

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JENNIFER JORDAN,

Plaintiff and Appellant,

v.

PAUL LIN, M.D.,

Defendant and Respondent.

B270651

(Los Angeles County
Super. Ct. No. BC507583)

APPEAL from a judgment of the Superior Court of Los Angeles County. Donna Goldstein, Judge. Affirmed.

Tofer & Associates, Michael P. Greenslade and Jennifer Mahgerefteh for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport; Law + Brandmeyer, Kent T. Brandmeyer and Paul Delgadillo for Defendant and Respondent.

Jennifer Jordan (appellant) appeals from a judgment entered after the trial court granted summary judgment on her claim of medical malpractice against Paul Lin, M.D. (respondent).¹ Appellant contends: (1) the trial court erred in determining that appellant did not plead lack of informed consent in her first amended complaint (FAC); and (2) if this court agrees that appellant did not plead lack of informed consent, she should have been permitted to amend her complaint to add this cause of action subsequent to the summary judgment proceedings.

We find that the trial court did not err in granting respondent's summary judgment motion, nor did it abuse its discretion in denying appellant leave to amend her complaint. Therefore, we affirm the judgment.

FACTUAL BACKGROUND

On March 15, 2012, appellant was referred to respondent for evaluation and management of cervical cancer. Respondent examined appellant, reviewed her records, and concluded that she had villoglandular well-differentiated adenocarcinoma of the cervix. Respondent discussed treatment options with appellant, her husband, and her mother for 60 minutes. One of the treatment options respondent offered was radical hysterectomy, bilateral pelvic lymphadenectomy, and removal of the right ovary. Appellant was to consider her options and see respondent

¹ Appellant's notice of appeal, filed March 1, 2016, references the order granting summary judgment, filed January 15, 2016. No final judgment is included in the record. However, a review of the online case summary shows that a judgment was filed on February 3, 2016, and notice of entry of judgment was filed on February 26, 2016. Thus, appellant's appeal was timely filed and we may treat it as an appeal from the final judgment entered against her. (Cal. Rules of Court, rule 8.104, subds. (a), (d).)

in two weeks for a second examination and to let respondent know her decision.

On March 29, 2012, appellant and her husband returned to see respondent and notified him of appellant's decision to undergo a radical hysterectomy, including removal of the right ovary and fallopian tube.

On April 11, 2012, respondent saw appellant again for an examination. He identified an area of reddish tissue on appellant's cervix that could indicate grossly invasive cancer. Appellant reiterated her decision to undergo robotic-assisted laparoscopic radical hysterectomy and right salpingo-oophorectomy, along with a bilateral pelvic lymphadenectomy. Respondent counseled appellant extensively on the options available to her as well as the advantages and disadvantages of treatment options. Respondent discussed "[r]isks, benefits, and alternatives." On the same date, appellant signed a consent for hysterectomy.

Respondent performed the surgery on April 24, 2012. During the surgery, appellant's right obturator nerve was identified and noted to be partially transected. Neurosurgery was consulted, and the nerve was repaired during surgery.

On April 25, 2012, appellant was examined by respondent. Respondent informed appellant of the complication with the obturator nerve and the repair. Respondent consulted physical therapy and neurology for a more detailed examination. The neurologist noted some weakness in appellant's lower right extremity. Physical therapy was ordered.

Appellant saw respondent on May 9, 2012, for her postoperative exam. Appellant reported occasional pain in the right side of her abdomen and along her right thigh. She further reported that her right leg became tired sometimes. However, the symptoms did not affect her greatly and did not impact her

activities of daily living. Appellant was continuing to receive physical therapy.

PROCEDURAL HISTORY

Appellant's FAC was filed on September 30, 2014. The named defendants were respondent, City of Hope National Medical Center, and Intuitive Surgical, Inc. Appellant alleged three causes of action: medical malpractice, strict products liability - design defect, and negligence. However, only the medical malpractice cause of action was directed against respondent. Appellant generally alleged that she was injured during the surgical procedures carried out by respondent. Appellant specifically alleged that:

“Obturator nerve injury is not a recognized complication of pelvic lymph nodal dissection, and not part of the informed consent procedures [respondent] provided when informing [appellant] of all surgical risks so that [appellant] can decide whether or not to proceed with the surgery.”

Appellant further alleged that she continued to suffer right lower extremity weakness as a result of the obturator nerve injury.

Respondent moved for summary judgment on September 22, 2015. Respondent argued that appellant could not establish the necessary elements of a claim of professional negligence. Respondent presented expert testimony through the declaration of Dr. Robert E. Bristow that respondent's care and treatment of appellant met the applicable standard of care for specialists such as respondent during the relevant time frame. Dr. Bristow opined that respondent performed the surgery with technical proficiency and within the standard of care. Dr. Bristow was of the opinion that the injury to the obturator nerve was a known

and recognized risk of the surgery that occurs in the absence of negligence.

