Filed 7/28/21 Melton v. CHA Health Systems CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PATRICIA MELTON, Plaintiff and Appellant, v. CHA HEALTH SYSTEMS, INC., et al., Defendants and Respondents.	B302521 (Los Angeles County Super. Ct. No. BC601979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph M. Hammock, Judge. Affirmed.

Balisok & Associates, Inc. and Russell S. Balisok for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Lann G. McIntyre, George E. Nowotny, Wendy S. Dowse; Dummit Buchholz & Trapp, Scott D. Buchholz and Evan Kalooky for Defendants and Respondents CHA Health Systems, Inc. and CHA Hollywood Medical Center, L.P.

Cole Pedroza, Kenneth R. Pedroza and Matthew S. Levinson for Defendant and Respondent Farough Kerendi.

In this survival and elder abuse action, Patricia Melton sued a hospital, its limited partner, and her deceased husband's attending physician alleging that, against her instructions, they prolonged the life of her husband, Dennis Lipscomb, by approximately two months. Melton's operative second amended complaint (SAC) alleges a variety of survival causes of action, as well as a claim for elder abuse under the Elder Abuse Act (Welf. & Inst. Code, § 15600 et seq.).

The trial court granted judgment on the pleadings and dismissed Melton's other causes of action in a series of orders. Melton appeals the trial court's dismissal of six of the SAC's causes of action.

We affirm. Melton stipulated in the trial court that Lipscomb's estate suffered no economic harm as a result of defendants' allegedly tortious conduct. This is fatal to the survival causes of action alleged in the first through fifth causes of action.

The seventh cause of action involving elder abuse was also properly dismissed. The SAC neither mentioned Lipscomb's advanced healthcare directive nor pleaded that the conditions precedent to its operation had been satisfied. Under its express provisions, Lipscomb himself, not Melton, retained decision-making authority about whether to end his life until the last few days. At that point, Melton's request to end Lipscomb's life was granted. No valid claim for elder abuse exists.

FACTUAL AND PROCEDURAL BACKGROUND

A. Lipscomb's Hospitalization at the Chalet

Lipscomb was diagnosed with respiratory failure and several other medical conditions. For the last several months of his life, he was dependent on a ventilator to breathe.

On February 26, 2014, Lipscomb was admitted to defendant CHA Hollywood Medical Center, doing business as Hollywood Presbyterian Medical Center (HPMC) (HPMC and its limited partner, CHA Health Systems, Inc., are, collectively, CHA). He was then transferred to and from HPMC's subacute care unit (the Chalet) as his condition varied from acute to subacute until his death.

On March 14, 2014, CHA assigned defendant Farough Kerendi, M.D. to Lipscomb as his attending physician upon his initial admission to the Chalet. Dr. Kerendi followed the course of Lipscomb's medical care and treatment as he was transferred to and from HPMC to the Chalet.

On May 28, 2014, Lipscomb was admitted for the last time to the Chalet, which lasted 63 days.

Lipscomb's medical condition and mental faculties fluctuated during the last few months of his life. At times, he was able to communicate verbally; other times, he could communicate non-verbally, by motioning or mouthing words.

Lipscomb executed an advanced healthcare directive several years before his death using the form directive available at Probate Code section 4701. His "California Advance Health Care Directive" (the Directive) provides that power of attorney over his healthcare decision-making would transfer to Melton only in the event that certain conditions precedent were met, the first of which was that Lipscomb's attending physician

determined he could no longer make his own healthcare decisions.

On June 1, 2014, Melton allegedly presented Dr. Kerendi with a signed copy of the Directive and asked that Lipscomb's life support be withdrawn on the ground that she now possessed power of attorney over her husband's healthcare decisions.

On June 29, 2014, Kenneth Karotkin, Ph.D., conducted a psychological exam requested by Dr. Kerendi in order to assess whether Lipscomb was still capable of making his own healthcare decisions. Dr. Karotkin found Lipscomb "confused," but "alert," and "able to visually orient" to him. He also observed Lipscomb suffered "some diminished capacity," but "was unable to determine to what degree that [diminished capacity] existed and how, accordingly, that might interfere or allow him to participate" in making decisions about his healthcare.

On July 16, 2014, Lipscomb's Medicare benefits expired. That same day, after a further meeting with Melton and her family, Dr. Kerendi and Lipscomb's pulmonologist placed Lipscomb on a morphine drip until he could tolerate removal of the mechanical ventilator without experiencing any potential pain and suffering.

On July 29, 2014, Lipscomb's ventilator was removed. He died the next day.

