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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ARTHUR ANDELSON,

Plaintiff and Appellant,

v.

NEPTUNE MANAGEMENT CORP.
et al.,

Defendants and Respondents.

B271564

(Los Angeles County
Super. Ct. No. SC121354)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Vicki Roberts for Plaintiff and Appellant.

Law Offices of Priscilla Slocum and Priscilla Slocum; Early, Maslach, Karen Bernard, for Defendants and Respondents.

Plaintiff and appellant Arthur Andelson's (plaintiff's) father initially arranged to have his remains cremated and scattered at sea off the coast of Los Angeles County upon his death. After plaintiff's father died, plaintiff's brother, Robert Andelson (Robert),¹ scattered the father's ashes off the coast of *Orange* County. Plaintiff sued two mortuaries that were involved in handling his father's remains, defendants and appellants Neptune Management Corp. d/b/a Neptune Society-Sherman Oaks (Neptune Sherman Oaks) and Leneda, Inc. d/b/a Neptune Society of Riverside (Neptune Riverside) (collectively, defendants). Plaintiff's complaint asserted numerous theories of liability, most of which ultimately derived from plaintiff's contention that defendants should never have given his father's cremated remains to Robert. The parties filed competing motions for summary judgment, and the trial court granted defendants' motions. We now consider whether summary judgment was granted in error.

I. BACKGROUND

A. *Factual History*

In November 2008, Arvin Andelson (Father) entered into an "AGREEMENT FOR PRE-ARRANGED FUNERAL SERVICES" with Neptune Sherman Oaks for cremation services upon his death. The agreement provided that if Father died outside Neptune Sherman Oaks' service area (Los Angeles, Ventura, Santa Barbara, and San Luis Obispo counties), Neptune Sherman Oaks would "use its best efforts to cause a mortuary in

¹ We refer to Robert by his first name to avoid confusion with his family members who share the same surname.

the area of death to perform the cremation and, if desired, to send the ashes back to [Neptune Sherman Oaks' service area].”

Father completed additional paperwork for Neptune Sherman Oaks that same day. In “INSTRUCTIONS REGARDING DISPOSITION OF REMAINS,” Father authorized Neptune Sherman Oaks to cremate his remains and directed that his ashes be disposed of by “Burial at Sea - Three miles off the coast of the County of Los Angeles by [Neptune Sherman Oaks] or its duly appointed representative” (this agreement and instructions are hereafter referred to as the Pre-need Agreement). Father also signed a “STATISTICAL FORM,” which contained information Neptune Sherman Oaks would later need to prepare his death certificate.

Plaintiff knew about Father’s arrangement with Neptune Sherman Oaks but did not see the documents Father signed. Father told plaintiff he did not want a memorial service when he died, but Father gave no indication he had expressed that wish to Neptune Sherman Oaks.

In the summer of 2010, Father sent plaintiff a copy of his will, which he had executed in March of that year. In the will, Father bequeathed his entire estate to plaintiff, whom he also appointed executor, and expressly “le[ft] nothing” to Robert. The will also stated Father “wish[ed] to be cremated and [plaintiff was to] make all decisions with respect to [Father’s] cremation and ashes.” Neither Father nor plaintiff gave Neptune Sherman Oaks a copy of the will.

In July 2012, Father executed an “Advance Health Care Directive,” which included a power of attorney for health care (we refer to the document as the Power of Attorney). In the document’s health care instructions section, Father directed his

medical providers not to prolong his life under certain circumstances. In the power of attorney section, Father designated Robert (plaintiff's brother) to make health care decisions for him should he become incapacitated. In that same section, and in tension with his will designating plaintiff to make decisions with respect to cremation, Father empowered Robert, upon Father's death, "to make anatomical gifts, authorize an autopsy, and direct disposition of [Father's] remains"

The following month, plaintiff arranged for Father to receive hospice care. On August 1, 2012, Father executed a "REQUEST FOR CONFIDENTIAL COMMUNICATIONS REGARDING MEDICAL INFORMATION" in which he asked the hospice care provider to communicate with Robert first, and then plaintiff, regarding Father's medical information. The form asked whether Father had a "Durable Power of Attorney for Health Care," with boxes to be checked if the response was "Yes (Does [the hospice] have a copy o[n] file?)" or "No." Father did not check either box. Father also signed a form regarding "Physician Orders for Life-Sustaining Treatment." In it, Father provided directions regarding resuscitation, palliative care, and artificial means of nutrition. A box on the form was checked indicating Father had "No Advance Directive." Father also signed an "Informed Consent" form. In a section regarding advance directives, boxes were checked indicating Father knew of his right to have an advance directive and he did not have one.

