Filed 4/5/18 Rosales v. The Northeast Community Clinic CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| IVETTE ROSALES,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>THE NORTHEAST COMMUNITY CLINIC et al.,<br><br>Defendants and Respondents. | B276465<br><br>(Los Angeles County Super. Ct. No. BC607569) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle Williams, Judge. Reversed.

Onwaeze Law Group, Ogochukwu Victor Onwaeze for Plaintiff and Appellant.

Brobeck, West, Borges, Rosa & Douville, Fredrick M. Borges, Stephen A. Rosa and Elizabeth D. Fleming for Defendant and Respondent The Northeast Community Clinic.

Schmid & Voiles, Denise H. Greer and Deborah S. Taggart for Defendant and Respondent Thomas Cachur.

Cole Pedroza, Kenneth R. Pedroza and Tammy C. Weaver for Defendant and Respondent David N. Steinberg.

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After suffering a late-term miscarriage, the fetus's mother and father sued the mother's treating physicians and the clinic employing them. The parents' complaint alleged a single claim, but was murky about what that claim was. The trial court construed the claim solely as one for wrongful death and granted judgment on the pleadings (because wrongful death of a fetus is not a viable claim under California law). Mother has appealed. Because a mother's emotional distress is a "patently obvious" consequence of medical malpractice leading to the death of a late-term fetus or a stillborn child (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1080 (*Burgess*)), we must reasonably infer that the negligent care of the mother leading to the death of the late-term fetus caused mother to suffer emotional distress; as such, her complaint validly states a claim for medical malpractice. Accordingly, we reverse and remand for further proceedings.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts[1]

In May 2014, plaintiff Ivette Rosales (plaintiff) was pregnant. Over the ensuing months, she sought prenatal care from defendants Dr. David N. Steinberg and Dr. Thomas Cachur, both of whom were employed by defendant The Northeast Community Clinic (Clinic). In the ninth month of the pregnancy, the doctors did not properly diagnose that plaintiff was suffering from obstetric cholestatis, did not order proper testing, and did not "closely monitor the condition of . . . plaintiff . . . and of the fetus." As a result of these failures, the fetus died on February 20, 2015.

### II. Procedural Background

On January 19, 2016, plaintiff and the fetus's father sued

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1 All facts are taken from the operative complaint.

the Clinic, Dr. Steinberg, and Dr. Cachur (collectively, defendants). The complaint was captioned, "Complaint for Professional Negligence," but went on to allege that the parents were "entitled to bring an action for the wrongful death" of the fetus. The complaint alleged that defendants had been "negligent" in providing medical care to plaintiff and in monitoring her and the fetus, and alleged that this negligence proximately caused the death of the fetus. Plaintiffs sought (1) funeral and burial expenses, and (2) "special and general damages."

All three defendants moved for judgment on the pleadings, arguing that (1) California law does not recognize a cause of action for the wrongful death of a fetus, and (2) any attempt to amend the complaint to allege medical malpractice as to plaintiff would be futile because the one-year statute of limitations period had expired on February 20, 2016 (Code Civ. Proc., § 340.5), and such a claim was too different from what plaintiff initially pled to relate back.

After full briefing and a hearing, the trial court granted defendants' motions and dismissed the complaint. The court ruled that the complaint "clearly sounds in wrongful death" and that California law bars wrongful death claims for the death of a fetus. The court rejected the parents' argument that the complaint also stated a claim for medical malpractice, noting that "there are no allegations . . . tending to show that [plaintiff], as opposed to the fetus, suffered injury." The court further concluded that plaintiff could not amend the complaint to add a claim for medical malpractice because such a claim would be time barred. In reaching this conclusion, the court reasoned that a new claim can relate back to the date of the filing of an earlier

claim only if both claims rest on the same facts and the same injury, and found that the injury to plaintiff underlying a medical malpractice claim was different than the injury alleged to the fetus in the initially pled wrongful death claim.

Plaintiff (but not the fetus's father) filed a timely notice of appeal.

## DISCUSSION

Plaintiff argues that the trial court erred in (1) granting judgment on the pleadings, and (2) denying her leave to amend. We review the first claim de novo (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 (*Harris*)), and the second for an abuse of discretion (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242).

