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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CYNTHIA L. CARDOZA,

Plaintiff and Appellant,

v.

USC UNIVERSITY HOSPITAL et al.,

Defendants and Respondents.

B195092

(Los Angeles County
Super. Ct. No. BC338034)

APPEAL from judgments of the Superior Court of Los Angeles County.
George H. Wu, Judge. Reversed with directions.

Cynthia L. Cardoza, in pro. per., for Plaintiff and Appellant.

Agajanian, McFall, Weiss, Tetreault & Crist, Scott B. McFall and Donald Ornelas, Jr., for Defendant and Respondent USC University Hospital.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mary Lawrence Test, Vangi M. Johnson, and David J. O'Keefe for Defendants and Respondents Douglas Hood, Michael Leke, and Fred Weaver.

Plaintiff Cynthia L. Cardoza, in pro. per., appeals from judgments (orders of dismissal) entered in favor of defendants, USC University Hospital (hospital) and Drs. Douglas Hood, Michael Leke, and Fred Weaver (collectively physicians), after their demurrers to plaintiff's third amended complaint, for fraud, were sustained without leave to amend. Because there is a reasonable possibility that plaintiff could amend to state a statutory claim under the Health Care Decisions Law (Prob. Code, § 4600 et seq.; decision law), we reverse the dismissals with directions to allow leave to amend.

FACTS

Plaintiff commenced this case on August 10, 2005, about one month less than three years after the September 17, 2002 death of her mother, Pascentia McDonald (McDonald), age 73, a patient at the hospital. The complaint alleged that the hospital, and the three attending physician defendants, had mistreated Ms. McDonald, first by injuring her peritoneum during thoracoabdominal aneurysm surgery on August 14, 2002, then by neglecting and concealing the prospect of infection – which eventually caused multiple organs to fail – and by performing numerous other surgeries, against the decedent's prior directive. Plaintiff's brother Bobby Miles, also named a defendant (but not a party to this appeal), wrongfully approved these surgeries as McDonald's agent under an advance health care directive (AHCD) with power of attorney, in which plaintiff had been named alternative agent, should Miles be unable to act. As against respondents, plaintiff listed her causes of action as being for wrongful death, professional negligence, and elder abuse.

The physicians demurred to each cause of action, for failure to state a claim and on the basis of applicable statutes of limitations, Code of Civil Procedure sections 331.5 (personal injury/wrongful death, two years) and 340.5 (medical negligence, one year after discovery). (Undesignated section references are to the Code of Civil Procedure.) The hospital also demurred.¹ Plaintiff did not file opposition, and the court sustained the

¹ We are unable to describe this or any others of the hospital's pleadings, because neither plaintiff nor the hospital designated them for inclusion in the clerk's transcript.

demurrers with leave to amend. At the hearing, plaintiff stated that her grievance was infringement of her mother's right to die with dignity and without suffering.

In her first amended complaint (FAC), plaintiff elaborated on her mother's course at the hospital, and plaintiff's own interaction with the physicians and other hospital personnel. Plaintiff also attached as exhibits hospital records and other papers, including McDonald's AHCD, which followed the form provided by Probate Code section 4701.

Executed the day before McDonald's initial surgery, the AHCD commenced with a health care power of attorney, by which McDonald appointed Miles her agent to make health care decisions for her (including to withdraw health care keeping her alive). His authority would be effective when McDonald became unable to make decisions on her own. Plaintiff was designated as alternate agent, should Miles be discharged or not be willing, able, or available to make a health care decision. As agent, Miles was to act in accordance with McDonald's wishes as known to him, and also in accordance with her further instructions in the AHCD. Those instructions directed McDonald's health care providers that she did not want her life prolonged should she have an incurable condition that would soon result in death, or if she was not expected to regain consciousness, or if the burdens of treatment would outweigh expected benefits. The instructions also rejected prolongation of a noncognitive existence, and made similar provisions.²

Plaintiff alleged that defendant Hood informed her on August 30, 2002, that her mother had an infection of toxic bacteria throughout her body. By that time, McDonald was in serious and painful condition. Plaintiff persuaded her to agree another exploratory surgery. McDonald thereafter underwent repeated surgeries, which she allegedly did not want, and became more debilitated, causing plaintiff suffering as well.³ At some point

² Attached to the AHCD was a declaration under the Natural Death Act, former Health & Safety Code section 7185 et seq., superseded in 2000 by the decision law. In this declaration, McDonald abjured life-prolonging treatment should she suffer an irreversible condition.