In early September 2012, a hospice worker faxed a copy of Father's Power of Attorney to plaintiff. Robert, on the other hand, was unaware of the document.

Father died on September 23, 2012. Because he died in Riverside County, outside of Neptune Sherman Oaks' service

area, the task of handling Father's remains fell to Neptune Riverside. The hospice provided Neptune Riverside with a copy of the Power of Attorney. Neither plaintiff nor anyone else gave Neptune Riverside a copy of Father's will.

The day after Father's death, Neptune Riverside contacted Robert, told him they had the Power of Attorney designating him as Father's agent, and discussed with him Father's Pre-need Agreement. Neptune Riverside prepared a death certificate for Father and completed a permit application to dispose of his remains "AT SEA OFF THE COAST OF LOS ANGELES COUNTY." That same day, plaintiff emailed a copy of Father's will to Robert and advised him not to make any decisions pertaining to Father or his estate.

The next day, plaintiff called Neptune Riverside and told an unidentified employee that Father had died, plaintiff was executor of his estate, and plaintiff would pay the outstanding balance on Father's bill. The employee told plaintiff the balance had been taken care of and she was "only going to be dealing with Robert." Plaintiff replied: "That's strange. I'm the one that's the executor. There's a will." Plaintiff also told the employee he was "responsible for [Father's] remains." The employee repeated she would only deal with Robert and the phone then "went quiet." Plaintiff assumed the employee either hung up the phone or simply stopped responding. Plaintiff did not contact either defendant again.

Less than 20 minutes after plaintiff spoke with Neptune Riverside, Robert sent him an email that read: "I know that you have just been in contact with the Neptune Society. Anything related to [Father]'s ashes must be arranged through me! No need for you to contact Neptune again as I have taken care of

[Father]’s final request from his last POWER OF ATTORNEY dated July 26, 2012.” Later that day, Robert sent another email to plaintiff stating he had “already made arrangements with Neptune [to] recover [Father’s] ashes” and “[s]hould [plaintiff] be concerned, [Robert was] following [Father’s] wishes in regards to his remains.” Robert also wrote he had contacted Father’s friends “and [would] have a proper memorial as [Father] instructed [him].” Plaintiff later said he did not challenge these representations by Robert because he felt Father’s “wishes were being taken care of”

Father was cremated on October 1, 2012. The death certificate states Father’s remains were disposed of on October 1, 2012,² and the certificate identifies the place of final disposition as “AT SEA OFF THE COAST OF LOS ANGELES COUNTY.” When plaintiff received a copy of the death certificate, he believed Father’s ashes had been scattered at sea by defendants on October 1.

In actuality, Neptune Riverside released Father’s cremated remains to Robert on October 9, 2012. Before receiving the remains, Robert signed a number of forms including a (1) “Disclosure of Preneed Funeral Agreement,” in which Robert acknowledged having received a copy of Father’s instructions from Neptune Sherman Oaks about the disposition of his remains; (2) an “AUTHORITY TO CREMATE,” in which Robert certified he had authority to direct the disposition of Father’s

² According to industry practice and guidelines from the Department of Public Health, if a decedent’s remains are to be cremated, the date of disposition on the death certificate is the date of cremation.

remains and asked Neptune Riverside to release those remains to Father's family to scatter at sea; (3) a "DECLARATION FOR DISPOSITION OF CREMATED REMAINS," in which Robert represented he had the right to control the disposition of Father's remains and stated the remains would be returned to Father's family "FOR SCATTERING OFF THE LOS ANGELES COUNTY COASTLINE"; and (4) a "Release of Cremated Remains," in which Robert represented he was "entitled to possess[]" Father's cremated remains and would "take full responsibility for [their] final disposition" in accordance with law. Robert subsequently discussed with Neptune Riverside changing the county of final disposition from Los Angeles to Orange, and Neptune Riverside prepared a new permit to dispose of Father's cremated remains "AT SEA OFF THE COAST OF ORANGE COUNTY."

About a week later, Robert held a memorial service for Father that plaintiff did not attend because he believed the service was against Father's wishes. Shortly thereafter, plaintiff learned Father's cremated remains had been displayed at the service. Plaintiff became extremely upset, developed anxiety and sleep problems, and began to avoid social interaction.

In November 2012, Robert scattered Father's cremated remains at sea off the coast of Orange County. Plaintiff said he had no knowledge of what happened to Father's remains after they were displayed at the memorial service Robert held for Father.