"'A motion for judgment on the pleadings is equivalent to a demurrer.'" (*Harris*, *supra*, 59 Cal.4th at p. 777.) As with a demurrer, a court ruling on such a motion is tasked with evaluating whether the "face" of the complaint "state[s] facts sufficient to constitute a cause of action" under any theory. (Code Civ. Proc., § 438, subds. (c)(1)(B)(ii) & (d); *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298-1299.) In evaluating the facial sufficiency of a complaint, we "liberally construe[]" the complaint by "assum[ing] the truth of (1) all facts properly pleaded by the plaintiff, (2) all facts contained in exhibits to the complaint, (3) all facts that are properly the subject of judicial notice, and (4) all facts that reasonably may be inferred from the foregoing facts." (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305.)

The sole claim in the original complaint contains elements of a claim for wrongful death as well as elements of a claim for medical malpractice. The question before us is whether it

properly pleads a viable claim for either.

## I. Wrongful Death

To plead a claim for wrongful death, a plaintiff must allege "(1) a 'wrongful act or neglect' on the part of one or more persons that (2) 'cause[s]' (3) the 'death of [another] person.'" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404; see generally Code Civ. Proc., § 377.60 et seq.) In alleging that defendants' negligence proximately caused the fetus's death, the complaint adequately pleads these elements in the abstract. Plaintiffs have nevertheless failed to state a claim for wrongful death because California's wrongful death statute does not recognize a claim for the wrongful death of a fetus. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 579-580.)

## II. Medical Malpractice

To plead a claim for medical malpractice, a plaintiff must allege: (1) that the physician-defendant did not """"use such skill, prudence, and diligence as other members of his profession commonly possess and exercise"""; (2) that this negligent conduct """"proximate[ly] caus[ed]"""" the plaintiff's injury; and (3) """"actual loss or damage."""" (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.)

Although the complaint is anything but a model of clarity, it sufficiently alleges a claim for medical malpractice as to plaintiff. The complaint explicitly alleges the first element and part of the second element—namely, that defendants were negligent in their care of plaintiff, which caused the death of the late-term fetus. The trial court was correct that the complaint nowhere explicitly alleges "that [plaintiff], as opposed to the fetus, suffered injury." But our Supreme Court held in *Burgess* that it "is patently obvious" and "cannot be disputed" that the

negligent care and delivery of a stillborn fetus or severely injured live baby "will foreseeably cause [the] mother serious emotional distress." (*Burgess*, *supra*, 2 Cal.4th at p. 1080; *id.* at p. 1076 ["the mother's emotional well-being and the health of the child are inextricably intertwined"]; see also *Johnson v. Superior Court* (1981) 123 Cal.App.3d 1002, 1007 ["a mother forms a sufficiently close relationship with her fetus during pregnancy so that its stillbirth will foreseeably cause her severe emotional distress"].) *Burgess* requires us to reasonably infer that plaintiff suffered emotional distress from the late-term death of her fetus. Because "the damage element" of a medical malpractice claim is "satisfie[d]" by "[s]erious emotional distress" (and without any further need for actual *physical* damage) (*Burgess*, at p. 1079; *Johnson*, at p. 1004 [emotional distress may be alleged in a medical malpractice action]), the complaint sufficiently alleges a claim for medical malpractice.

To be sure, and as defendants point out, the complaint goes on to muddy the waters considerably by alleging that defendants also provided negligent care to the fetus; by alleging that plaintiff *and the fetus's father* have standing to bring a claim for wrongful death; and by naming the fetus's father as a plaintiff (when he could not be a plaintiff for medical malpractice practiced against the fetus's mother). But an allegation that the *fetus* suffered negligent care is no different from an allegation that *its mother* did because "[d]uring pregnancy, the mother and child are a unique physical unit." (*Burgess*, *supra*, 2 Cal.4th at p. 1080.) More broadly, all of the unneeded allegations and parties certainly clutter up the complaint, but they do not somehow negate the elements that are either explicitly alleged or that we must reasonably infer.

## DISPOSITION

The judgment is reversed. The parties are to bear their own costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST