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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CARMEN Y. BARKER,

Plaintiff and Appellant,

v.

FORD MOTOR COMPANY,

Defendant and Respondent.

E060236

(Super.Ct.No. RIC1110657)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Judge. Reversed.

Butler & Dodge, Terrence L. Butler, Karen R. Dodge; Esner, Chang & Boyer, Stuart B. Esner; Law Office of Shea S. Murphy and Shea S. Murphy for Plaintiff and Appellant.

Snell & Wilmer, Daniel S. Rodman, Todd E. Lundell, and Katie A. Richardson for Defendant and Respondent.

## I. INTRODUCTION

On May 10, 2011, plaintiff and appellant, Carmen Barker, sustained significant injuries when the Ford Explorer she was driving collided with a traffic pole. Approximately six weeks later, plaintiff filed her original complaint against defendant and respondent Ford Motor Company (Ford), and fictitiously named Doe defendants. She subsequently dismissed Ford without prejudice.

In April 2013, plaintiff filed a motion for leave to file a third amended complaint (TAC) that would bring Ford back into the case. The court granted the motion at a hearing on April 29, and signed the order on May 3—about one week before the expiration of the two-year statute of limitations. Plaintiff filed her TAC on June 26, approximately six weeks after the running of the statute on May 10, 2013. Ford demurred to the TAC based on the running of the statute of limitations.

In response to the demurrer, plaintiff, relying on Code of Civil Procedure section 473,<sup>1</sup> argued that her counsel mistakenly believed that the TAC was deemed filed upon the granting of the motion. The court rejected this argument and sustained the demurrer without leave to amend. Plaintiff appealed.

On appeal, plaintiff does not rely on section 473. Rather, she relies on *Wiener v. Superior Court* (1976) 58 Cal.App.3d 525 for the proposition that an amended complaint is deemed filed on the date the motion for leave to file the amended complaint is filed.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

We asked the parties to brief two additional issues: (1) whether the filing of the TAC should relate back to the date of the filing of the second amended complaint; and (2) whether plaintiff has forfeited the relation-back argument by failing to raise it below or on appeal. We have received and considered the parties' supplemental briefs. We hold that the relation-back argument has not been forfeited and for purposes of pleading the TAC does relate back to the date of the filing of the second amended complaint. We therefore reverse the judgment.

## II. FACTS

Plaintiff's accident occurred on May 10, 2011. She filed her initial complaint on June 21, 2011. The only named defendant was Ford. In addition, plaintiff alleged that Does 1 through 100 were "legally responsible in some manner." The first cause of action was for strict products liability, the second for negligence, and the third for breach of expressed and implied warranty. Ford, Does 1 through 9, and Does 20 through 100 were designated as defendants in these causes of action. A fourth cause of action was alleged against "Does Governmental Entities 10 through 19" for a dangerous condition of public property.

In March 2012, plaintiff substituted the City of Riverside (the City) for Doe 10 and dismissed Ford without prejudice.

The City successfully demurred to the original complaint and to plaintiff's first amended complaint. Plaintiff filed a second amended complaint in September 2012.

Plaintiff named the City and Does 1 through 20 as defendants.<sup>2</sup> She alleged two causes of action, both related to a theory of dangerous condition of public property. Each Doe defendant was alleged to be specifically involved in the creation or maintenance of the dangerous condition.

On February 26, 2013, plaintiff's counsel contacted the court to reserve a date for a hearing to "[a]mend the [c]omplaint to add a [n]ew [c]ause of [a]ction." The court reserved April 3. On April 3, the hearing was not held. The date of April 29 was reserved. On April 5, plaintiff filed her motion for leave to file the TAC. In the proposed TAC, which was attached to her moving papers, plaintiff not only restated the dangerous condition theories against the City, but alleged causes of action against Ford for negligence, strict products liability, and breach of express and implied warranty.

The court granted the motion on April 29. There was no discussion on the record as to whether the proposed TAC was to be deemed filed or how much time plaintiff had to file the TAC. A minute order indicates that plaintiff was given 20 days leave to amend. The court signed a written order, prepared by plaintiff's counsel, on May 3 and

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<sup>2</sup> Paragraph 10 of the second amended complaint states: "The true names and capacities, whether individual, public entity, corporate associates, agents or otherwise of defendants DOES 1 through 20, inclusive, are unknown to plaintiff, who therefore sues said defendants by such fictitious names, and will ask leave of this Court to amend this Complaint when the identities of such individuals have been ascertained. Plaintiff is informed and believes and thereupon alleges that each of the defendants designated herein as a DOE is responsible in some manner and liable herein by reason of negligence, malfeasance, nonfeasance, wanton and reckless misconduct, and conscious disregard, and said defendants directly, legally and proximately caused the injuries and damages asserted in this Complaint by such wrongful conduct."

filed it on May 6. The order stated: “Plaintiff’s Third Amended Complaint shall be filed immediately.”

Plaintiff filed her TAC on June 26, 2013—47 days after the running of the statute of limitations on May 10, 2013. Ford was served with the summons and TAC on July 2, 2013.

### III. STANDARD OF REVIEW

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions . . . .” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) We utilize two standards of review. “We first review the complaint de novo to determine . . . whether the trial court erroneously sustained the demurrer as a matter of law. [Citation.] Second, we determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend.” (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) ““[G]reat liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]” [Citations.] This abuse of discretion is reviewable on appeal ‘even in the absence of a request for leave to amend’ [citations], and even if the plaintiff does not claim on appeal

that the trial court abused its discretion in sustaining a demurrer without leave to amend.”