B. Procedural History

In the operative amended complaint filed in October 2013, plaintiff sued defendants for breach of contract, common counts, fraud (premised on theories of intentional or negligent

misrepresentation, concealment, and promise without intent to perform), negligence, intentional violations of numerous statutes in the Business and Professions and Health and Safety Codes, and breach of fiduciary duty. Plaintiff sought actual damages of \$5 million, punitive damages of at least \$5 million, and statutory double and treble damages. In its answer to the amended complaint, Neptune Riverside asserted, as an affirmative defense, that plaintiff was not entitled to relief because “[d]efendants in good faith relied upon the written authorization of a person representing himself to be a person having the right to control the disposition of the remains of the decedent.”

All three parties filed motions for summary judgment, or summary adjudication in the alternative. The trial court considered plaintiff’s motion first.

In plaintiff’s view, Neptune Sherman Oaks breached the Pre-need Agreement and deceived Father by transferring its obligations to Neptune Riverside upon Father’s death, and by not attempting to have Father’s ashes returned to Neptune Sherman Oaks’ service area. Plaintiff contended Neptune Riverside had no right to release Father’s ashes to Robert because Robert’s authority under the Power of Attorney was not effective and, even if it were, the terms of the will and the Pre-need Agreement were controlling under applicable statutes. Plaintiff asserted defendants “conspired” with Robert to manufacture documents in support of Robert’s authority over Father’s remains and he contended defendants’ preparation of false documents constituted fraud. Plaintiff further argued defendants had a “special relationship” with Father’s close family members that created fiduciary obligations to plaintiff, and he asserted defendants had

violated more than a dozen statutes relating to preparing death certificates and disposing of cremated remains.

The trial court denied plaintiff's motion after hearing argument from the parties. The court found the Power of Attorney operated as a sort of amendment to Father's will regarding the disposition of his remains. The court additionally ruled defendants were exempt from liability pursuant to Health and Safety Code section 7111 because there was no "evidence [defendants had] actual notice that Robert was lying when he claimed he had authority" to control the disposition of Father's remains.³ The court also concluded the evidence showed Neptune Sherman Oaks did not breach its contract with Father, or commit fraud, by entrusting Father's remains to Neptune Riverside.

The trial court next turned to defendants' motions for summary judgment. Neptune Riverside contended it was immune from liability pursuant to Probate Code section 4121, which enumerates the criteria for a legally sufficient power of attorney; Health and Safety Code section 7110, which provides that a person authorizing cremation "warrants the truthfulness of any fact set forth in the authorization" and such person is "personally liable for all damage occasioned by or resulting from breach of such warranty"; and Health and Safety Code section 7111. Neptune Riverside further contended it owed no duty, fiduciary or otherwise, to plaintiff; plaintiff could not establish

³ Health and Safety Code section 7111 releases a crematory from liability for disposing of remains pursuant to the written authorization of a person who represents he or she has the right to control the disposition of such remains unless the crematory "has actual notice that the representation is untrue."

fraud because he could not show reliance nor could he meet the heightened burden required for punitive damages; plaintiff could not establish breach of contract because the evidence showed full compliance with the Pre-need Agreement; and plaintiff's claim for common counts was not viable because it depended on the insufficiently alleged breach of contract cause of action.

Neptune Sherman Oaks similarly contended Health and Safety Code section 7111 precluded liability because it had no actual notice Robert's representation of authority to dispose of Father's remains was untrue. And Robert's authority was genuine in any event, according to Neptune Sherman Oaks, because the Power of Attorney unambiguously empowered him to direct the disposition of Father's remains. Neptune Sherman Oaks further contended there was no evidence to support plaintiff's fraud or punitive damages claims because Neptune Sherman Oaks arranged for Neptune Riverside to carry out Father's cremation services in compliance with the Pre-need Agreement, the death certificate was prepared in accordance with state requirements, Neptune Riverside properly released Father's cremated remains to Robert, and plaintiff suffered no harm because Robert complied with Father's request to have his ashes scattered at sea.

Consistent with the positions plaintiff espoused in his own motion for summary judgment, plaintiff opposed defendants' motions by arguing the Power of Attorney was not effective and, even if it were, it could not amend or otherwise supersede the terms of Father's will. Plaintiff maintained defendants had notice of the will by virtue of plaintiff's phone call with the unidentified employee of Neptune Riverside, and he averred that if defendants were unaware of the will, the law required them to

follow the instructions set forth in Father's Pre-need Agreement over any contrary instructions in the Power of Attorney.

In their reply briefs, defendants argued plaintiff was obligated, if he genuinely had a right to control the disposition of Father's remains, to act to enforce that right by providing them a copy of Father's will, which he did not do. They added that plaintiff's two-minute phone conversation with Neptune Riverside did not provide actual notice Robert had misrepresented his authority, and plaintiff could not have provided actual notice in any event because Robert's representations were in fact true.