B. Procedural History

Melton sued CHA and Dr. Kerendi, alleging they did not comply with her "demand that her husband be removed from life support" after she presented defendants with the Directive. She alleged they intentionally prolonged Lipscomb's life against her instructions so that they could continue to bill Medicare until his "benefits had been exhausted." Lipscomb's Medicare benefits

would be exhausted, Melton claimed, after 100 days at the Chalet, and defendants finally removed Lipscomb's ventilator after 112 days.

Filed May 8, 2017, the SAC pleads the following causes of action: (1) "Reckless" (*sic*); (2) "Fraud – Concealment"; (3) "Fraud – Misrepresentation"; (4) "Battery"; (5) "Intentional Infliction of Emotional Distress"; (6) "Negligent Infliction of Emotional Distress"; (7) "Elder Abuse – Neglect (Welf. & Inst. Code[, §§] 15610.57[,] 15610.63[,] 15657)" [asserted against Dr. Kerendi only]; (8) "Financial Elder Abuse (Welf. & Inst. Code[,] §§ 15610.63[,] 15657.5)"; (9) "Violation of Patient Rights (Health & [Saf.] Code[,] § 1430[, subd.] (b)"; and (10) "Unfair Business Practices ([Bus.] & Prof. Code[,] § 17200)."

The trial court's rulings from April, July, and August 2017 sustaining various demurrers and motions for summary judgment were subsequently overturned during writ review based upon whether the Medical Injury Compensation Reform Act's one-year limitations rule applied to the SAC. (See, e.g., *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 356.)

On October 12, 2017, in accordance with Division Eight's alternative writ (*Melton v. Superior Court* (Oct. 6, 2017, B284199)), the trial court vacated its prior rulings that had sustained CHA's demurrer and Dr. Kerendi's motion for summary adjudication. However, the trial court noted that its prior ruling made August 2, 2017, granting judgment on the pleadings as to the seventh cause of action asserting a claim under the Elder Abuse Act, remained intact.

CHA thereafter filed a new motion for summary judgment or adjudication. Dr. Kerendi likewise renewed his motion for summary judgment.

On July 3, 2018, the trial court dismissed the first, second, third, fifth, and seventh causes of action, treating CHA's motion for summary judgment as a motion for judgment on the pleadings.

On July 2, 2019, the trial court treated Dr. Kerendi's renewed motion for summary judgment as a motion for judgment on the pleadings, and dismissed the first, second, third, and fifth causes action. The trial court denied the motion as to the fourth cause of action for battery, which thereafter proceeded toward trial.

During a pretrial hearing conducted as jury selection was about to start, the trial court observed that the only possibility for a plaintiff's verdict awarding punitive damages was that they be supported by compensatory damages in the form of "[an unpaid hospital] bill that was given to [Melton] afterwards for the period of time in which the Medicare payments or the insurance payments did not cover."

Melton's counsel acknowledged that Melton had not paid any medical bills on her husband's behalf, and that the unpaid bill owed by the estate was no longer collectible. Concluding that "without an actual economic damage, . . . [Melton] cannot recover punitive damages on the [fourth] cause of action," the trial court advised Melton that, if she were to proceed to trial without evidence of "actual damages," the court would grant a nonsuit.

To avoid the expense and delay of impaneling a jury and making opening statements in order to make a formal nonsuit motion, the parties stipulated that no economic damages would

be recoverable at trial. The trial court granted a nonsuit on Melton's remaining cause of action for battery.

Melton timely appealed.

DISCUSSION

We limit our discussion to the trial court's rulings dismissing the first through fifth and seventh causes of action, which Melton asserts in her capacity as Lipscomb's successor in interest.[1]

A. Standards of Review

We independently review a judgment on the pleadings, and review the judgment, not the court's rationale. (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448.) " 'A defendant is entitled to judgment on the pleadings if the plaintiff's complaint does not state a cause of action. In considering whether a defendant is entitled to judgment on the pleadings, we look only to the face of the pleading under attack . . . . All facts alleged in the complaint are admitted for purposes of the motion, and the court determines whether those facts constitute a cause of action. The court also may consider matters subject to judicial notice.

---

[1] Melton's opening brief waives any challenge to the trial court's dismissal of her eighth through tenth causes of action. Melton's briefing fails to advance any argument of error involving the dismissal of the SAC's sixth cause of action for negligent infliction of emotional distress. Both respondents' briefs argue this failure to contest the trial court's dismissal of her sixth cause of action constitutes forfeiture. We agree. (See *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 667, fn. 11 ["plaintiffs' one-sentence, perfunctory request for retrial of the causation issue that cites no supporting authority constitutes a forfeiture"].)

[Citations.]' " (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 684-685.)

As to the fourth cause of action for battery, when a "nonsuit is granted after opening argument, the reviewing court accepts as true the facts asserted in the opening statement" and in the plaintiff's trial "briefs and argument." (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 664.)