*(Aubry v. Tri-City Hospital Dist., supra, at pp. 970-971.)*

*A. Plaintiff's TAC Relates Back to the Date of the Filing of Her Second Amended Complaint*

Plaintiff was injured in a single car accident on May 10, 2011. The statute of limitations for her personal injury action ran on May 10, 2013. (See § 335.1 [two-year limitations period for an action for injury caused by the wrongful act or neglect of another].) There is no dispute that plaintiff timely filed her second amended complaint on September 5, 2012. The TAC naming Ford was not filed until June 26, 2013, approximately six weeks after the limitations period expired.

“The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. [Citations.] A recognized exception to the general rule is the substitution under section 474 of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. [Citations.] If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is

deemed filed as of the date the original complaint was filed.” (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176.)<sup>3</sup>

In order for there to be an effective substitution under section 474 after the statute of limitations has run, the plaintiff must “show that her new claim is based on ‘the same general set of facts’ as alleged in the original complaint . . . .” (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 595, fn. 14.) In addition, a cause of action must be stated against the Doe defendants in the original complaint and, procedurally, the newly named defendant should be substituted in for an existing Doe defendant. (*Woo v. Superior Court, supra*, 75 Cal.App.4th at p. 176.)<sup>4</sup> Further, the plaintiff must be ignorant of the identity of the newly added defendant or ignorant of facts giving rise to a cause of action against such defendant at the time of the filing of the original complaint. (*General Motors Corp. v. Superior Court, supra*, at pp. 588, 593-594.)<sup>5</sup>

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<sup>3</sup> Section 474 provides, in part: “When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly . . . .”

<sup>4</sup> Here, Ford was not properly substituted for a Doe defendant. This procedural requirement will be discussed, *post*. For ease of the subsequent discussion, it will be assumed that plaintiff, rather than naming Ford as a defendant in her TAC, actually substituted Ford for a Doe defendant.

<sup>5</sup> Although cases discussing the section 474 requirement of the plaintiff’s ignorance generally refer to the plaintiff’s ignorance at the time the *original complaint was filed*, when, as here, superseding pleadings have been filed, the relevant inquiry is the plaintiff’s ignorance at the time she filed the pleading with the pertinent Doe allegations. (See *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130-1131 [an amended complaint supersedes any previously-filed complaint, which “ceases to have any effect either as a pleading or as a basis for judgment”]; *Fireman’s*  
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We now turn to each of the above requirements.

1. The TAC Was Based on the Same General Set of Facts as the Second Amended Complaint

We first consider whether the TAC is based on the same “general set of facts” alleged in the second amended complaint.

The second amended complaint is premised almost entirely on the theory that plaintiff’s injuries were caused by a dangerous condition of public property. In the first cause of action, plaintiff alleged: “Defendants [City] and Does 1 through 20, inclusive, did not create a plan involving reasonable safety considerations when it decided to place [a traffic pole] too close to the roadway at or near the [intersection where the accident occurred]”; and “Defendants [City] and Does 1 through 20, inclusive did not have said plan which involved placing said [pole] too close to the traveled roadway properly approved by any person or board or governmental entity having authority to approve such placements.” Other averments are equally specific in alleging a connection between defendants and the location of the traffic pole as the basis for liability. The second cause of action also arises from the same dangerous condition of public property and, as with the first cause of action, each of the Doe defendants was allegedly specifically involved with the existence of the dangerous condition.

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*Fund, supra*, 114 Cal.App.4th at p. 1144 [““an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading”” ].) Here, that pleading is the second amended complaint.

More generally, plaintiff further alleged that the Doe defendants were “responsible in some manner” and were “retailers, distributors, [and] wholesalers.” Plaintiff also alleged that she was “driving a 2003 Ford Explorer,” and “was severely injured on or about May 10, 2011, as a result of a collision between her [vehicle] and a traffic pole.”

We look first to *Garrett v. Crown Coach Corp.* (1968) 259 Cal.App.2d 647, one of two seminal cases on the relation-back doctrine and whether the amended pleading is based on the “same general set of facts.” In *Garrett*, the plaintiff’s vehicle was struck by a school bus. The plaintiff filed an action against the board of education, two school districts, two named individuals, and five Doe defendants. (*Id.* at p. 648.) The plaintiff alleged that the two school districts negligently operated and maintained the school bus. The Doe defendants were alleged to be the agents and servants of the school districts and acting within the course and scope of their employment. (*Id.* at p. 649.) The original complaint described the bus as a “1960 Crown 79 passenger school bus.” (*Id.* at p. 650.) Approximately two years after the accident, the plaintiff filed an amended complaint substituting Crown Coach Corporation (Crown) for Doe One. The amended complaint realleged the original cause of action, but added new allegations that Crown negligently designed and manufactured the bus. (*Id.* at p. 649.)

In identifying the issue, which is, in essence, the same issue we face here, the court stated: “The problem in the case at bench arises because the amended pleading seeks to hold Crown [*sic*] upon a theory not spelled out in the original complaint. The first pleading is based specifically upon allegedly negligent maintenance and operation of

the bus. The school districts were allegedly responsible for the vehicle, and the other defendants, including Doe One, were alleged to have acted as agents and servants of those entities. The second amended complaint reflects plaintiff's desire to charge Crown as a negligent designer and manufacturer, a theory not revealed by any factual allegation in the earlier pleading." (*Garrett v. Crown Coach Corp.*, *supra*, 259 Cal.App.2d at p. 650.) The court further observed: "In the case at bench the original complaint, alleging that Doe One was operating the bus as an agent and servant of the school districts, seems to identify Doe One as a person other than the corporation which designed and manufactured the vehicle." (*Id.* at p. 652.)

The *Garrett* court, relying on *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, held that the amended complaint related back to the date the original complaint was filed because the amended complaint "[sought] to hold Crown legally responsible for the same accident and the same injuries referred to in the original complaint." (*Garrett v. Crown Coach Corp.*, *supra*, 259 Cal.App.2d at p. 651.) In so holding, the court acknowledged that, as in *Austin*, the plaintiff, by way of the original complaint, did not contemplate suing the party she later substituted in. As explained: "The amendment in [*Austin*] changed not only the theory of liability, but the factual allegations upon which the asserted liability of the defendant was to be based." (*Garrett v. Crown Coach Corp.*, *supra*, at p. 652.)

Similarly, in *Barrows v. American Motors Corp.* (1983) 144 Cal.App.3d 1, the plaintiffs' decedent was killed when a jeep in which he was riding overturned. The

plaintiffs sued the driver of the vehicle and Does 1 through 10. Approximately one year after the running of the statute of limitations, the plaintiffs settled with the driver and thereafter filed an amended complaint against American Motors Corporation and Does 1 through 100. In the amended complaint, the plaintiffs alleged that the defendants manufactured and distributed the jeep. They asserted causes of action for negligence, strict products liability, and breach of express and implied warranty. (*Id.* at p. 5.) The defendants demurred to the first amended complaint based on the statute of limitations “because the amended complaint nowhere alleged that respondents are the Doe defendants fictitiously named and sued in the original complaint.” (*Ibid.*)

In reversing the trial court’s order sustaining the demurrer without leave to amend, the appellate court stated: “So long as the amended pleading relates to the same general set of facts as the original complaint, a defendant sued by fictitious name and later brought in by amendment substituting his true name is considered a party to the action from its commencement for purposes of the statute of limitations. [Citation.] Case law makes clear that where, as here, the standard Doe allegations are contained in the original complaint against the driver of a vehicle, it is proper to amend the complaint to bring in other defendants on warranty and product liability theories; since the amendment involves the same accident and injury, the amendment relates back to satisfy the statute of limitations.” (*Barrows v. American Motors Corp.*, *supra*, 144 Cal.App.3d at p. 7; see also *Barnes v. Wilson* (1974) 40 Cal.App.3d 199, 205 [Fourth Dist., Div. Two]

[“plaintiffs’ fourth amended complaint seeks to hold [the newly added defendants] responsible for the same occurrence and damage alleged in the original complaint.”].)

Here, plaintiff’s TAC is based on the same general set of facts alleged in her second amended complaint. The second amended complaint clearly alleged that plaintiff was injured when the Ford Explorer she was driving struck a pole. By the TAC’s terms, plaintiff sought to hold Ford legally responsible for the same accident and the same injuries. It is of no moment that the Doe defendants were allegedly involved with or aligned with the City. And the fact that plaintiff added new theories against Ford does not militate against the conclusion that the amended pleading is based on the same general set of facts.

In relying on *Fireman’s Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135 [Fourth Dist., Div. Two] (*Fireman’s Fund*), Ford correctly states that in order for a section 474 amendment to relate back, recovery must be sought in both pleadings on the same general set of facts. Ford then states: “This requirement anticipates continuity in the *factual theory* underlying a plaintiff’s complaint, though it allows a plaintiff to make changes to her *legal theory*.” This is simply not the law when dealing with amended pleadings under section 474.<sup>6</sup>

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<sup>6</sup> Ford continues with this misapprehension throughout its supplemental brief. Ford states, for example: “In order to assert viable claims against Ford, the third amended complaint creates an entirely new *factual theory*,” and “when Barker filed her third amended complaint, she contemplated an entirely new *factual theory* of liability.” (Italics added.) And, in discussing *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342 (*Coronet*), Ford incorrectly states that the reason the court held that the amended complaint did not relate back was because the amended pleading alleged

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If we accepted Ford’s premise we would, in essence, preclude the use of section 474 in cases where the plaintiff was ignorant of facts giving rise to a cause of action; any amendment under section 474 based upon the discovery of such facts would necessarily interject a *new factual theory* into the case. If Ford’s argument had been applied in *Garrett*, for example, the plaintiff could not have brought Crown into the case because any contention that the bus was improperly designed would have interjected a new factual theory into what was otherwise an action for negligent operation of the bus. And in *Barrows*, the plaintiff would not have been entitled to bring American Motors Corporation into the case based upon a new factual theory of product defect in an otherwise standard automobile negligence case. Ford’s premise is clearly contrary to settled law. (See, e.g., *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170 [§ 474 “is broadly interpreted to mean not only ignoran[ce] of the defendant’s identity, but also ignoran[ce] of the facts giving rise to a cause of action against that defendant”]; *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 943 [same].)

For its “factual theory” argument, Ford relies primarily on two cases: *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157 and *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265. Neither case deals with amendments under Code of Civil Procedure section 474,

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“different *factual theories*.” (Italics added.) Finally, Ford concludes: “In sum, because Barker’s third amended complaint alleges against Ford an entirely new and different *factual theory* . . . .” (Italics added.)

which are to be liberally construed. (*General Motors Corp. v. Superior Court, supra*, 48 Cal.App.4th at p. 593.) Instead, each case deals with amending a pleading to add a new claim against a party previously named in the case. In *Amaral*, the plaintiff initially sued an employer for violation of certain wage and hour laws, and subsequently amended to add a claim under the Labor Code Private Attorneys General Act of 2004. (Lab. Code, § 2698 et seq.) As the *Amaral* court stated: ““The prevailing rule with respect to actions involving parties designated by their true names in the original complaint is that, if an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the same general set of facts. [Citation.]’ [Citation.] Cases applying this relation back rule have made it clear that ‘it is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative. [Citation.]’ [Citation.]” (*Amaral v. Cintas Corp. No. 2, supra*, at p. 1199, italics added.)

In *Pointe San Diego Residential Community, L.P.*, the plaintiffs filed a timely complaint for legal malpractice. After the statute of limitations ran, they sought to file an amended complaint against a named defendant. The court found that the amended complaint related back. In so doing, it explained the rationale underlying the relation-back doctrine as it relates to pleadings involving already existent defendants: “In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading. ‘The policy behind statutes

of limitations is to put defendants on notice of the need to defend against a claim in time to prepare a fair defense on the merits. This policy is satisfied when recovery under an amended complaint is sought on the same basic set of facts as the original pleading.

[Citation.]’ [Citations.]”<sup>7</sup> (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP, supra*, 195 Cal.App.4th at p. 277.)

The inquiry is generally the same in both a section 474 amendment involving a new defendant and an amendment that is sought against a defendant who is already involved in the ongoing litigation. In the latter situation, courts must be more concerned that the amendment does not interject a whole new “factual theory” about which the defendant has not had an opportunity to conduct discovery or prepare to defend. As such, the cases relied upon by Ford are inapposite.

Ford also relies on *Barrington v. A.H. Robins Co.* (1985) 39 Cal.3d 146 and *Coronet, supra*, 90 Cal.App.3d 342. *Barrington* did not directly address whether an amended pleading relates back for purposes of section 474; the issue was whether an amended pleading related back to the original pleading for purposes of the requirement that service of the summons be made within three years after the action is commenced. (*Barrington v. A.H. Robins Co., supra*, at p. 149.) That aside, *Barrington* is unhelpful to Ford. In that case, the plaintiff sued her doctor and a drug manufacturer for medical

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<sup>7</sup> In *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, another case relied upon by Ford, the court did not allow an amended pleading in a legal malpractice case against an already named defendant. The plaintiff attempted to allege a “different incident[]” of malpractice that occurred over four years after the incident alleged in the initial complaint.

malpractice and the negligent failure to warn of the dangers involved in taking a drug. Thereafter, she substituted A.H. Robins Co. (Robins) for a Doe defendant. As to Robins, she alleged that the instrumentality that caused her injury “was a defective ‘Dalkon Shield’ intrauterine device, manufactured by Robins.” (*Ibid.*) The court held that the amended complaint did not relate back to the filing of the original complaint because it was not based on the same operative facts. (*Id.* at p. 154.)

We agree. But that is not our case. In *Barrington*, as here, the injury alleged in the original complaint was the same injury alleged in the amended complaint.<sup>8</sup> In *Barrington*, however, the injury alleged in the original complaint was related to a drug; but in the amended complaint, the injury was related to a totally separate and distinct course of events—the use of an intrauterine device. Our case is not analogous. Here, plaintiff alleged in the second amended complaint that the injury occurred as a result of a Ford Explorer colliding with a traffic pole. She alleged the exact same course of events in the TAC. In both complaints: “PLAINTIFF, driving a 2003 Ford Explorer . . . was severely injured on or about May 10, 2011, as a result of a collision between her VEHICLE and a traffic pole . . . .” Both pleadings are based on the exact same incident involving the exact same instrumentalities.

In *Coronet*, *supra*, 90 Cal.App.3d 342, the plaintiff’s decedent was electrocuted while using a hair dryer. The day before the running of the statute of limitations a

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<sup>8</sup> We assume such to be the case in *Barrington*. There is no discussion by the court as to whether the injuries alleged in the original complaint were the same as those alleged in the amended complaint.

complaint was filed against the manufacturer of the hair dryer and a number of Doe defendants. Well over two years after the accident, the plaintiff filed a second amended complaint naming Coronet in place of a Doe defendant. The plaintiff alleged that Coronet manufactured ““a table lamp with a Leviton switch and socket.”” (*Id.* at p. 344, italics omitted.) The appellate court reversed the trial court’s overruling of the demurrer, indicating that the second amended complaint did not relate back because the original complaint made no mention of the table lamp as an instrumentality of the electrocution. While we believe the case could have been resolved differently, it is nonetheless distinguishable from the present facts. Here, both the second amended complaint and the TAC reference the same injury-producing instrumentalities—the Ford Explorer and the traffic pole.

2. The Second Amended Complaint States a Cause of Action Against the Doe Defendants

Ford argues that a cause of action against Ford is not stated by way of the Doe allegations in the second amended complaint. We disagree. Plaintiff alleged in the second amended complaint that she was injured when the Ford Explorer she was driving collided with a traffic pole. She further alleged “that each of the defendants designated herein as a DOE is responsible in some manner and liable herein by reason of negligence, malfeasance, nonfeasance, wanton and reckless misconduct, and conscious disregard, and said defendants directly, legally and proximately caused the injuries and damages asserted in this Complaint by such wrongful conduct.” Throughout the second amended

complaint, plaintiff alleges wrongful conduct against the Doe defendants. As in *Garrett v. Crown Coach, supra*, 259 Cal.App.2d 647, the allegations in the second amended complaint are sufficient to state a cause of action against the Doe defendants.

Ford relies on *Fireman's Fund, supra*, 114 Cal.App.4th 1135 and *Pacific Coast Refrigeration, Inc. v. Badger* (1975) 52 Cal.App.3d 233. Neither case supports its position.

In *Fireman's Fund*, the plaintiff filed a subrogation action to recover \$428,804 it had paid its insured for property damage caused by a malfunctioning ballcock in a toilet. The original complaint named Kohler Co. and Does 1 through 10. A subsequently filed first amended complaint did not contain any Doe allegations. The plaintiff thereafter filed Doe amendments naming Sparks Construction, Inc. (Sparks) as Doe 1 and T.D. Desert Development, LP (T.D.) as Doe 2. The plaintiff then served the original complaint, original summons, and the Doe amendments. (*Fireman's Fund, supra*, 114 Cal.App.4th at p. 1140.) After Sparks and T.D. filed answers, they learned that a first amended complaint had been filed that did not contain any Doe allegations. They moved for judgment on the pleadings based on the argument that the first amended complaint superseded the original complaint and, because the first amended complaint contained no Doe allegations, they could not be substituted for Doe defendants. (*Id.* at pp. 1141-1142.) Both the trial court and this court agreed.

The court explained: “Here, the first amended complaint had no Doe allegations. “It is well established that an amendatory pleading supersedes the original one, which

ceases to perform any function as a pleading. [Citations.]” [Citation.]” (*Fireman’s Fund, supra*, 114 Cal.App.4th at p. 1144.) “It has long been the rule that an amended complaint that omits defendants named in the original complaint operates as a dismissal as to them.” (*Id.* at p. 1142.) “Accordingly, we agree with the trial court that Fireman’s first amended complaint effectively dismissed all Doe defendants.” (*Id.* at p. 1143.)

*Fireman’s Fund* is simply not applicable to the present facts. Unlike the plaintiff in that case, plaintiff here did include Doe allegations in the pertinent pleading; i.e., the timely-filed second amended complaint. Thus, until the TAC was filed, one of the Does alleged in the second amended complaint effectively stood in place for the yet-to-be-named Ford. When Ford was subsequently named in the TAC, it took the place of the previously-alleged Doe, thereby preventing application of the statute of limitations. In *Fireman’s Fund*, by contrast, there was no Doe holding a similar place for Sparks or T.D. and, therefore, nothing to which the amended pleading could relate back.

Nor does *Pacific Coast Refrigeration, Inc.* support Ford’s position. There, the plaintiff sued Doug Badger and Does 1 through 10 for foreclosure of a mechanic’s lien. (*Pacific Coast Refrigeration, Inc. v. Badger, supra*, 52 Cal.App.3d at p. 238.) After the statute of limitations period expired, the plaintiff amended the complaint to add Florence Badger, Doug Badger’s wife. To avoid the statute of limitations bar, plaintiff argued that Florence had been named in the original complaint as “Doe One.” The Court of Appeal rejected this argument, stating: “Plaintiff’s attempt to treat Florence Badger as a fictitious defendant is unavailing because examination of the original complaint reveals

that no cause of action has been alleged against any fictitious defendant.” (*Id.* at p. 249.) Although the caption of the complaint referred to 10 fictitious defendants, the only reference in the body of the complaint to Doe defendants was the allegation that their identities were unknown and that when they are learned, the complaint will be amended to state a charge against them. As stated by the court: “The lack of charging allegations in the original complaint renders it unavailable to rebut the running of the statutory limitation period.” (*Ibid.*) Continuing, the court stated: “[W]e have yet to read of a case where the running of the statute has been held to be avoided by filing a complaint wherein a defendant is designated by a fictitious name and the only allegations as to him are that the plaintiff is ignorant of the defendant’s true name and, when he knows it, will amend by substituting it, and at that future time make some charge against such defendant.” (*Id.* at p. 250, quoting *Gates v. Wendling Nathan Co.* (1938) 27 Cal.App.2d 307, 315, overruled on other grounds in *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 694.)

Here, in contrast to the lack of charging allegations in *Pacific Coast Refrigeration, Inc.*, plaintiff alleged that each Doe defendant “is responsible in some manner and liable herein by reason of negligence, malfeasance, nonfeasance, wanton and reckless misconduct, and conscious disregard, and said defendants directly, legally and proximately caused the injuries and damages asserted in this Complaint by such wrongful conduct.” *Pacific Coast Refrigeration, Inc.* is, therefore, easily distinguishable.

We now turn to the procedural requirement that Ford be substituted for a Doe defendant pursuant to section 474 or expressly identified in the TAC as a previously designated Doe.