The trial court granted defendants' motions for summary judgment based essentially on the same findings it had made in deciding plaintiff's motion. The court concluded Neptune Sherman Oaks did not breach any duty or commit fraud when it entrusted Father's remains to Neptune Riverside; the Power of Attorney giving Robert authority to direct the disposition of Father's remains was Father's "last written directive" on that issue and therefore "amended the directive in [Father's] [w]ill"; and Health and Safety Code section 7111 exempted defendants from liability because there was no evidence they had notice Robert was lying about possessing authority to direct the disposition of Father's remains.

II. DISCUSSION

The parties do not dispute the material facts in this case. This appeal turns, therefore, on how the law applies to those facts. In order for plaintiff to show a triable issue exists regarding any of his causes of action, it must be the case that Neptune Sherman Oaks acted improperly when it arranged for

Neptune Riverside to handle the disposition of Father's remains or Neptune Riverside acted improperly when it gave Father's remains to Robert. Our review of the record and applicable legal authority reveals no genuine dispute requiring either theory to be tried to a jury. Because defendants complied with the laws governing control over Father's remains, plaintiff fails to show the trial court incorrectly granted defendants' motions for summary judgment or, a fortiori, to show plaintiff should have been entitled to summary judgment against them.

A. Standard of Review

A party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*)). A plaintiff may move for summary judgment on the ground there is no defense to the action; a defendant may move for summary judgment on the ground plaintiff's action lacks merit. (Code Civ. Proc., § 437c, subd. (a)(1); *Aguilar, supra*, at p. 843.) Once the moving party establishes a prima facie showing of the absence of a defense, or lack of merit, as the case may be, the other party may defeat summary judgment by presenting evidence "that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, at p. 850.)

We review a grant or denial of summary judgment de novo. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499; *Regents of the University of California v. Superior Court* (1999) 20 Cal.4th 509, 531.) We consider the record before the trial court at

the time of its ruling, with the exception of evidence to which the court sustained objections; we liberally construe the evidence in support of the party opposing summary judgment; and we resolve any doubts regarding the evidence in favor of that same party. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

B. Statutes Applicable to Resolution of the Summary Judgment Motions

The Uniform Health-Care Decisions Act (Prob. Code, § 4670 et seq.) permits an adult with capacity to “execute a power of attorney for health care” which “may authorize the agent to make health care decisions and may also include individual health care instructions.” (Prob. Code, § 4671, subd. (a).) A power of attorney for health care is considered an “advance health care directive” and is legally sufficient if it includes the date of execution, the patient’s signature, and an acknowledgment before a notary public. (Prob. Code, §§ 4605, 4673, 4680.)

Before his or her death, a decedent “may direct, in writing, the disposition of his or her remains and specify funeral goods and services to be provided.” (Health & Saf. Code, § 7100.1, subd. (a).) Unless the decedent signs and dates a later statement altering that direction, it “may not be altered, changed, or otherwise amended in any material way, except as may be required by law, and shall be faithfully carried out upon his or her death” (Health & Saf. Code, § 7100.1, subd. (a).) Unless the power of attorney for health care provides otherwise, Probate Code section 4683 allows a designated agent to make certain decisions “that may be effective after the principal’s death,” including “[d]irecting the disposition of [the principal’s] remains

under Section 7100 of the Health and Safety Code.” (Prob. Code, § 4683, subd. (b)(3).)

A principal may revoke any or all of an advance directive “at any time and in any manner that communicates an intent to revoke” except when it comes to the revocation of a designated agent, which can only be effected “by a signed writing or by personally informing the supervising health care provider.” (Prob. Code, § 4695.) An advance directive that conflicts with an earlier directive revokes the earlier directive “to the extent of the conflict.” (Prob. Code, § 4698.)

One who provides written authorization for cremation “warrants the truthfulness of any fact set forth in the authorization” and “is personally liable for all damage occasioned by or resulting from breach of such warranty.” (Health & Saf. Code, § 7110.) A “crematory is not liable for cremating . . . or for other disposition of remains permitted by law, pursuant to that authorization, unless it has actual notice that the representation is untrue.” (Health & Saf. Code, § 7111.)

C. Preliminary Issues

In rather cursory fashion, plaintiff challenges the trial court’s denial of plaintiff’s motion to strike Neptune Sherman Oaks’ motion for summary adjudication and the form of its separate statement of undisputed material facts. Neither challenge warrants reversal.

Plaintiff’s motion to strike asserted Neptune Sherman Oaks violated the requirement that a notice of motion for summary adjudication, even if offered as an alternative to summary judgment, identify the specific causes of action as to which adjudication is sought (Cal. Rules of Court, rule 3.1350(b)).

The trial court denied plaintiff's motion, concluding Neptune Sherman Oaks' failure to conform to applicable rules did not prejudice plaintiff. On appeal, plaintiff provides no reasoned argument for why the trial court's ruling was erroneous apart from claiming the ruling was inconsistent with the court's prior treatment of plaintiff's own motion⁴ and asserting our review of the issue should be de novo. That does not suffice. By granting summary judgment to defendants, the trial court concluded all of plaintiff's claims were meritless. Thus, whether or not plaintiff or Neptune Sherman Oaks was allowed to move for summary adjudication of a subset of those claims is irrelevant. And the lack of any prejudice to plaintiff is just as apparent under a de novo standard of review as it is under an abuse of discretion standard.

Further, as to plaintiff's argument that Neptune Sherman Oaks did not properly format its separate statement of material facts (Cal. Rules of Court, rule 3.1350(h)), we conclude the trial court was within its discretion to reject the formatting challenge.⁵ (*Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 309 [ruling on motion to strike

⁴ The trial court denied plaintiff's motion for summary adjudication, offered in alternative to plaintiff's motion for summary judgment, on the ground he failed to identify the specific issues sought to be adjudicated.

⁵ Plaintiff also asserts, for the first time on appeal, that Neptune Sherman Oaks failed to separately identify three of plaintiff's causes of action in its separate statement. (Cal. Rules of Court, rule 3.1350(d).) Plaintiff did not raise this issue in the trial court, and we consider it forfeited.

pleading for nonconformity with court rule reviewed for abuse of discretion])

D. The Power of Attorney Authorized Neptune Riverside to Release Father's Cremated Remains to Robert

Plaintiff contends Robert's authority under the Power of Attorney never took effect and, even if it did, the directions set forth therein could not supplant the directions in Father's will or the Pre-need Agreement. Plaintiff misunderstands applicable law.

Unless a power of attorney for health care provides otherwise, a designated agent has no authority to make decisions for the principal while the principal is alive with capacity to make his or her own decisions. (Prob. Code, § 4682; *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1128 (*Young*).) But that rule ceases upon the principal's death, at which point the designated agent may direct the disposition of the principal's remains unless the power of attorney specifies otherwise. (Prob. Code, § 4683.) Here, Father explicitly granted Robert the right to control the disposition of his remains. (Compare *Young, supra*, at p. 1129 [agent had no authority to bind principal to arbitration agreement where the power of attorney contained "no terms authorizing the patient's agent to make any decisions other than 'health care decisions' for the patient"].) Thus, even though the Power of Attorney did not entitle Robert to make health care decisions during Father's life (while he continued to possess capacity), it authorized Robert to make certain decisions, including to direct the disposition of Father's remains, once Father died.

Nor did Father revoke the Power of Attorney. The fact that he executed subsequent health care forms indicating, through checked and unchecked boxes, he had no advance directive is not sufficient, without more, to show he intended to revoke the Power of Attorney. (Prob. Code, § 4695 [revocation of agent designated in power of attorney for health care may only be effected “by a signed writing or by personally informing the supervising health care provider”].) A checked or unchecked box regarding Father’s possession of an advance directive is not “a signed writing” showing an intent to revoke the designation of an agent, and there is no evidence Father personally informed supervising hospice personnel of any intent to revoke the authority he previously granted to Robert.

Indeed, at most, the forms Father signed suggest he intended to revoke the health care instructions section of the Power of Attorney document. (Because the forms Father later signed provided more detailed health care instructions than the Power of Attorney, there would have been no reason for Father’s health care providers to rely on the less specific instructions in the Power of Attorney.) The health care instructions portion of the document was separate, however, from its power of attorney provisions, and it is one of those power of attorney provisions that authorized Robert to control the disposition of Father’s remains.⁶

⁶ Plaintiff argues the Power of Attorney was never effective by its own terms because Robert’s authority under section 1.3 of the document would only become effective if Father’s primary physician determined he was “unable to make [his] own health care decisions” or if Father checked a box giving Robert “authority to make health care decisions for [Father] . . . immediately.” Father did not authorize Robert to

Thus, even if Father's conduct suggested an intent to revoke the health care instructions portion of the Power of Attorney, it did not suffice to show he intended to revoke the power of attorney provisions. And the fact that hospice personnel forwarded a copy of the Power of Attorney to Neptune Riverside upon Father's death indicates they had been given no reason to believe the Power of Attorney had been revoked.