³ The post-infection surgeries were ostensibly performed in an attempt to isolate the source of the infection; but plaintiff suggested they were experimental.

McDonald was placed on life support measures (she had had breathing assistance since not long after the initial surgery). On September 17, 2002, plaintiff threatened to sue, and respondents finally agreed to withdraw life support. McDonald expired the same day.

In addition to charging elder abuse, plaintiff this time alleged claims for misrepresentation and concealment against respondents and Miles. The fraud involved misrepresenting the source of McDonald's infection, and also denying that there was an AHCD. As a consequence, plaintiff alleged, she suffered severe emotional distress, which continued to date. In addition, McDonald suffered greatly, and lost her right to die with dignity. Plaintiff also labeled respondents' alleged mistreatment of her mother "intentional tort," and alleged it qualified for punitive damages.

Respondents demurred to the FAC. The physicians again interposed the one and two-year statutes of limitations, as well as the three-year discovery statute for fraud (§ 338, subd. (d)). Their demurrer also argued that the fraud allegations were either at odds with other pleaded facts or lacked essential elements.

Plaintiff again did not file opposition, nor did she appear at the hearing. Based on its previous statute of limitations rulings, the trial court sustained the demurrers without leave to amend with respect to the elder abuse claim, and also those for wrongful death, negligence, and malpractice, which the FAC's title referred to. The court sustained the demurrers with leave to amend as to the fraud and concealment claims, because they had not been pled with the clarity and specificity required. Respondents were directed to provide a transcript of the hearing to plaintiff.

In her second amended complaint (SAC), plaintiff again set forth a chronological recital of her observations of and reactions to her mother's stay at the hospital. The SAC then alleged fraud claims, of misrepresentation, concealment, and promise made without intent to perform. The alleged misrepresentation and concealment involved McDonald's medical condition, denial that she had made a written directive, and the representation that measures undertaken were solely to save her life. The false promises were to honor the AHCD and the former Natural Death Act, and to act only where life-saving potential outweighed risk of death or diminishment of quality of life. In reliance, plaintiff

“allowed” McDonald to suffer terribly, rather than interfering.⁴ Plaintiff’s damages included emotional distress and loss of ability to earn. Plaintiff again sought punitive damages.

Respondents once again demurred. Again citing the requirement of specific pleading of fraud, and explaining it to plaintiff, the court sustained the demurrers with leave to amend.

Plaintiff’s ultimate, third amended complaint began with a fresh chronicle of her experiences with respondents, between August 30 and September 17, 2002. She alleged that several members of the hospital staff told her that McDonald had no AHCD but only the power of attorney for Miles, notwithstanding McDonald had informed plaintiff of the AHCD. On the day McDonald died, defendant Hood told plaintiff that “the problem I had letting your mother go was because [her] mind was 100%.”

Plaintiff then alleged claims for misrepresentation and concealment, centering around (1) the hospital’s denial that McDonald had an AHCD, concealment of it, and assertion that under it plaintiff could not have a role in determining her mother’s care; (2) Hood’s similar assertions and concealment of the AHCD, his claim of lack of knowledge of the cause of the infection, and his statements that McDonald could be cured. Plaintiff also alleged promises without intent to perform: by the hospital, that it would investigate the status of the AHCD, and by Hood, that he would honor certain tenets of professional responsibility. The other two physicians were alleged to have conspired with Hood in all particulars. In each instance, plaintiff’s reliance involved refraining from acting to aid her mother, and plaintiff’s damages consisted of extended emotional distress. Separately, plaintiff continued to assert fraud allegations against Miles, the gravamen being that he had misrepresented and concealed the existence of the AHCD. The punitive damages allegations averred that Miles had allowed McDonald’s life to be extended so as to permit him to remove funds from her estate.