As stated in *Woo v. Superior Court, supra*, 75 Cal.App.4th 169: “Among the requirements for application of the section 474 relation-back doctrine is that the new defendant in an amended complaint be substituted for an existing fictitious Doe defendant named in the original complaint.” (*Id.* at p. 176.) In *Woo*, the plaintiff “made no apparent attempt to satisfy this procedural requirement. The amended complaint adds Woo as a defendant but does not identify him as a substitute for a previously named fictitious defendant. Furthermore, the summons served on Woo identifies him as being sued as an individual defendant, not as a defendant previously sued under a fictitious name.” (*Ibid.*) Although the manner of bringing Woo into the case was “inept,” it did not prevent Woo from being added to the case. The court explained that “the courts of this state have considered noncompliance with the party substitution requirements of section 474 as a procedural defect that could be cured and have been lenient in permitting rectification of the defect. [Citations.]” (*Id.* at p. 177.) Thus, the plaintiff was “permitted to allege that Woo is a defendant substituted for a fictitious Doe defendant named in her original complaint and therefore do not hold that her noncompliance with the procedural requirements of section 474 forecloses consideration of her section 474 relation-back contention.” (*Ibid.*)

In *Streicher v. Tommy's Electric Co.* (1985) 164 Cal.App.3d 876, the plaintiff sued a general contractor and subcontractor after a radio-controlled overhead garage door accidentally opened, causing him to fall from some scaffolding. Four Doe defendants were identified as business entities. Three additional Doe defendants were identified as individual partners in one of the business entities, and 97 additional Doe defendants were identified. (*Id.* at pp. 879-880.) The plaintiff alleged that the defendants negligently “owned, possessed and controlled the construction site, that they had provided an unsafe workplace through their failure, among other things, to ‘supervise and control the installation and operation of radio-controlled overhead garage doors’ on the worksite . . . .” (*Id.* at p. 880.) Approximately three years following the accident and after plaintiff settled with the named defendants, the plaintiff filed an amended complaint against the manufacturer of the door. The amended complaint stated causes of action for strict products liability, negligence, and breach of express and implied warranty. (*Ibid.*) The plaintiff did not substitute the newly added defendants as Doe defendants; as here, the plaintiff simply named the newly added defendants in the amended complaint. These defendants demurred on the basis that the statute of limitations had run because the “plaintiff’s amended complaint did not substitute [the defendants] for any of the fictitiously named defendants in his original complaint, the amended complaint was in fact adding new defendants to the action and [it] was not permissible after the running of the one-year statute of limitations.” (*Id.* at pp. 880-881.) The trial court sustained the demurrers without leave to amend. The appellate court reversed.

After concluding that the relation-back doctrine applied, the *Streicher* court addressed the issue that the plaintiff had improperly named the new defendants in the amended complaint as opposed to substituting them in as Doe defendants. “The issue remains whether the court abused its discretion in denying [the plaintiff] leave to amend the complaint to cure his failure to properly allege that [the defendants] were being substituted for some of the fictitiously named defendants in the original complaint. [The plaintiff] argues this omission constituted a procedural error which was easily curable through amendment. We agree. [¶] ‘It is axiomatic that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend. [Citations.]’ [Citation.] We are satisfied the amended complaint’s allegations sufficiently state a cause of action for products liability against [the defendants]. Moreover, ‘[a]n amendment substituting the true names of fictitious defendants is not a matter of substance because it does not change the cause of action nor affect the issues raised by the pleadings. [Citation.]’ [Citation.] Since the defect in the complaint does not affect the substance of its allegations and it is reasonably possible the defect can be cured by amendment, we conclude the trial court abused its discretion in dismissing the action without giving [the plaintiff] the opportunity to amend.” (*Streicher v. Tommy’s Electric Co., supra*, 164 Cal.App.3d at pp. 884-885.)<sup>9</sup>

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<sup>9</sup> Ford in essence concedes this issue in its supplemental brief.

Here, as in *Streicher*, the only obstacle to the addition of Ford to the action is that plaintiff's counsel did not substitute Ford for a Doe defendant. This can easily be accomplished upon remand and should not bar the matter from moving forward. In this vein, it must also be noted that prior to the filing of the amended complaint, plaintiff did obtain an order from the court allowing him to bring Ford into the action.

3. Plaintiff Must be Ignorant of Facts Giving Rise to a Cause of Action Against Ford at the Time of the Filing of Her Second Amended Complaint

“A plaintiff can avail himself or herself of section 474 if the plaintiff is ignorant of facts that give rise to a cause of action against a person who is otherwise known to the plaintiff. ‘In keeping with th[e] liberal interpretation of section 474, it is now well established that even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant’s actual identity (that is, his name), the plaintiff is “ignorant” within the meaning of the statute if he lacks knowledge of that person’s connection with the case or with his injuries.’ [Citation.]” (*McOwen v. Grossman, supra*, 153 Cal.App.4th at p. 942.) More precisely, the statute “allows a plaintiff in good faith to delay suing particular persons as named defendants *until he has knowledge of sufficient facts to cause a reasonable person to believe liability is probable. . . .*” (*General Motors Corp. v. Superior Court, supra*, 48 Cal.App.4th at p. 595.) Section 474 “does not impose upon the plaintiff a duty to go in search of facts she does not actually have at the time she files her original pleading.” (*Id.* at p. 596, fn. omitted.) Nor does the fact that a plaintiff may learn of facts giving rise to a cause of

action prior to the running of the statute of limitations affect or destroy a plaintiff's ability to bring an entity into the action as a Doe defendant, after the running of the statute. (See *Streicher v. Tommy's Electric Co.*, *supra*, 164 Cal.App.3d at p. 883 [“plaintiff's *actual knowledge at the time* the suit is filed is dispositive in triggering the application of section 474's fictitious defendant provisions”].)

Quite clearly, plaintiff was not ignorant of Ford's identity—Ford was a named defendant in plaintiff's initial complaint. Therefore, the relevant inquiry is whether plaintiff was ignorant of facts giving rise to a cause of action against Ford at or before the time she filed her second amended complaint.