Under Health and Safety Code section 7100.1, a decedent's last written directions regarding the disposition of his or her remains are to be carried out upon his or her death. By virtue of this statute, and because the Power of Attorney contained the last written directions of Father regarding disposition of his remains, its instructions controlled over prior, conflicting written instructions in both his will and the Pre-need Agreement.⁷

exercise immediate authority, nor was he ever determined to lack capacity. Nevertheless, plaintiff's argument fails because section 1.3 pertains merely to the preceding section in the Power of Attorney, which gives the agent authority to make health care decisions during the principal's life. The provision at issue in this case (section 1.5) pertains to the agent's "POSTDEATH" authority to dispose of remains, which is entirely separate from the agent's authority while the principal remains alive.

⁷ Plaintiff contends a power of attorney can never supply the last written directions of a decedent because that construction would conflict with Health and Safety Code section 7100, which prioritizes who has the right to control the disposition of a decedent's remains "unless other directions have been given by the decedent pursuant to Section 7100.1" We see no conflict. The fact that section 7100 gives first priority to "[a]n agent under a power of attorney for health care who has the right and duty of disposition under Division 4.7 (commencing with Section 4600) of

Plaintiff's contention that a will always constitutes a decedent's final instructions is legally incorrect.⁸

Because the Power of Attorney validly authorized Robert to control Father's remains, Neptune Riverside committed no misconduct in arranging with Robert for their disposition. The fact that Robert was unaware he had been designated as Father's agent did not negate the validity of the Power of Attorney. Apart from telling Neptune Riverside in a two-minute phone call that Father had a will and plaintiff was responsible for his remains, plaintiff did nothing to prove his asserted authority trumped Robert's or to stop Neptune Riverside from giving Father's ashes to Robert. Plaintiff was given a copy of the Power of Attorney more than two weeks before Father's death, and Robert did not pick up Father's ashes until more than two weeks after Father's death. During that time, plaintiff never provided Neptune

the Probate Code" (Health & Saf. Code, § 7100, subd. (a)(1)) does not mean that a power of attorney cannot supply "other directions." Section 7100, subdivision (a)(1) refers to a designated agent to whom the power of attorney does not explicitly grant authority to control the disposition of remains. This case involves a different circumstance—Father explicitly granted such authority to Robert in writing. Thus, Robert's authority derives from the last written directions (the "other directions") provided in the Power of Attorney.

⁸ Plaintiff misreads Probate Code section 4265 when he argues that statute prohibits a power of attorney from modifying a will. Section 4265 provides that a power of attorney may not authorize a designated agent to amend the principal's will. Here, the Power of Attorney did not authorize Robert to amend Father's will. Father himself altered the effect of the will's provisions by executing the Power of Attorney.

Riverside a copy of Father's will or instructed them not to release Father's cremated remains until control of their disposition could be sorted out. Under the circumstances, there is no factual dispute that Neptune Riverside was fully justified in releasing the ashes to Robert based on the Power of Attorney and Robert's representations.

E. Defendants Complied With the Pre-need Agreement

Plaintiff contends the Pre-need Agreement obligated defendants to scatter Father's cremated remains off the coast of Los Angeles County rather than give those remains to Robert to scatter elsewhere. Plaintiff further suggests that an agreement between defendants, pursuant to which Neptune Sherman Oaks always referred customers to Neptune Riverside, deceived Father and violated Neptune Sherman Oaks' promise to "use its best efforts to cause a mortuary in the area of death to perform [Father's] cremation" Plaintiff's contentions are meritless.

For the reasons discussed in the preceding section, defendants were bound to follow the Power of Attorney, as Father's last written directions, regarding the disposition of his remains. Consequently, to the extent the Power of Attorney conflicted with the directions in the Pre-need Agreement, defendants were not contractually bound to follow the Pre-need Agreement. (See Prob. Code, § 4698 ["An advance health care directive that conflicts with an earlier advance directive revokes the earlier advance directive to the extent of the conflict"].)

Plaintiff suggests the arrangement between Neptune Sherman Oaks and Neptune Riverside contravened the "best efforts" clause in the Pre-need Agreement and deceived Father, who was unaware of defendants' referral arrangement.

Disregarding the question of whether plaintiff has standing to raise this claim of breach in the first place, or what damages it occasioned, we see no basis on which a factfinder could conclude Father's ignorance of defendants' relationship has any bearing upon Neptune Sherman Oaks' agreement to use best efforts.