Respondent further argued that appellant could not establish causation with sufficient medical probability. Dr. Bristow opined that, to a reasonable degree of medical probability, no negligence on the part of respondent caused appellant's injuries. Further, respondent's actions in consulting neurology, having the nerve repaired, informing appellant immediately, recommending evaluation by a neurologist, and recommending physical therapy were proper and timely.

Appellant filed an opposition to respondent's motion on November 30, 2015. Appellant did not offer a declaration of an expert witness to oppose respondent's motion for summary judgment. Instead, she argued there was no evidence to support a finding that respondent explained to appellant the risks of surgery, including the risk of damage to the obturator nerve, "that went beyond handing [appellant] a form to sign at the hospital minutes prior to her surgery."

Respondent filed a reply brief on December 4, 2015. Respondent argued that in the absence of an expert declaration from appellant on standard of care and causation, his motion was properly granted. In addition, respondent submitted additional excerpts from appellant's deposition transcript relating to the discussions appellant had with respondent regarding the risks of the procedure.

On January 15, 2016, the trial court granted respondent's motion for summary judgment. The court set forth its reasoning in a minute order dated December 11, 2015. The court held that respondent met his burden of proof under Code of Civil Procedure section 437c because his evidence demonstrated that appellant could not establish the elements of breach of duty or causation.

The burden then shifted to appellant to offer evidence creating a disputed issue of fact. Appellant did not meet this burden.

In response to appellant's argument that respondent did not repudiate a cause of action for lack of informed consent, the trial court noted that appellant's cause of action for medical malpractice did not plead malpractice based on lack of informed consent. The court cited *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663 (*Bostrom*) as support for the proposition that summary judgment cannot be granted or denied on grounds not raised by the pleadings.

Further, appellant did not introduce evidence suggesting that there was no informed consent. The court stated: "The only 'evidence' [appellant] seeks to introduce is that she has no recollection of any discussion regarding the risks of the surgery. Indeed elsewhere in her deposition she testifies had she received and signed an informed consent disclosure."

The order granting respondent's motion for summary judgment was filed on January 15, 2016. Appellant filed her notice of appeal on March 1, 2016.

DISCUSSION

I. Standards of review

We review a grant of summary judgment de novo, deciding independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253 (*Nazir*)). The appellate court's task is to make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court" [Citations.]" (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 234-235.)

An order denying a request to amend a pleading is generally reviewed for abuse of discretion. (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.)

II. Failure to provide informed consent

A. Relevant legal principles

A cause of action for lack of informed consent recognizes “the basic right of the patient to make the ultimate informed decision regarding the course of treatment to which he knowledgeably consents to be subjected.” (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243.) However, a doctor is not required to give “a lengthy polysyllabic discourse on all possible complications.” (*Id.* at p. 244.) When a procedure involves serious risks, the doctor is required to “disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur.” (*Ibid.*) Beyond that, “a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.” (*Id.* at pp. 244-245.)

When pleading a claim of failure to inform, a plaintiff must establish a causal relationship between the physician’s failure to inform and the injury to the plaintiff. “Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given.” (*Cobbs v. Grant, supra*, 8 Cal.3d at p. 245.)

B. Appellant did not allege failure to provide informed consent

Appellant alleged a single cause of action against respondent: medical malpractice. In this cause of action, she alleged that respondent negligently “failed to exercise the proper degree of knowledge, skill, and competent [*sic*], and therefore fell below the applicable standard of care” in performing the surgery, making the decision to repair the obturator nerve, and failing to properly diagnose and treat the resulting lower extremity weakness. Appellant has not appealed the trial court’s determination that this medical malpractice claim fails as a

matter of law based on respondent's uncontradicted evidence that his actions were within the applicable standard of care.

Appellant did not allege a separate cause of action for failure to provide informed consent. However, appellant argues that California is a "notice pleading" state, thus she must provide no more than a short and plain statement of her claims, fair notice of what the claim is, and the grounds upon which it rests.² Appellant points to paragraph 17 of the FAC, in the "Factual Background" section of the FAC, in which appellant alleged that "[o]bturator nerve injury is not a recognized complication of pelvic lymph nodal dissection, and not part of the informed consent procedures [respondent] provided."

This allegation is insufficient to provide respondent with notice of a claim for failure to provide informed consent. To properly allege such a claim, appellant was required to allege that respondent failed to provide her with the information a skilled practitioner would provide. If, as appellant alleges, obturator nerve injury is not a recognized complication of her surgery, then it would not be outside of the standard of care for a physician to fail to provide warning of that risk. (See *Cobbs v. Grant, supra*, 8 Cal.3d at p. 244 [doctor is not required to provide a "lengthy polysyllabic discourse on all possible complications"].)