In considering this issue, we are mindful of the fact that the case is at the pleading stage, and we are reviewing a ruling on a demurrer. We, like the trial court, must therefore “accept properly pleaded facts as true.” (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173.) Significantly, the question whether a plaintiff knew of facts giving rise to a cause of action at the time a complaint is filed is ordinarily a question of fact (*McOwen v. Grossman*, *supra*, 153 Cal.App.4th at pp. 945-948), and one which the defendant has the burden of proof at trial (*Fuller v. Tucker*, *supra*, 84 Cal.App.4th at p. 1173). Because a plaintiff's ignorance regarding her Doe amendments is an element of the defendant's affirmative defense of statute of limitations, when the issue is raised by demurrer, the “defect ““must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action

may be barred.” [Citations.]’ [Citation.]” (*Czajkowski v. Haskell & White, LLP, supra*, at p. 174.)

Here, plaintiff, in her second amended complaint, pled that the identities of the Doe defendants were unknown and that each of the Doe defendants was responsible in some manner for plaintiff’s injuries and damages. By this allegation, plaintiff has, in essence, pled that at the time she filed the second amended complaint she did not know of facts giving rise to a cause of action against the Doe defendants. As stated above, we must accept these allegations as true for purposes of a demurrer. Moreover, and while not considered by us as part of the pleading, the record and declarations submitted by plaintiff’s counsel support a good faith assertion that plaintiff recently discovered the facts regarding Ford’s potential liability.<sup>10</sup> The court’s register of actions indicates that plaintiff’s counsel called the court on February 26, 2013, to reserve a date to “[a]mend the [c]omplaint to add a [n]ew [c]ause of [a]ction.” In a declaration filed with the court on April 5, 2013, in support of plaintiff’s motion for leave to file the TAC, plaintiff’s counsel stated: “The potential liability of FORD MOTOR COMPANY came to light after an automotive expert examined the remains of plaintiff’s Ford vehicle which was involved in the incident that gives rise to the instant litigation. [¶] . . . Upon discovering that FORD MOTOR COMPANY had potential liability in this matter, following an

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<sup>10</sup> Plaintiff’s counsel’s declarations indicate that the allegations are made in good faith and with factual support. (See *Coronet, supra*, 90 Cal.App.3d at p. 348 [allowing leave to amend, if real parties in interest could truthfully plead that the hair dryer was connected to the lamp with its Leviton switch and socket, thus referencing the same general set of facts].)

inspection of the vehicle, plaintiff contacted this Court to set the herein motion to amend the complaint to add this defendant.” In opposing the demurrer to the TAC, plaintiff’s counsel submitted a declaration stating: “PLAINTIFF was in a coma for many months following the accident. [¶] . . . [¶] . . . During the 2 years following the filing of the complaint, Plaintiff counsel had the car inspected by multiple experts exploring potential liability for the subject incident. [¶] . . . [¶] . . . In the Spring of 2013, during one of the many ongoing conversations with the PLAINTIFF discussing the accident, the PLAINTIFF related to her counsel **for the first time** that she . . . had a clear recollection of an inability to engage the brakes on her FORD vehicle in the time immediately prior to impact with the pole resulting in the horrific crash. [¶] . . . In the Spring of 2013, Plaintiff counsel further discussed this newly discovered evidence with accident reconstruction experts who suggested another inspection of the vehicle to determine if there was a defect in the FORD vehicle that would result in PLAINTIFF’s inability to effectively engage the brakes on the subject vehicle immediately prior to the crash. [¶] . . . In March of 2013, some 2 months prior to the two year anniversary of the accident, plaintiff counsel had the vehicle reinspected . . . . [¶] . . . For the first time, attention was focused on the brakes and floor mats and other items which could support PLAINTIFF’s recollection. [¶] . . . Plaintiff counsel determined that there was sufficient new information to re-add the FORD MOTOR COMPANY as a defendant in the instant litigation.”

These actions and statements by plaintiff's counsel are sufficient to support plaintiff's position that at the time she filed the second amended complaint she was ignorant of facts giving rise to a cause of action against Ford.

Ford submits that “[a]ccording to the declaration filed by [plaintiff]’s counsel in support of her motion to amend the complaint, after filing the second amended complaint [plaintiff] remembered that she was unable to engage the brakes on her vehicle immediately prior to the accident. . . . Counsel then discussed [plaintiff]’s recollection with an accident reconstruction expert, performed another inspection of the vehicle, and ‘determined that there was sufficient new information to re-add’ Ford as a defendant. . . . [¶] This vague assertion of ‘new information’ does not demonstrate that [plaintiff] was genuinely ignorant of facts giving rise to a cause of action against Ford.” (Fn. omitted.)

Ford may well be correct, but the argument ignores the fact that we are at the pleading stage. Nothing in the language cited by Ford establishes as a matter of law that plaintiff knew of facts giving rise to a cause of action at the time she filed her second amended complaint. Although Ford’s assertion that plaintiff had the requisite knowledge at the relevant time may be established through discovery and trial, at this point, the allegations of the complaint are sufficient. Accordingly, the trial court erred in sustaining Ford’s demurrer without leave to amend. Plaintiff invoked section 474 in the second amended complaint by alleging that the Doe defendants, unknown to her, engaged in wrongful conduct and were in some manner responsible for her injuries. Assuming the

truth of this allegation, as the trial court is required to do, the demurrer should have been overruled.

*B. We May Consider the Issue of Whether Plaintiff's TAC Relates Back to the Date of the Filing of the Second Amended Complaint*

Plaintiff did not argue at the trial court level that the TAC related back to the date of the filing of the second amended complaint. Nor did she make the argument in her opening or reply briefs on appeal. We asked the parties to brief the question whether plaintiff has forfeited this argument by failing to raise it earlier.