“[A] ‘best efforts’ provision ‘requires a party to make such efforts as are reasonable in [] light of that party’s ability and the means at its disposal and of the other party’s justifiable expectations’ 2 Farnsworth on Contracts § 7.17 at 350 (2d ed. 1998)[].” (*Samica Enterprises, LLC v. Mail Boxes Etc. USA, Inc.* (C.D. Cal. 2008) 637 F.Supp.2d 712, 717 (*Samica*)). The essence of the standard is a requirement of “diligence.” (*Ibid.*)

Neptune Sherman Oaks promised to use its best efforts to procure cremation services for Father in the vicinity of his death. By arranging for Neptune Riverside to perform those services, Neptune Sherman Oaks went beyond fulfilling its obligation to use diligence; it actually achieved the desired result—the provision of cremation services in the area where Father died. Neptune Sherman Oaks never promised Father it would procure services from any particular provider. The fact that finding an alternative cremation provider was aided by its prior arrangement with Neptune Riverside did not keep it from fulfilling its obligation to use best efforts. Nor has plaintiff shown a genuine issue that the outcome would have been different had Neptune Sherman Oaks used greater effort than it did. (See *Samica, supra*, 637 F.Supp.2d at p. 718.)

F. Defendants Did Not Create False Documents

Plaintiff contends defendants included falsehoods in Father's death certificate, the Statistical Form, and other

documents in order to deceive Father and plaintiff. His assertions are not supported by the record or applicable authority.

Father's death certificate provides a "DISPOSITION DATE" of October 1, 2012, with the "PLACE OF FINAL DISPOSITION" as "AT SEA OFF THE COAST OF LOS ANGELES COUNTY." Plaintiff interpreted the death certificate as representing that defendants scattered Father's ashes at sea off of Los Angeles County on October 1, but the fact that plaintiff's belief differed from what actually occurred does not mean defendants prepared an intentionally false document. Pursuant to state law guidance and industry practice, neither of which are in dispute, Father's cremation date was designated as the disposition date. Defendants' conformity to prevailing authority was not a misrepresentation of fact. While the death certificate proved inaccurate regarding Father's actual place of final disposition, Neptune Riverside was not aware at the time it prepared this certificate that Robert would scatter Father's ashes off of Orange County rather than Los Angeles County. Thus, it cannot be said there was an intentional (or even negligent) misrepresentation.

Plaintiff correctly avers that certain information in the Statistical Form, such as the inclusion of Robert's name as the person in charge of Father's cremation arrangements, appears to have been added by a different person, and perhaps at a different time, than when Father initially signed the document. But plaintiff cannot demonstrate the addition of Robert's name was a misrepresentation because Robert did, in fact, hold authority to control Father's disposition through the Power of Attorney. Furthermore, as plaintiff himself maintains, the Statistical Form

was not a part of Father's Pre-need Agreement but merely an internal document containing information defendants would need to prepare Father's death certificate. Because Robert's designation as Father's agent occurred after Father signed the Statistical Form, it is only natural that his name would have been added to the form at a later date, by someone other than Father.⁹

Plaintiff's other claims of falsified documents are also unsupported. There is no evidence Neptune Riverside falsely created documents to support Robert's authority over Father's ashes. Father, and the Power of Attorney Father created, are what gave Robert that authority. Neptune Riverside merely created documents to conform to Father's decision. Plaintiff complains, for example, that Neptune Riverside "illegally replac[ed]" Father's Pre-need Agreement when it obtained Robert's "DECLARATION FOR DISPOSITION OF CREMATED REMAINS" and "AUTHORITY TO CREMATE." Neptune Riverside's conduct was not improper. Because the Power of Attorney—not the Pre-need Agreement—was the last written document describing who had authority over Father's remains, Neptune Riverside appropriately sought authorization from Robert. (See Health & Saf. Code, § 7100.1, subd. (a).)

⁹ Plaintiff also posits Neptune Sherman Oaks listed a false home address and phone number for Father on the Pre-need Agreement and Statistical Form in order to preserve a sales commission that should have gone to Neptune Riverside. Whatever the merit—or lack thereof—of this argument, it pertains to the relationship between the two defendants and has no bearing on plaintiff's claims.

While some of the documents prepared by Neptune Riverside indicate Father's ashes would be scattered off the coast of Los Angeles County, plaintiff points to nothing in the record to establish such statements were misrepresentations when made. What the record shows is that Neptune Riverside prepared documents showing Father's ashes would be scattered off the coast of Los Angeles County because it had not yet learned Robert intended to scatter the ashes elsewhere.¹⁰

G. Defendants are Entitled to Summary Judgment

With the preceding conclusions established by the record before the trial court, defendants' entitlement to summary judgment is readily apparent.

1. Breach of contract and common counts causes of action

A breach of contract cause of action requires proof of "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Because the record establishes defendants complied with the Pre-need Agreement—to the extent its terms were not superseded by the Power of Attorney under

¹⁰ Plaintiff also faults Neptune Riverside for obtaining Robert's written "AUTHORITY TO CREMATE" Father eight days after Father was already cremated, but he provides no authority or argument as to how this conduct caused harm. Likewise, plaintiff fails to show how a discrepancy in identifying which crematory Father's body would be sent to amounted to an intentional misrepresentation or resulted in any harm.

applicable law—plaintiff has not shown a genuine issue of material fact warrants trial on his breach of contract cause of action.

A common count claim may be brought to enforce a debt and usually derives from a contractual, or quasi-contractual, relationship. (See *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [essential allegations of common count are statement of indebtedness, the consideration such as goods sold or services performed, and nonpayment]; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 554, p. 682.) Plaintiff's cause of action for common counts, as pled in the operative complaint, is based on the same facts that underlie his breach of contract cause of action. Because the contract claim is without merit, plaintiff's common counts cause of action was also appropriately resolved against him on summary judgment. (*Lambert v. Southern Counties Gas Co. of Cal.* (1959) 52 Cal.2d 347, 353 [common count “premised on detailed factual allegations in another count must stand or fall with the other count”].)

2. *Negligence and breach of fiduciary duty causes of action*

Liability based on negligence requires proof of “duty, breach, causation, and damages.” (*Conroy v. Regents of the Univ. of Cal.* (2009) 45 Cal.4th 1244, 1250.) Providers of crematory services owe “a duty to respect[] the expectations of both decedents and their survivors that the remains will be accorded dignified and appropriate treatment.” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 898.) Here, plaintiff fails to raise a genuine issue as to whether defendants breached that duty. Giving Father's cremated remains to Robert in accordance with

the Power of Attorney and applicable law did not show disrespect to Father's remains. (Compare *id.* at p. 879 [allegations defendants mutilated decedents' remains, sold body parts for profit, took and sold gold from the remains, and cremated up to 15 bodies together].)

Nor has plaintiff raised a genuine issue of material fact to support defendants' liability for breach of fiduciary duty. Insofar as a provider of cremation services might owe a fiduciary duty to a decedent's family member, that duty would be limited to "properly prepar[ing] and dispos[ing] of [the decedent's] remains." (*Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1140.) Plaintiff does not claim defendants improperly prepared Father's remains, and we have concluded they transferred those remains for disposal in accordance with applicable law. It follows that there can be no merit to plaintiff's fiduciary duty cause of action.

3. *Fraud cause of action*

Liability for fraud requires proof of (1) a misrepresentation, which may include concealing a fact or making a promise with the intent not to perform, (2) knowledge of the falsity, (3) the intent to induce reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The related tort of negligent misrepresentation does not require intent to defraud but only "[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' (Civ. Code, § 1710, subd. 2)," or "[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' (Civ. Code,

§ 1572, subd. 2[].)” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174.)

The record is devoid of evidence, or reasonable inferences therefrom, that defendants knowingly misrepresented or concealed any material facts upon which plaintiff relied to his detriment. Neptune Riverside prepared the death certificate in conformity with prevailing industry practice and state agency guidance. It created other documents relating to Father’s final disposition in accordance with the Power of Attorney and based on its reasonable belief at the time that Robert would scatter Father’s ashes off the coast of Los Angeles County. Even if Neptune Sherman Oaks intentionally misstated Father’s address and phone number on the Pre-need Agreement and Statistical Form, or failed to inform Father of its relationship with Neptune Riverside, plaintiff did not adduce any substantial evidence of reliance on, or damages arising from, those acts.

4. *Health and Safety Code section 7111*

Contrary to plaintiff’s assertions, Neptune Riverside specifically pled immunity under Health and Safety Code section 7111 as an affirmative defense: “Defendants in good faith relied upon the written authorization of a person representing himself to be a person having the right to control the disposition of the remains of the decedent.” Because any liability Neptune Sherman Oaks might bear for the release of Father’s ashes to Robert is derivative of Neptune Riverside’s conduct in releasing the ashes, Neptune Riverside’s entitlement to immunity would shield Neptune Sherman Oaks as well.

Of course, an immunity defense is unnecessary where the party to be immunized would not be liable absent the defense.

The language of Health and Safety Code section 7111 bears this out. By immunizing a crematory for disposing of remains pursuant to a written representation of authority “unless [the crematory] has actual notice that the representation is untrue,” the statute sets forth two conditions: one, actual notice, and two, an untrue representation. Because Robert’s representation of authority was true in this case, there was no way for Neptune Riverside to have received actual notice his representation was false. (Compare *Sinai Temple v. Kaplan* (1976) 54 Cal.App.3d 1103, 1109-1110 [cemetery entitled to rely on representation of person who did not actually have priority to control disposition of remains].) The fact that Robert was not aware of his authority until Neptune Riverside informed him of it did not render Robert’s authority false or his representation untrue.

DISPOSITION

The judgment is affirmed. Neptune Management Corp. d/b/a Neptune Society-Sherman Oaks and Leneda, Inc. d/b/a Neptune Society of Riverside are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.*

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