Further, appellant did not allege the essential causal relationship between respondent's alleged failure to inform and her injury. Specifically, appellant did not allege that, had she been informed of this risk, she would not have proceeded with the surgery. Appellant does not address this omission in her pleadings on appeal. Thus, even interpreting her FAC liberally,

² Appellant fails to provide a proper citation to legal authority for this claim, however, we nevertheless address the argument.

we find that appellant did not plead a cause of action for failure to provide informed consent.

C. Appellant cannot rely on a theory of liability not pled in the complaint to defeat a summary judgment motion

A summary judgment motion is “directed to the issues framed by the pleadings.” (*Van v. Target Corp.* (2007) 155 Cal.App.4th 1375, 1387.) “Those are the only issues a motion for summary judgment must address. [Citations.]” [Citation.]” (*Ibid.*) A defendant is not required to negate a legally inadequate claim. (*Bostrom, supra*, 35 Cal.App.4th at pp. 1662-1663.)

Respondent brings to our attention the recent case *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438 (*Jacobs*).³ In *Jacobs*, an individual was injured while viewing a vacant property with the intent to potentially purchase the property. The potential purchaser stood on a diving board over an empty pool in order to assess accessibility of the property from an adjacent road. (*Id.* at p. 442.) The board broke loose from its base and the plaintiff fell into the empty swimming pool, sustaining serious injuries. (*Ibid.*)

In response to the defendants’ summary judgment motion, the plaintiff raised for the first time allegations that the empty pool was a dangerous condition. The defendants asserted that plaintiff could not defeat their motion based on a theory of liability that was not alleged in the complaint. (*Jacobs, supra*, 14 Cal.App.5th at pp. 442-443.) The trial court agreed, and the Court of Appeal affirmed, concluding “a fair reading of the complaint’s allegations does not suggest a negligence claim based

³ The *Jacobs* case was filed after respondent’s pleading in this matter was submitted. Respondent thereafter indicated his intent to rely on the case via letter, which was served on all counsel.

on the condition of the empty pool as opposed to the condition of the diving board.” (*Id.* at p. 444.) Thus, the defendants were entitled to summary judgment without addressing that claim. (*Ibid.*)

Respondent in this matter met his burden when he “negated the sole basis of plaintiff’s claims.” (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499.) “It was not incumbent on [respondent] to refute liability on some theoretical possibilities not included in the pleadings. [Citations.]” (*Ibid.*) Because appellant did not plead lack of informed consent, we need not discuss whether a triable issue of fact exists as to this cause of action. Thus, summary judgment was properly granted.

III. Denial of leave to amend the complaint

A trial court has discretion to permit a party to amend a complaint if it appears that the party can state a legally sufficient claim. (*Bostrom, supra*, 35 Cal.App.4th at p. 1663 [“if summary judgment is granted on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment”].) We review the court’s denial of appellant’s request to amend her complaint for abuse of discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486 [trial court’s discretionary ruling regarding amendment of complaint will be upheld “unless a manifest or gross abuse of discretion is shown”].)

Here, the trial court’s decision was well within reason. The trial court noted that appellant did not “show any admissible evidence that [she] can prove [lack of] informed consent.” The court noted:

“[I]n [her] opposition, [appellant] does not introduce any evidence that there was no informed consent. The only ‘evidence’ [appellant] seeks to

introduce is that she has no recollection of any discussion regarding the risks of the surgery. Indeed elsewhere in her deposition she testifies that she received and signed an informed consent disclosure.”

Because it did not appear from the evidence submitted that appellant could state a cause of action for lack of informed consent, the trial court did not abuse its discretion in denying appellant’s request. (See *Bostrom*, *supra*, 35 Cal.App.4th at p. 1663 [trial court should only permit amendment if it appears from the materials submitted that plaintiff could state a cause of action].)

Further, appellant’s request was untimely. It appears from the record that appellant’s request to amend her complaint was not made until the hearing on respondent’s summary judgment motion. Unwarranted delay in seeking leave to amend may be considered by the trial court in determining whether or not to grant such leave. (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280.) “Thus, when a plaintiff seeks leave to amend his or her complaint only after the defendant has mounted a summary judgment motion . . . ‘[i]t would be patently unfair to allow plaintiffs to defeat [the] summary judgment motion by allowing them to present a ‘moving target’ unbounded by the pleadings.’ [Citations.]” (*Ibid.*) The trial court did not abuse its discretion in denying appellant leave to amend her complaint after respondent’s summary judgment was fully briefed.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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