The fundamental policy behind forfeiture is one of fairness. The adverse party and the lower court should be afforded the opportunity to address and consider the pertinent legal arguments. “It is axiomatic that a party may not complain on appeal of rulings to which it acquiesced in the lower court. [Citation.] . . . . It is unfair to the trial judge and the adverse party to attempt to take advantage of an alleged error or omission on appeal when the error or omission could have been, but was not, brought to the attention of the trial court in the first instance.” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 912.)<sup>11</sup>

We find that even if plaintiff did not argue the relation-back theory at the trial court and on appeal, we are free to consider the matter because it involves an issue of law on undisputed facts and, at our request, the parties have been given ample opportunity to

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<sup>11</sup> We note that in its points and authorities filed in support of its demurrer, Ford extensively discussed the relation-back doctrine.

address the issue through supplemental briefing.<sup>12</sup> (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341, fn. 6.)

As earlier discussed, the TAC is based on the same general set of facts as the second amended complaint, and contains charging Doe allegations to which the TAC can relate back. Further there are sufficient allegations in the second amended complaint to plead plaintiff's ignorance of facts giving rise to a cause of action against Ford. Because we have concluded that, from a pleading standpoint, the TAC relates back, we are dealing with an issue of law on undisputed facts.

We agree with Ford that disputed factual issues may exist as to whether plaintiff was aware of facts giving rise to a cause of action against Ford at the time plaintiff filed the second amended complaint. Such issues, however, cannot be resolved at the pleading stage in this case. Thus, while Ford may well continue to contest plaintiff's knowledge of facts at the time she filed the second amended complaint, that dispute does not change the nature of the issue for purposes of this appeal.

### C. *Wiener Is Inapplicable to the Present Facts*

Plaintiff relies on *Wiener v. Superior Court, supra*, 58 Cal.App.3d 525 for the proposition that the TAC was timely filed as of the date of the filing of the motion for

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<sup>12</sup> Ford has had ample time to address the issue on appeal. On February 24, 2015, we served our order requesting supplemental briefing on counsel for the parties. Plaintiff was given until March 17, 2015, to file and serve her supplemental brief; Ford was given until April 7, 2015. Ford has thus had ample time to address the issue.

leave to amend the complaint (a copy of the TAC was attached to the motion). Under our facts, we disagree.

In *Wiener*, the plaintiff filed a complaint against the defendants for defamation. The comments complained of were allegedly published in the Los Angeles Times on April 23, 1974. On April 24, 1975, the plaintiff filed a motion for leave to file an amended complaint. The attached amended complaint realleged the causes of action relative to the April 23 publication; it also added three new causes of action alleging that on April 25, 1974, the defendants made additional defamatory statements about the plaintiff that were published in the Huntington Beach Independent. The motion was calendared for May 19, 25 days after the one-year statute of limitations ran on the causes of action based on the April 25, 1974, publication. The motion was granted and the proposed amended complaint was deemed filed by the court. (*Wiener v. Superior Court, supra*, 58 Cal.App.3d at pp. 527-528.)

The defendants demurred to the three new causes of action based on the running of the statute of limitations. The trial court sustained the demurrer without leave to amend. (*Wiener v. Superior Court, supra*, 58 Cal.App.3d at p. 528.)

In reversing the trial court's decision, the appellate court began by noting: "We have concluded that *under the facts of this case* the action on the second cause was 'commenced' when the notice of motion was filed, thereby *stopping* the running of the statute." (*Wiener v. Superior Court, supra*, 58 Cal.App.3d at p. 527, italics added.) The facts of *Wiener* differ from those before us in two primary respects. First, the amended

complaint which added new causes of action was against an already named defendant who had appeared in the action; thus, at the time of the filing of the motion, the defendant was, in essence, served with the proposed amended complaint prior to the running of the statute of limitations. Second, the calendaring of the hearing on the motion was a court function beyond the plaintiff's control. Given these facts the court found that the filing of the motion "stopp[ed] the running of the statute." (*Ibid.*)

Here, however, Ford was not a named party at the time of the filing of the motion to amend. Thus, the proposed third amended complaint was not served on Ford prior to the running of the statute of limitations. Further, the inability to file a timely TAC was not the result of some court function. Plaintiff had ample time to file the TAC after the ruling on the motion and before the expiration of the two-year statute of limitations.<sup>13</sup> As a result, we cannot conclude that by filing the motion for leave to amend, the statute of limitations was in some way "stopp[ed] from running."

We decline to apply *Wiener* to the present facts.

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<sup>13</sup> We are mindful of plaintiff's argument in response to the demurrer. Counsel in his declaration indicated that he thought the TAC would be deemed filed at the time of the granting of the motion. Support for this notion can be found in the fact that the TAC attached to plaintiff's motion, is separately paginated from the motion itself. Further, the order prepared by plaintiff's counsel states: "Plaintiff's Third Amended Complaint shall be filed immediately." This is a very odd directive to be placed in an order prepared by plaintiff, unless there was some contemplation by plaintiff's counsel that the TAC would be filed forthwith by the clerk of the court. However, we are left with the situation in which there was no discussion on the record as to the proposed amended complaint being deemed filed and the clerk's record demonstrates that plaintiff was given 20 days leave to amend.

IV. DISPOSITION

The judgment is reversed. Plaintiff is awarded her costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.