⁴ In an addendum, plaintiff appeared to acknowledge that her allegation of peritoneal injury during the original surgery was a “theory.”

Respondents once more demurred. Among other things, the physicians cited Probate Code section 4740, which immunizes from liability health care providers who in good faith comply with a health care decision made by one whom they believe authorized to make it for the patient. The physicians again argued that the pleading of fraud was inadequate, and cited the fraud statute of limitations, implicitly assuming that the fraud claims could not relate back to the commencement of the action. This time appellant apparently filed opposition, but it has not been included in the record on appeal.

At the hearing, the court indicated that plaintiff was essentially urging intentional infliction of emotional distress. However, such a claim would be barred by limitations. After taking the demurrers under submission, the court sustained them without leave to amend. The orders of dismissal under review followed.

DISCUSSION

In her discursive briefs, plaintiff challenges the rulings below only secondarily. She primarily seeks leave to amend once more, to state a further theory for relief. We review first the disposition of the claims plaintiff formally asserted, and then the question of leave to amend.

As the trial court ruled, the statutes of limitations for personal injury or death (§ 335.1), and medical malpractice (§ 340.5), foreclosed virtually all of the causes of action that plaintiff advanced. Those statutes respectively allow suit within two years and one year of the injury. The claimed injuries here occurred between August 14 and September 17 of 2002. The action was commenced August 10, 2005, just short of three years later. Although plaintiff claims she did not obtain notice of certain facts until she received documents from the hospital, in mid-2003, her complaint still came more than two years after that alleged discovery. Therefore, plaintiff's erstwhile claims for wrongful death, malpractice, battery ("informed consent"), and elder abuse all were barred.

With respect to plaintiff's remaining pleaded claim, for fraud, it could be argued that the limitations period also had run, because the claim first appeared in the FAC, which was filed more than three years after the allegedly fraudulent acts. But under the

modern, liberal rule that allows amendments that arise from the same general set of facts (5 Witkin, Cal. Procedure, Pleading § 1167, p. 627), we believe the fraud claim related back to the filing of the original complaint, which occurred less than three years after the alleged fraud. (Cf. *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212, 234 [claim of fraudulent misrepresentation of nature of surgery related back to complaint for negligent performance of it].)⁵

Nevertheless, plaintiff's fraud cause of action was properly dismissed, because it intrinsically failed to state facts constituting a cause of action, for two reasons. First, plaintiff alleged that, in reliance upon defendants' false representations, concealment, and false promises (principally concerning McDonald's AHCD), she refrained from acting. But the pleadings did not indicate a causal connection between that inaction and the emotional distress damages plaintiff claimed. Throughout the versions of her complaint, plaintiff's distress stemmed from McDonald's suffering, not plaintiff's withholding action. Second, it has been held that in a fraud case, emotional distress damages are recoverable only in aggravation of other damages, not alone. (*Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1269.) But plaintiff's ultimate complaint alleged only damages for emotional distress.

The remaining question is whether plaintiff should have been, and should now be, allowed leave to amend. "A showing that the complaint can be amended to state a cause of action 'need not be made in the trial court as long as it is made to the reviewing court.' If there is a reasonable possibility that a plaintiff can amend [her] complaint to cure [its] defects, leave to amend must be granted. [Citation.]" (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1041-1042.) The allegations of plaintiff's third amended complaint and its predecessors disclose a

⁵ Although *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256 refused to relate back a decedent's claim for elder abuse where the original complaint had alleged a relative's claim for wrongful death, here plaintiff's original complaint asserted both personal and decedent's claims.

