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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEE ANN MORGAN,

Plaintiff and Appellant,

v.

JEFFREY C. WANG et al.,

Defendants and Respondents.

B284748

(Los Angeles County
Super. Ct. No. BC624990)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Terry A. Green, Judge. Affirmed.

The Law Offices of Terence Geoghegan and Terence
Geoghegan for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza and Matthew S.
Levinson; Reback, McAndrews & Blessey, Robert C. Reback and
David J. Rubaum for Defendants and Respondents.

In a 2010 medical malpractice action, Lee Ann Morgan (plaintiff) alleged she suffered severe injuries during a 2009 spinal surgery performed by the defendant surgeons. The trial court entered summary judgment for the surgeons, and plaintiff's subsequent appeal was dismissed. Six years later, in 2016, plaintiff filed the present action against the same surgeons, seeking damages for the same injuries she allegedly suffered during the same 2009 spinal surgery. The surgeons demurred to the second action on res judicata and statute of limitations grounds, and the trial court sustained the demurrer without leave to amend. We find no error, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2009, plaintiff underwent spinal surgery at the UCLA Medical Center. The surgery was performed by defendants Jeffrey Wang, M.D., Rahul Basho, M.D., and Joshua Bales, M.D. This appeal concerns two lawsuits plaintiff brought against Dr. Wang, Dr. Basho, Dr. Bales, and the UC Regents (collectively, Dr. Wang) arising out of that surgery.

I.

The First Action

A. Complaint

Plaintiff filed an action against Dr. Wang in December 2010 (the prior action), and filed the operative first amended complaint in October 2011. That action asserted a single cause of action for “medical negligence [and] absence of informed consent,” alleging as follows:

Plaintiff consulted with Dr. Wang concerning disabling back pain in August 2009. He advised her that she suffered from degenerative disc disease and that her only viable surgical option was spinal fusion. Dr. Wang did not inform plaintiff of other

surgical options that would have preserved her spinal mobility. On Dr. Wang's recommendation, plaintiff consented to a "posterior lumbar interbody fusion" procedure. Dr. Wang instead performed a "transforaminal lumbar interbody fusion," a procedure that Dr. Wang had not discussed with plaintiff and to which she had not consented. Dr. Wang performed the surgery in a negligent manner, removing the facet joints between plaintiff's L4 and S1 vertebrae, lacerating the dural membranes over plaintiff's spinal cord, implanting an inappropriately-sized interbody cage device, improperly using a bone morphogenic protein, and implanting "rod and screw fixation hardware."

Plaintiff awoke from the surgery "with severe numbness, tingling, [and] damage to the left L5-S1 nerve root." She currently experiences symptoms that were not present before the surgery, including severe pain, numbness, and weakness in her lumbar spine and left leg.

B. Summary Judgment

Dr. Wang moved for summary judgment, asserting there was no breach of the standard of care and no causation. The trial court granted the motion and, on November 1, 2012, entered judgment for Dr. Wang. Plaintiff's appeal from the judgment was dismissed.

II.

The Present Action

A. Complaint

Plaintiff filed the present action in June 2016 and filed the operative first amended complaint in October 2016.¹

¹ The present action also names four device manufacturers (SeaSpine, Inc., Stryker Spine Corporation, Zimmer Bionet

Like the complaint in the prior action, the complaint in the present action alleged that Dr. Wang advised plaintiff that her only surgical option was spinal fusion; that plaintiff agreed to allow Dr. Wang to perform a posterior lumbar fusion; that Dr. Wang instead performed a “transforaminal lumbar interbody fusion,” to which plaintiff had not consented; that during the surgery, Dr. Wang removed the facet joints of the L4-S1 vertebrae, improperly inserted bone morphogenic protein and an interbody cage spacer, and implanted “rod and screw fixation hardware”; and that as a result of the surgery, plaintiff suffered disabling pain, numbness, and weakness in the lumbar spine and left leg.

As relevant here, the complaint also alleged some new details about Dr. Wang’s use of the bone morphogenic protein and interbody cage spacer: namely, that Dr. Wang combined the bone morphogenic protein, interbody disc spacer, and bovine collagen sponge in a manner not approved by the Food and Drug Administration (FDA). The complaint also alleged some additional details concerning the cause of plaintiff’s pain, numbness, and weakness: that as a result of the improper combination of the protein, disc spacer, and collagen sponge, plaintiff has experienced “uncontrolled bone overgrowth around the nerve root holes and surrounding soft tissue,” “accelerated adjacent disc degeneration,” and “vertebral damage to the L1-2, L2-3 and L3-4 segments.” Finally, the complaint alleged six new causes of action: absence of informed consent, battery, negligence per se, breach of fiduciary duty, fraud, and product liability.

Spine, Inc., and Globus Medical, Inc.) as additional defendants. They are not parties to the present appeal.

B. Demurrer

Dr. Wang demurred. He contended that the claims asserted in the present action (1) were barred by res judicata (claim preclusion) because they had been litigated and decided on the merits in the first action, and (2) were barred by the applicable statutes of limitations.

Plaintiff opposed the demurrer, urging that the claims asserted in the present action were “very different from those alleged in the earlier litigation,” and the action was timely because the applicable statutes of limitations had been tolled by defendant’s fraud and concealment.

The trial court sustained the demurrer without leave to amend, concluding that the present action alleged violations of the same primary rights adjudicated in the prior action. A judgment of dismissal was entered June 28, 2017. Plaintiff timely appealed.

DISCUSSION

Plaintiff contends the trial court erred in sustaining the demurrer because the two cases alleged violations of independent primary rights, and the present action is not time-barred.

For the reasons that follow, we conclude that the present action alleges violations of the same primary right—the right to be free of an unconsented to and injurious surgery—that was adjudicated in the prior action. The present action therefore is barred by the doctrine of claim preclusion (res judicata). Having so concluded, we need not address whether the plaintiff’s action also is barred by the statute of limitations.

I.

Standard of Review

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.)

II.

The Demurrer Was Properly Sustained Without Leave to Amend

A. *Claim Preclusion*

Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. “Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896–897 (*Mycogen*).)

Res judicata precludes the relitigation of matters that were actually litigated, as well as those that could have been litigated in a prior suit, so long as they are part of the cause of action finally resolved in that suit. (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557 (*Bullock*).

“A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. ‘ “Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.” ’ ” (*Mycogen, supra*, 28 Cal.4th at p. 897.)

For res judicata to apply, three requirements must be satisfied: “(1) the present action is on the same cause of action as the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding.” (*Bullock, supra*, 198 Cal.App.4th at p. 557.) Here, it is undisputed both that the first action resulted in a final judgment on the merits, and that the parties to this action were also parties to the first action. Thus, only the first element is at issue: whether the first action adjudicated the same causes of action alleged in this case. We turn now to that issue.

B. Primary Rights

In California, what constitutes a “cause of action” for purposes of res judicata is determined by application of the primary right theory. “[A] ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a

breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against ‘splitting’ a cause of action. [Citation.]” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 (*Crowley*).)

Simply put, a primary right is the plaintiff’s “right to be free from the particular injury suffered.” (*Crowley, supra*, 8 Cal.4th at p. 681.) The injury suffered is distinguishable from both the legal theory upon which liability is premised and the relief sought as a remedy for that injury. (*Id.* at pp. 681–682.) Accordingly, “ ‘[e]ven where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.’ [Citation.]” (*Ibid.*) Likewise, “ ‘[t]he violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief’ [Citation.]” (*Id.* at p. 682.) But different primary rights, or injuries, may be suffered by the same wrongful conduct. (*Le Parc Community Assn. v. Workers’ Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1170); see also *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954–955 [“[T]he significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive.”].)

Our Supreme Court recently discussed primary rights in the context of res judicata in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788 (*Boeken*). There, after the plaintiff’s husband was diagnosed with lung cancer, the plaintiff filed a common law action for loss of consortium against Philip Morris, a cigarette manufacturer, which she subsequently dismissed with

prejudice. After her husband died of lung cancer, plaintiff filed a second action against Philip Morris, alleging wrongful death. Philip Morris demurred to the second action, arguing it was barred by *res judicata* because it involved the same primary right as the first action. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. (*Id.* at p. 793.)

The Supreme Court affirmed the judgment of dismissal. It explained that in her first action, plaintiff had alleged that defendant's wrongful conduct permanently deprived her of her husband's companionship and affection. Thus, the primary right at issue in that case "was the right not to be wrongfully deprived of spousal companionship and affection, and . . . [t]he breach was the conduct of defendant Philip Morris that wrongfully induced plaintiff's husband to smoke defendant's cigarettes." (*Boeken, supra*, 48 Cal.4th at p. 798.) The second case alleged a different theory but the same primary right involved in the first action; it therefore was precluded by the judgment in the first case. The court explained: "Plaintiff's previous common law action sought compensation not only for the loss of consortium injury that she had suffered and would continue to suffer as a result of her husband's physical and emotional condition while he was still alive, but also for the loss of consortium injury that she anticipated she would continue to suffer as a result of her husband's premature death. Plaintiff's present wrongful death action likewise seeks compensation for the loss of consortium injury that she has suffered and will continue to suffer as a result of her husband's premature death. With respect to postdeath loss of consortium, the two actions concern the same plaintiff seeking the same damages from the same defendant for the same harm,

and to that extent they involve the same primary right. Plaintiff dismissed her previous action with prejudice. Because such a dismissal is the equivalent of a final judgment on the merits [citation], plaintiff may not now litigate the same primary right a second time.” (*Boeken, supra*, at p. 804.)

C. *The Present Case Alleged Violations of the Same Primary Right that Was Litigated and Decided in the Prior Action*

Applying the principles articulated in *Boeken* here, we conclude that plaintiff’s prior and present actions involve the same primary right. As we have said, plaintiff’s prior action alleged that in September 2009, Dr. Wang performed a transforaminal lumbar interbody fusion, a procedure to which plaintiff had not consented. Dr. Wang performed the procedure negligently, including by removing facet joints between plaintiff’s L4 and S1 vertebrae, implanting an inappropriately-sized interbody cage device, improperly using a bone morphogenic protein, and implanting “rod and screw fixation hardware.” As a result, plaintiff experienced pain, numbness, and weakness in her lumbar spine and left leg, caused by damage to the nerve root and failing hardware.