B. The First through Fifth Causes of Action

California allows certain "action[s] to be maintained by 'the decedent's personal representative or, if none, by the decedent's successor in interest.' " (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 295, quoting Code Civ. Proc., § 377.30.) "This is commonly called a survival action." (*County of Los Angeles*, *supra*, at p. 295.) Melton acknowledges that the first through fifth causes of action are survival causes of action.

Melton's counsel stipulated that neither Lipscomb nor his estate had suffered financial loss. We take judicial notice of the pretrial stipulation as a judicial admission. (See Evid. Code, § 452, subd. (d) [a court may take judicial notice of its own records]; *Pang v. Beverly Hospital, Inc*. (2000) 79 Cal.App.4th 986, 989 [in considering a motion for judgment on the pleadings, a court may consider matters subject to judicial notice, such as "a party's admissions or concessions"].)

Although Code of Civil Procedure section 377.20, subdivision (a), provides that "a cause of action for or against a person is not lost by reason of the person's death," Code of Civil Procedure section 377.34 goes on to prohibit recovery for pain and suffering on behalf of the decedent where, as here, death occurs

before judgment.[2] Section 377.34 therefore operates as a "ban against recovery for pain and suffering" in survival actions. (*County of Los Angeles v. Superior Court*, *supra*, 21 Cal.4th at p. 295.)

Melton's stipulation that Lipscomb had not suffered economic loss, together with the bar of pain and suffering damages under Code of Civil Procedure section 377.34, eliminates the possibility of recovering punitive damages. (See, e.g., *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147 ["actual damages are an absolute predicate for an award of exemplary or punitive damages"]; *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801-802 [same]; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238 ["An award of actual damages, even if nominal, is required to recover punitive damages"]; *Sterling Drug, Inc. v. Benatar* (1950) 99 Cal.App.2d 393, 401-402 [same].)

Melton's admission that the estate was not injured financially, combined with the limitation of Code of Civil Procedure section 377.34, bars any recovery on the SAC's first through fifth causes of action against all defendants.[3]

---

[2] Code of Civil Procedure section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."

[3] In an effort to avoid the bar of Code of Civil Procedure section 377.34, Melton argues that punitive damages are not dependent upon recovery of compensatory damages because the

C. The Seventh Cause of Action

In order to recover under the Elder Abuse Act, the plaintiff must prove by clear and convincing evidence that the defendant is liable for physical abuse, neglect, or abandonment and, further, that the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of such abuse, neglect, or abandonment. (Welf. & Inst. Code, § 15657.)

" 'Physical abuse' " is defined to include "[b]attery, as defined in Section 242 of the Penal Code." (Welf. & Inst. Code, § 15610.63, subd. (b).) Penal Code section 242 defines "battery" as "any willful and unlawful use of force or violence upon the person of another."

Criminal liability for battery requires that the defendant's unlawful contact with the plaintiff be made without the plaintiff's consent. (See *People v. Shockley* (2013) 58 Cal.4th 400, 405 [noting that a battery is committed "when a person touches a

---

possibility of recovering enhanced remedies under the seventh cause of action for elder abuse will, by itself, support the first through fifth causes of action. This very argument was rejected by our colleagues in Division Four in *Berkley v. Dowds* (2007) 152 Cal.App.4th 518 when discussing the applicability of the so-called rule of *Mother Cobb's Chicken Turnovers v. Fox* (1937) Cal.2d 203. (*Berkley*, *supra*, at p. 530.) In simple terms, this rule states that punitive damages cannot be awarded unless actual damages are recoverable. (*Mother Cobb's Chicken*, *supra*, at p. 205.) Because Melton stipulated that she could not recover actual, compensatory damages, the rule of *Mother Cobb's Chicken* is a second, independent, ground supporting the trial court's rulings dismissing her survival causes of action. Melton's efforts to cast doubt on the continued viability of *Mother Cobb's Chicken* are unavailing.

child nonconsensually and harmfully"]; *People v. Miranda* (2021) 62 Cal.App.5th 162, 175 ["Battery occurs when a patient has not given informed consent to a medical procedure that occurs while the patient is under anesthetic"], review granted June 16, 2021, S268384.)

A civil cause of action for battery likewise requires proof that the "plaintiff did not consent to the touching." (*So v. Shin* (2013) 212 Cal.App.4th 652, 669, citing CACI No. 1300; see also *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611 ["A contact is 'unlawful' if it is unconsented to"].)

In the context of medical care, "[i]t is well settled that a physician who performs a medical procedure without the patient's consent commits a battery irrespective of the skill or care used." (*Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1266-1267.) Lack of consent is an essential element of a claim for battery. (See *Ashcraft v. King*, *supra*, 228 Cal.App.3d at p. 609 ["As a general rule, one who consents to a touching cannot recover in an action for battery"]; Civ. Code, § 3515 ["He who consents to an act is not wronged by it"].)

