint in the first action, it

was "necessarily decided" when the court sustained the demurrer without leave to amend in the 2014 order.

Fourth, we must determine whether the decision in the first action was "final and on the merits." (*Lucido*, *supra*, 51 Cal.3d at p. 341.) A judgment of dismissal was entered in the first action on or about August 19, 2014. The record does not show that any appeal from that judgment was taken by Elizabeth and it is therefore final. (See § 1235.120 [final judgment is "a judgment with respect to which all possibility of direct attack by way of appeal, motion for a new trial, or motion under Section 663 to vacate the judgment has been exhausted"].) Moreover, the fact that the judgment in the first action occurred by way of a dismissal after sustaining a demurrer without leave to amend does not suggest that the judgment was not "on the merits." (*Lucido*, *supra*, at p. 341.) "The fact that the appeal in [the prior case] resulted from the sustaining of a general demurrer does not preclude application of the res judicata doctrine. [Citation.] '[A] judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one. [Citations.]' [Citation.]" (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1427-1428.) We therefore disagree with the Greens' contention on appeal that principles of former adjudication cannot be applied here because the first action was not final and decided on the merits.

Fifth and finally, in order to find issue preclusion (collateral estoppel), it must be shown from the record that the parties against whom preclusion is being asserted (i.e., the Greens) were "the same as, or in privity with, the party to the former proceeding. [Citations.]" (*Lucido*, *supra*, 51 Cal.3d at p. 341.) The answer is unquestionably in the affirmative as to Elizabeth, since she was the plaintiff in both the first action and second action.

As to George, the trial court found that he was in privity with Elizabeth for purposes of establishing claim preclusion. The Greens challenge that conclusion on appeal. Although "there is no universally applicable definition of privity" (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 947), it is generally the case that "privity between parties exists when the plaintiffs in the second action are sufficiently close to the unsuccessful party in the original action to preclude relitigation of the same issues. [Citations.] Traditionally, it was determined that privity ' "involves a person so identified in interest with another that he represents the same legal right." ' [Citation.] Under the modern approach, privity denotes that the plaintiffs in the succeeding action have an 'identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.' [Citations.]" (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 745-746.)

In a proper case, a spouse of a litigant in the prior litigation may be deemed " 'sufficiently close' so as to justify applying collateral estoppel. [Citation.]" (*Mueller v. J. C. Penney Co.* (1985) 173 Cal.App.3d 713, 723.) We conclude that is the case here. There were allegations in both the first and second actions that George was involved along with Elizabeth in the care of Burrell. In 2008, Burrell relocated to the area and lived with the Greens and George's daughter. It was alleged that George was the alternate or successor to Elizabeth as the attorney-in-fact for Burrell under the 2005 power of attorney. George, according to the first amended complaint in the second action, was the one who discovered on "a routine visit to the nursing home" that "Burrell was missing" and the representatives of Cedar Crest said that "Burrell had 'gone to Louisiana,' " without providing any further information. And the Greens alleged in the first amended complaint in the second action that they both "had a close personal relationship with Mr. Burrell," that George "had been [his] son-in-law for some 37 years," and that George and Elizabeth had both suffered damages resulting from Cedar Crest's unauthorized discharge of Burrell that included

"severe mental anguish and emotional distress." Under the circumstances presented here, the trial court did not err in concluding that George, as Elizabeth's husband, was in privity with her for purposes of establishing issue preclusion.

Each of the five elements of collateral estoppel identified in *Lucido*, *supra*, 51 Cal.3d at page 341 were satisfied here. The fact that the Greens may have asserted theories or factual allegations in the second action that were not alleged in the first action does not prevent the application of collateral estoppel. (See *Frommhagen*, *supra*, 197 Cal.App.3d at p. 1301 [previously litigated issues barred by collateral estoppel if they " 'were involved in the prior case even though some *factual* matters or *legal* arguments which could have been presented in the prior case in support of such issues were not presented' "].)

The Greens argue on appeal that the second action is not precluded under principles of res judicata or collateral estoppel because the first action was a survival action in which Elizabeth, in a representative capacity, sought recovery for the damages inflicted upon her late father, Burrell. Their contention is that because the first action was a survival action filed on Burrell's behalf while the second action was the Greens' personal action for damages, the second action was not barred under the doctrines of claim preclusion or issue preclusion. The Greens argue further that because Elizabeth filed the first action in a representative capacity only, she was not a " 'party' to the 2014 survival action" and George has "no privity . . . [with] Elizabeth acting as a successor in interest."

We reject these arguments for two reasons. First, the Greens did not assert below in opposition to the demurrer to the first amended complaint in the second action that the first action involved a very different proceeding, namely, a survival action. They have therefore forfeited the argument. (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1192 [plaintiff's failure to raise arguments in opposition to demurrer rendered them forfeited on appeal].) Second, even were we to consider the merits of this forfeited argument, we would conclude that it lacks merit. There is nothing in the record that evidences that the first action was, in fact, a survival action brought on behalf of Burrell. The first amended

complaint in the first action did not identify Elizabeth as a party bringing suit in a representative capacity on behalf of her father. Further, neither the complaint nor the first amended complaint in the first action was accompanied by a statement from Elizabeth as the decedent's successor-in-interest as required under section 377.32 to bring a survival action. (See *Hayes v. County of San Diego* (9th Cir. 2013) 736 F.3d 1223, 1229 [party lacks standing to bring survival action where she fails to comply with California's requirements under § 377.32 that representative file affidavit and certified copy of death certificate].) The first action was not a survival action.

The Greens argue further that collateral estoppel should not act as a bar to the second action because due process standards were not met. Their argument is that (1) because Elizabeth "was denied a full and fair opportunity to pursue the [2014] survival case. . . [because it] was dismissed . . . before the merits of the action were ever reached"; (2) this "technical dismissal in 2014 for failing to state a claim is not a basis for preclusion of the 2016 action by res judicata or collateral estoppel"; and (3) this "clear failure of due process" cannot be upheld. The Greens cite no case authority in support of this constitutional challenge, as required under rule 8.204(a)(1)(B) of the California Rules of Court. We need not address this unsupported due process challenge. (See *People v. Carroll* (2014) 222 Cal.App.4th 1406, 1412, fn. 5 [appellate court declines to address due process where appellant presented "no constitutional analysis or authority other than saying a conviction based on insufficient evidence violates due process"].) Moreover, the Greens' argument is a challenge to the propriety of the underlying order sustaining demurrer without leave to amend to the first amended complaint in the first action. A judgment of dismissal was entered on that order and that judgment is final. Their contention that the court's dismissal of the first action constituted a denial of due process is an improper collateral attack upon a judgment from which no appeal was taken and which has for years been a final judgment. (See *Johnson v. Fontana County Fire Protection Dist.* (1940) 15 Cal.2d 380, 391.)

The trial court did not err in sustaining Cedar Crest's demurrer to the first amended complaint on the ground that the second action was precluded under the doctrines of res judicata and collateral estoppel.[5]

C. No Abuse of Discretion in Denial of Leave to Amend

The trial court, upon concluding that the Greens' claims in the first amended complaint were barred by res judicata and collateral estoppel, sustained the demurrer without leave to amend. In so concluding, the court cited *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187 (*Baughman*), wherein the appellate court held that "[i]f there is no liability as a matter of law, leave to amend should not be granted."

The Greens failed to make an adequate showing below in support of their request for leave to amend, merely stating in a concluding sentence of their memorandum in opposition to demurrer that "[i]f the Demurrer is sustained as to any cause of action, then Plaintiffs request leave to amend the pleading under Code Civ. Proc. §472(c) with further factual allegations within their knowledge." Elizabeth, in arguing the merits of their opposition at the hearing on demurrer, did not elaborate on the matters that could be added to a proposed amended complaint if the court were to sustain the demurrer with leave to amend. And the Greens on appeal do not address the propriety of the court's denial of leave to amend. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4

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[5] Cedar Crest also argues in this appeal that the trial court's order sustaining the demurrer to the first amended complaint was correct based upon alternative grounds not reached by the court, namely, (1) that the negligence, negligence per se, and negligent infliction of emotional distress causes of action were barred by the applicable statutes of limitation; and (2) the Greens failed to plead facts sufficient to constitute a cause of action as to any claims asserted in the first amended complaint. Because we have concluded that the court properly sustained the demurrer on the grounds of res judicata and collateral estoppel, it is unnecessary for us to address these additional arguments. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 845, fn. 5 [appellate courts will not address issues whose resolution is unnecessary to the disposition of the appeal].)

[appellate court treats as abandoned arguments made at trial level that are not asserted on appeal].)

In determining whether leave to amend should have been granted where a pleading is vulnerable to a motion for judgment on the pleadings, we assess "whether the defect can reasonably be cured by amendment." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465.) We review a trial court's denial of leave to amend under an abuse of discretion standard. (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448.) And in establishing error in the denial of leave to amend, " '[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff . . . . Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]' " (*Total Call Internat. Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 173.)

The Greens having presented no showing of how they could cure the defects in the first amended complaint, and it appearing that "there is no liability as a matter of law" (*Baughman*, *supra*, 38 Cal.App.4th at p. 187), the court did not abuse its discretion by denying the Greens leave to amend.

III. DISPOSITION

The judgment and order of dismissal filed on November 23, 2016, is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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