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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

UNIVERSITY OF SOUTHERN
CALIFORNIA et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

DAVID PULLMAN,

Real Party in Interest.

B276770 c/w B277757

(Los Angeles County
Super. Ct. No. BC597684)

ORIGINAL PROCEEDINGS in mandate. Malcolm
Mackey, Judge. Petitions granted.

Reback, McAndrews, Kjar, Warford & Stockalper,
Patrick E. Stockalper and Stephen A. Diamond for

Petitioners University of Southern California and Rick A. Friedman.

Brobeck, West, Borges, Rosa & Douville, Louise M. Douville and Matthew A. Yarvis for Petitioner St. Vincent Medical Center.

No appearance for Real Party in Interest David Pullman.

In the underlying action, real party in interest David Pullman sought punitive damages in connection with several of his claims against petitioners Rick A. Friedman, M.D., University of Southern California (USC), and St. Vincent Medical Center (St. Vincent). The trial court denied petitioners' motions under Code of Civil Procedure section 425.13 to strike the requests for punitive damages.¹ Petitioners seek relief by writ from those rulings. We grant their petitions for writ of mandate.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The limited record before us discloses the following facts: In October 2015, Pullman filed the operative complaint in the underlying action, asserting claims for

¹ All further statutory citations are to the Code of Civil Procedure unless otherwise indicated.

professional negligence, intentional misrepresentation, lack of informed consent, battery, and fraud in the inducement. Accompanying the claims for intentional misrepresentation, battery, and fraud in the inducement were requests for punitive damages (Civ. Code, § 3294). In addition to petitioners, the complaint named Marc S. Schwartz, M.D., and House Ear Clinic, Inc. as defendants.

The action was assigned to Superior Court Judge Holly J. Fujie. While the action was pending before Judge Fujie, all the defendants asserted challenges to the complaint's claims and requests for punitive damages. At some point, Schwartz and House Ear Clinic filed a demurrer to the claims for intentional misrepresentation, battery, and fraud in the inducement, as well as a motion to strike the requests for punitive damages accompanying those claims. The motion to strike contended that Pullman had not complied with section 425.13 in including the requests in his complaint. On December 11, 2015, petitioners USC and Friedman demurred to the claims for intentional misrepresentation, lack of consent, battery, and fraud in the inducement, and sought to strike the requests of punitive damages for noncompliance with section 425.13. Later, on December 15, 2015, St. Vincent filed a similar demurrer and motion to strike.

Judge Fujie ruled only on Schwartz's and House Ear Clinic's demurrer and motion to strike before the action was transferred to Superior Court Judge Malcolm Mackey. In an order dated January 22, 2016, Judge Fujie overruled

Schwartz's and House Ear Clinic's demurrer, but granted their motion to strike for failure to comply with section 425.13.

On July 26, 2016, following a hearing, Judge Mackey overruled petitioners' demurrers and denied their motions to strike. Friedman and USC filed a petition for writ of mandate challenging the ruling on their motion to strike, and St. Vincent filed a separate petition for writ of mandate challenging the ruling on its motion to strike. On January 19, 2017, we consolidated the petition proceedings for purposes of our review, and issued an alternative writ. On January 24, 2017, Judge Mackey declined to vacate his rulings on the motions to strike and issue new orders granting them.

DISCUSSION

Petitioners contend the trial court erred in declining to strike the complaint's requests for punitive damages, arguing that Pullman failed to comply with section 425.13. For the reasons discussed below, we agree.

A. Standard of Review

A motion to strike a complaint in whole or in part is governed by sections 435 through 437. Section 436, subdivision (b), provides that "[t]he court may, upon a motion . . . [s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." The trial court's ruling

on this matter is reviewed for abuse of discretion. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

B. *Governing Principles*

The key question regarding the motions to strike concerns the application of section 425.13. Subdivision (a) of section 425.13 (section 425.13(a)) provides that “[i]n any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint” unless the plaintiff secures an order permitting the claim upon a showing that “there is a substantial probability that the plaintiff will prevail on the claim”²

² Subdivision (a) of section 425.13 states: “In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within
(Fn. continued on next page.)

As Pullman obtained no such order prior to filing his complaint, section 425.13(a) bars its requests for punitive damages if the claims to which those requests attach constitute “action[s] for damages arising out of the professional negligence of a health care provider” The meaning of that portion of the statute was examined by our Supreme Court in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181 (*Central Pathology*). There, the plaintiff sought leave to amend her complaint against several health care providers to include new claims for which she sought punitive damages. (*Id.* at p. 185.) The proposed additional claims were for fraud and intentional infliction of emotional distress, predicated on allegations that after she submitted to a pap smear test, the defendants intentionally failed to disclose that the test revealed abnormal cells, and then “cover[ed] up” the identity of the facility responsible for the test results. (*Ibid.*) In granting leave to amend, the trial court ruled that section 425.13 was applicable only to claims for professional negligence. (*Central Pathology, supra*, at p. 185.)