reasonable possibility that plaintiff could amend, to state claims for relief under the decision law, Probate Code section 4600 et seq.⁶



Plaintiff claims respondents violated Probate Code section 4733, subdivision (a), which generally requires compliance with “an individual health care instruction of the patient,” meaning “a patient’s written or oral direction concerning a health care decision for the patient.” (Prob. Code, § 4623.) In turn, a “health care decision” includes directions to withdraw life-supporting care. (Prob. Code, § 4617, subd. (c).) Thus, intentional failure by any of the respondents to follow the provisions of McDonald’s AHCD could be a basis for a statutory damage action, under Probate Code section 4742, subdivision (a), which provides for damages against a health care provider or institution that intentionally violates the decision law.⁷

The physicians summarily contend that any claims under the decision law are time-barred. We disagree. The limitations period for the statutorily created liabilities of Probate Code section 4742 would appear to be three years (§ 338, subd. (a)), and plaintiff’s cause of action would relate back to her original complaint, which alleged disregard of McDonald’s AHCD.

The hospital contends that the proposed cause of action is precluded by Probate Code section 4740, which immunizes health care providers and institutions, acting in good faith and in accordance with professional standards, from liability for acts done in

⁶ In addition to this law, plaintiff alludes to Health and Safety Code section 24170 et seq., which concern medical experimentation on individuals, and provide for damages for failing to obtain a subject’s informed consent (Health & Saf. Code, § 24176). But the pleadings do not allege facts showing that McDonald was the subject of medical experimentation. Moreover, Health & Safety Code section 24189.5 exempts from coverage any terminal adult who has an AHCD directing withdrawal of life support, and further provides that in the event of conflict the decision law prevails. Given these circumstances, we do not perceive that plaintiff could amend to allege a claim under the Health and Safety Code.

⁷ The statute provides for liability “to the aggrieved individual” for damages of \$2,500 or actual damages, whichever is greater, plus attorney fees.

compliance with the decision law, including compliance with a health care decision by a person the provider or institution in good faith believes “has the authority to make a health care decision for a patient” (§ 4740, subd. (a).) The hospital argues that this immunity appears from the face of plaintiff’s existing pleadings, because their gravamen is the hospital’s (and the physicians’) compliance with Miles’ directives as designated agent, to continue with McDonald’s treatment and surgeries.  

However, operation of the immunity here is not so certain. Compliance with an agent’s decision that is at odds with the patient’s own expressed decision, in her AHCD, would probably not qualify as in good faith, assuming the provider or institution knew of the AHCD. Probate Code section 4684 requires that an agent make health care decisions “in accordance with the agent’s determination of the principal’s individual health care instructions, if any, and other wishes to the extent known to the agent.” Thus, Miles was not authorized to depart from McDonald’s AHCD. And under Probate Code section 4733, subdivision (a), defendants were bound to comply with McDonald’s own directives, except for reasons of conscience, ineffectiveness, or violation of health care standards. (Prob. Code, §§ 4734-4735.)

Plaintiff has also alleged that defendants concealed McDonald’s AHCD. Probate Code section 4742, subdivision (b), provides that a person who intentionally conceals a patient’s AHCD is subject to liability to that individual for damages of \$10,000 or actual damages, plus attorney fees. Although the statute may present an interpretive issue regarding the meaning of “conceal” under it, plaintiff’s allegations would appear to pose a reasonable possibility of her asserting a claim under this statute, in behalf of McDonald.

Probate Code section 4742, subdivision (b) underscores a threshold question, of standing, that confronts any effort by plaintiff to amend to assert claims under the decision law. Plaintiff could bring any such claims, belonging to McDonald, only as her personal representative or successor in interest, under section 377.30 et seq. Plaintiff takes note of these statutes in one of her reply briefs; she must satisfy them in order to be entitled to proceed.

DISPOSITION

The judgments are reversed, with directions to grant leave to file a fourth amended complaint. Plaintiff shall recover costs.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.