Melton maintains that she sufficiently pleaded a cause of action under the Elder Abuse Act for "physical abuse" of Lipscomb in the form of a "battery."

Her battery theory runs as follows. Following Lipscomb's placement on a ventilator, he "was confused and unable to make decisions." Melton "demanded of [Dr. Kerendi] that Lipscomb be removed from life support and [be] allowed to die." The legal basis for Melton's request was that she had "provided Chalet staff and [Dr.] Kerendi with Lipscomb's (*sic*) a (*sic*) duly executed and valid power of attorney for healthcare *appointing her as*

Lipscomb's agent." (Italics added.) Despite this demand, the SAC alleges Dr. Kerendi did not initiate medical action to remove life support until "some 60−70 days" following her demand.

Under California law, a patient retains the authority to make his or her own healthcare decisions unless he or she indicates that another person shall assume this authority "in a power of attorney for health care." (Prob. Code, § 4682.)

On October 21, 2013, Lipscomb executed the Directive. Although Melton did not attach the Directive to the SAC, the trial court properly took judicial notice of that document under the rule that "judicial notice may be taken of documents which form the basis of the allegations in the complaint." (See *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn. 3.)

The Directive provides that three conditions precedent must be satisfied before Lipscomb's agent obtains power of attorney over his healthcare decisions, including the authority to terminate life support.

The Directive's first condition precedent, found at part 1, section 1.3, entitled "WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE," provides: "My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box [__], my agent's authority to make health care decisions for me takes effect immediately." *Lipscomb did not check or otherwise mark the box.*

The second condition precedent, found at part 1, section 1.4, entitled "AGENT'S OBLIGATION," provides, in pertinent part: "My agent shall make health care decisions for me in accordance with this power of attorney for health care, any

instructions I give in [p]art 2 of this form, and my other wishes to the extent known to my agent. . . ."

The third condition precedent, found at part 2, section 2.1, entitled "END-OF-LIFE DECISIONS," provides in full: "I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below: [¶] [X] (a) Choice Not to Prolong Life[:] I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits, OR [¶] ___ (b) Choice to Prolong Life[:] I want my life to be prolonged as long as possible within the limits of generally accepted health care standards." *Lipscomb initialed the box adjacent to (a), and left the box adjacent to (b) blank.*

By not checking the box in part 1, section 1.3, Lipscomb elected *not to* immediately transfer life or death decision-making authority to Melton. Instead, that authority would transfer only if Lipscomb's primary physician determined that Lipscomb was unable to make his own healthcare decisions.

The SAC does not address the Directive at all. It does not plead that the first condition precedent was met, viz. that Dr. Kerendi determined Lipscomb was unable to make his own healthcare decisions.

Until July 16, 2014, Melton never possessed authority to request that Lipscomb's life be terminated. Until then, no physician had determined that Lipscomb was unable to make his own healthcare decisions. Because a physician making such a

determination is the first (of three) conditions precedent for the Directive to be triggered, authority did not pass to Melton until July 16, 2014, at which point Dr. Kerendi agreed with Melton to end Lipscomb's life.

Melton argues she was not required to plead that the conditions precedent of the Directive were met. Her reply brief argues: "There is no requirement that such elements be specifically alleged. Instead, the facts which would lead to satisfaction of one or more [of] the provisions in Lipscomb's power of attorney such as are alleged in the complaint are all that is required."

This argument is meritless. Lipscomb *could have* checked the box in part 1, section 1.3, which would have immediately transferred authority to Melton upon the Directive's execution, but he did not do so. Instead, Lipscomb expressly conditioned transfer of authority on the judgment of his attending physician. Melton's argument asks us to disregard the plain language of the Directive without supplying legal authority explaining why we may do so, and we decline that invitation.

As a result, the SAC failed to plead defendants committed a medical battery by providing medical care to Lipscomb against Melton's consent. Consequently, the SAC fails to plead a legal basis for its theory that Dr. Kerendi "physically abused" Lipscomb under the Elder Abuse Act.[4]

---

[4] Whereas the SAC could have alleged that Dr. Kerendi's wrongful "delaying tactics" exceeded the scope of Lipscomb's consent, it deliberately eschewed that approach, instead focusing on Melton's lack of consent to Lipscomb's treatment. But without pleading that the conditions precedent of the Directive had been satisfied, there was no legal basis for Melton to have obtained power of attorney over Lipscomb's healthcare decisions in the

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED

CRANDALL, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

---

first place. Thus, the SAC's failure to plead that those conditions precedent had been satisfied remains fatal to the seventh cause of action. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 382.)

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.