Rejecting that interpretation of the statute, our Supreme Court held that section 425.13(a) encompasses a broader range of claims because it refers to “actions . . . ‘*arising out of professional negligence*’” (italics added).

two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.”

(*Central Pathology*, *supra*, 3 Cal.4th at p. 192.) The court stated: “[I]dentifying a cause of action as an ‘intentional tort’ as opposed to ‘negligence’ does not itself remove the claim from the requirements of [the statute]. The allegations that identify the nature and cause of a plaintiff’s injury must be examined to determine whether each is directly related to the manner in which professional services were provided. Thus, a cause of action against a health care provider for battery predicated on treatment exceeding or different from that to which a plaintiff consented is governed by section 425.13 because the injury arose out of the manner in which professional services are provided. By contrast, a cause of action against a health care provider for sexual battery would not, in most instances, fall within the statute because the defendant’s conduct would not be directly related to the manner in which professional services were rendered. [Citation.]” (*Ibid.*) The court further concluded that the plaintiff’s claims for fraud and intentional infliction of emotional distress fell within the scope of section 425.13(a), as they “emanate[d] from the manner in which defendants performed and communicated the results of medical tests, a matter that is an ordinary and usual part of medical professional services.” (*Id.* at pp. 192-193.)

Following *Central Pathology*, appellate courts have examined the scope of section 425.13(a). In *Davis v. Superior Court* (1994) 27 Cal.App.4th 623, 625-626 (*Davis*), the plaintiff sued his employer’s workers’ compensation insurer and three doctors, asserting that after he suffered

an injury, they conspired to deprive him of workers' compensation benefits. His complaint alleged that at the insurer's direction, the doctors misrepresented their qualifications to treat him, lied to him regarding his medical condition, provided inadequate treatment, and covered up their incompetence. (*Ibid.*) One of the doctors filed a motion to strike the complaint's request for punitive damages due to noncompliance with section 425.13(a), which the trial court denied. (*Davis, supra*, at pp. 625-626.)

When the doctor sought relief by writ petition, the plaintiff tried to distinguish his circumstances from those presented in *Central Pathology*, pointing to the complaint's allegations that the doctor's misconduct began before he treated the plaintiff, and that the doctor acted with the motive of enriching himself through a conspiracy potentially affecting many injured workers. (*Davis, supra*, 27 Cal.App.4th at pp. 626-628.) The appellate court concluded that those allegations did not control the application of section 425.13(a), stating: "Under *Central Pathology*, the significant factor is not what motivated the physician to engage in the unethical, unprofessional or illegal conduct, or when he or she concocted the fraudulent scheme or made the misrepresentations. The focus is on the physician's conduct. Our inquiry begins with whether the doctor accused of the improper behavior was engaged in the practice of medicine at the time he or she was consulted by the patient. If so, we next examine the physician's activity. If the acts performed were those in which a medical practitioner ordinarily would

be expected to perform in his or her capacity as a health care provider, we then examine the misrepresentation allegedly made. If it relates to the acts performed by the physician in his or her capacity as a health care provider, as a matter of law the misrepresentation occurred during the rendition of medical services and section 425.13(a) applies.” (*Davis, supra*, at pp. 628-629.) Applying that analysis, the appellate court held that the plaintiff’s claims fell within the scope of section 425.13(a), as they relied on allegations that the doctor misrepresented his qualifications and intention to render proper treatment. (*Davis, supra*, at p. 629.)

In *Cooper v. Superior Court* (1997) 56 Cal.App.4th 744, 746 (*Cooper*), the plaintiff’s complaint asserted several claims against a doctor, alleging that he committed a sexual battery by inappropriately manipulating the plaintiff’s genitalia while providing gynecological services. According to the complaint, when the plaintiff visited the doctor’s office for the removal and replacement of an intrauterine device, the doctor performed the procedure with bare hands, then rubbed the plaintiff’s clitoris and tried to kiss her. (*Id.* at p. 747.) The trial court denied the doctor’s motion to strike the complaint’s prayer for punitive damages for noncompliance with section 425.13(a), apparently relying on the remark in *Central Pathology* that “in most instances,” claims of sexual battery against a health care provider are not subject to the statute. (*Cooper, supra*, at p. 750, italics omitted.) Reversing, the appellate court explained that the remark, though accurate, did not encompass the

circumstances alleged in the plaintiff's complaint: "Most types of services rendered by health care providers do not involve the genitalia. Thus if a podiatrist, ophthalmologist or dentist touches or manipulates a patient's genitalia, there will usually be no arguable connection between such conduct and the rendition of legitimate health care. . . . The list of examples of this type is endless. A doctor rendering gynecological care, by contrast, cannot render the full panoply of gynecological services without touching, probing or otherwise manipulating a woman's genitalia." (*Id.* at p. 751.)

C. Allegations in Complaint

Pullman's complaint requests punitive damages in connection with the claims for intentional misrepresentation, battery, and fraud, which are based on the following factual allegations: In August 2013, appellant visited the House Ear Clinic, complaining of a loss of hearing in his right ear. After a CAT scan revealed an acoustic neuroma in that ear, the defendants recommended a specific type of surgery -- namely, a translabyrinthine craniotomy -- to remove the acoustic neuroma. That recommendation was based on the false representation that the proposed surgery was safer and carried a lesser risk of damage to Pullman's facial nerves than any other procedure or course of treatment. The defendants otherwise failed to discuss alternative treatments with Pullman, and misrepresented their professional abilities and success rates. Pullman

relied on these omissions and misrepresentations in deciding to undergo the recommended surgery.

The complaint further alleges that in July 2014, Pullman met with Drs. Friedman and Schwartz, who are affiliated with USC and the House Ear Clinic. They stated -- falsely -- that less than 2.5 percent of the patients from whom they had removed an acoustic neuroma experienced facial nerve damage due to the surgery; in fact, over 50 percent of their surgery patients suffered facial nerve damage. They also stated that they would be present during the entire procedure. When Pullman instructed them to stop the surgery if they believed there was any damage to his facial nerve, even if the acoustic neuroma was not completely removed, they agreed to do so. Pullman would not have agreed to undergo the surgery absent these representations and assurances.

According to the complaint, on August 1, 2014, Pullman underwent the surgery at St. Vincent. Friedman and Schwartz failed to make proper use of a facial nerve monitoring device, and continued the surgery despite serious concerns regarding the state of Pullman's facial nerve, which was non-responsive to repeated stimulations during the procedure. In addition, Friedman left the operating room before the procedure was completed after rushing his portion of the surgery. During the surgery, Pullman's seventh cranial nerve was damaged, resulting in severe disfigurement and paralysis of the right side of his face.

D. *Analysis*

We conclude that the complaint's requests for punitive damages in connection with the claims for intentional misrepresentation, battery, and fraud in the inducement are subject to section 425.13(a). The application of that statute does not depend upon "technical pleading distinctions between intentional versus negligent tort theories," but upon whether the nature and cause of the alleged injuries are "directly related to the manner in which professional services were provided." (*Cooper, supra*, 56 Cal.App.4th at p. 749, quoting *Central Pathology, supra*, 3 Cal.4th at p. 192.)

Here, the complaint alleges that after an acoustic neuroma was discovered in Pullman's right ear, he consulted with Friedman of USC, who induced Pullman to undergo Friedman's recommended type of surgery by misrepresenting its risks of facial nerve injury and making various promises and assurances. When the surgery occurred at St. Vincent, Friedman breached those promises and assurances by failing to ensure adequate monitoring for nerve injury, continuing the surgery despite signs of nerve injury (contrary to the agreed-upon restrictions regarding the surgery), rushing his portion of the surgery, and leaving the operating room before the surgery was complete. As these allegations against petitioners are essentially similar to the allegations in *Davis* and *Cooper* that supported the application of section 425.13(a), they are "directly related" to

the rendition of health care by petitioners, for purposes of that statute.

Before the trial court, Pullman suggested that petitioners' alleged misrepresentation and fraud in the inducement were "separate and apart from the ordinary and usual practice of medicine," arguing that Friedman's misrepresentations regarding the type of surgery he recommended occurred before the surgery took place, and amounted to a "sales pitch" facilitating a "profit-making scheme" aimed to persuade Pullman to undergo the surgery.³ However, it is well established that "as an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243.) Accordingly, Friedman's alleged remarks to Pullman regarding the safety and efficacy of the recommended surgery constitute the manner in which an "ordinary and usual part" of professional medical services was carried out. (*Central Pathology, supra*, 3 Cal.4th at p. 193.) In sum, the trial court erred in denying petitioners' motions to strike the

³ Pullman submitted no preliminary opposition or return in opposition to the petitions for writ of mandate.

complaint's requests for punitive damages for failure to comply with section 425.13(a).⁴

⁴ The decisions upon which Pullman relied below are inapposite, as in each case, the appellate court concluded that the pertinent requests for punitive damages were subject to section 425.13(a). (*Williams v. Superior Court* (2002) 30 Cal.App.4th 318, 321 [phlebotomist's negligence action against rehabilitation institute that hired her to draw blood from violent patient fell within scope of section 425.13(a)]; *Palmer v. Superior Court* (1994) 103 Cal.App.4th 953, 957 [plaintiff's action against the medical group acting as his primary health care provider fell within scope of section 425.13(a), in view of his allegations that the medical group erroneously advised his health insurer that certain services he sought were not medically necessary].)

DISPOSITION

Let a peremptory writ of mandate issue directing that respondent trial court vacate its orders denying petitioners' motions to strike, and enter new orders granting those motions, without prejudice to a properly noticed and supported motion under section 425.13(a). The alternative writ, having served its purpose, is discharged. Petitioners are awarded their costs.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.