Plaintiff’s present action contains similar allegations. Like the first action, the present action alleges that Dr. Wang performed a transforaminal lumbar interbody fusion to which plaintiff had not consented; that Dr. Wang performed the procedure negligently, including by removing facet joints, misusing an interbody cage device and bone morphogenic protein, and implanting “rod and screw fixation hardware”; and that as a result, plaintiff experienced pain, numbness, and weakness in

her lumbar spine and left leg, caused by nerve damage and failing hardware.

In short, as in *Boeken*, the prior and present actions concern the same plaintiff (Morgan), seeking damages from the same defendant (Dr. Wang), for the same harm (damage to the lumbar spine and surrounding nerves and tissues). The two actions thus allege a violation of the same primary right—to be free of an unconsented to and injurious surgery. Under the Supreme Court’s analysis in *Boeken*, therefore, the judgment in the prior action necessarily bars the present action.

Plaintiff asserts that the present action includes some newly discovered information about Dr. Wang’s surgical technique (i.e., that Dr. Wang used the bone morphogenic protein in combination with a collagen sponge and an interbody cage device not approved for that use), the FDA’s approvals (i.e., that the FDA had not approved the use of bone morphogenic protein, collagen sponge, and interbody cage device in the manner in which Dr. Wang used them), and the source of plaintiff’s pain (i.e., uncontrolled bone growth impinging on nerves and soft tissue). But none of this newly discovered information changes the nature of the primary right alleged to have been violated because plaintiff continued to allege the *same injury* to plaintiff’s lumbar spine and surrounding nerves and tissue.

We reach the same conclusion with regard to the new legal theories pled in the present action. As plaintiff correctly notes, the present action includes some additional legal theories not pled in the prior action: breach of fiduciary duty (recommending a surgery that was not in plaintiff’s best interests), fraud (failing to disclose that the FDA had not approved use of the bone morphogenic protein, collagen sponge, and interbody cage device

in the manner used in plaintiff's surgery), product liability (defects in the bone morphogenic protein, collagen sponge, and interbody cage device, which Dr. Wang "fabricated" into "new devices" in the operating room), and absence of informed consent (to Dr. Wang's use of the bone morphogenic protein, collagen sponge, and interbody cage device in combination). But as we have said, the primary right is the plaintiff's right to be free from the particular injury suffered, *not* the legal theory on which liability for the injury is premised. Because all of the additional causes of action assert injuries to plaintiff's lumbar spine arising out the September 2009 spinal surgery performed by Dr. Wang, they do not allege violations of independent primary rights.

Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co. (2004) 120 Cal.App.4th 17 (*Friedman*), on which plaintiff relies, is inapposite. The issue before the court in *Friedman* was whether two actions arising out of the same surgery were "related" (and thus constituted a single "occurrence") within the meaning of the defendant physician's malpractice insurance policy—*not*, as in the present case, whether they arose out of the same primary right for purposes of issue or claim preclusion. (*Id.* at pp. 26, 29, 35–36 ["We must remember that it is the actual language of the insurance contract and not the common law doctrine of res judicata which governs this case."].) The court's holding—that "there was no possibility of *coverage* under the second suit" (*id.* at p. 36, italics added)—is irrelevant for present purposes.

Perry v. Shaw (2001) 88 Cal.App.4th 658 (*Perry*) is also inapposite. In *Perry*, the plaintiff sued her surgeon, who had surgically enlarged her breasts without her consent, for medical

negligence and battery.² The court held that the Medical Injury Compensation Reform Act (MICRA), which limited plaintiff's recovery of noneconomic damages based on "professional negligence," did *not* limit plaintiff's recovery of noneconomic damages based on battery. (*Id.* at pp. 660–669.) While *Perry* arguably supports the conclusion that medical negligence and medical battery violate different primary rights, that distinction is irrelevant in the present case because plaintiff's prior action asserted *both* medical malpractice *and* medical battery (lack of informed consent).³

Although we sympathize with plaintiff's situation, "[a] malpractice action may not be pursued piecemeal." (*Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 391.) Because the prior and present actions are based on a violation of the same primary right, the present action is barred under the doctrine of res judicata. The trial court thus properly sustained the demurrer without leave to amend.

² The plaintiff in *Perry* had consented to surgery to remove excess skin from her arms, back, thighs and stomach, but had told the defendant she did not wish to enlarge her breasts. (*Perry, supra*, 88 Cal.App.4th at p. 662.)

³ "In *Cobbs v. Grant* [(1972)] 8 Cal.3d 229, our Supreme Court held that where 'a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery. . . .' (*Perry, supra*, 88 Cal.App.4th at p. 663.)

DISPOSITION

The judgment of dismissal is affirmed. Defendants are awarded their appellate costs.

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EDMON, P. J.

We concur:

LAVIN, J.

GOODMAN, J.*

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