

FILED

Apr 19, 2022

DANIEL P. POTTER, Clerk

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Filed: 4/19/22

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LINDSEY CHOW,

Plaintiff and
Appellant,

v.

MA LEYBA et al.,

Defendants and
Respondents.

B307432

(Los Angeles County
Super. Ct. No. BC648838)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Monica Bachner, Judge. Affirmed.

Lindsey Chow, in pro. per., for Plaintiff and Appellant.

William Chow, in pro. per., for Defendant and Respondent.

La Follette, Johnson, DeHaas, Fesler & Ames, Janee M.

Tomlinson and David J. Ozeran for Defendants and Respondents.

Henry Chow was brought to the emergency room at St. Vincent Medical Center on October 31, 2015, where he was treated and then admitted to the hospital. He died on November 6, 2015, one day after his son, William Chow, agreed to make his father a DNR (do not resuscitate) patient. On January 31, 2017 Susan Chan Chow, Henry Chow's wife, and Lindsey Chow,¹ his daughter, filed this wrongful death and survival action, alleging medical negligence and related tort claims. Ultimately, following a series of demurrers and amended pleadings, as well as Susan's death, the trial court granted St. Vincent's motion for summary judgment and entered judgment in favor of St. Vincent finding Lindsey, who was representing herself, had failed to demonstrate a triable issue of fact whether St. Vincent had failed to meet the standard of care in treating Henry or St. Vincent's care was the cause of Henry's injury or death. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Henry Chow's Hospitalization and Death*

Henry, 77 years old, was brought to the St. Vincent emergency room on October 31, 2015 complaining of shortness of breath and chest pain.² He was given an electrocardiogram and intubated for respiratory distress. After intubation Henry experienced severe bradycardia and suffered cardiac arrest. He

¹ We hereafter refer to members of the Chow family by their first names to avoid repetition.

² Our description of Henry's hospitalization and the events preceding his death is based on St. Vincent's separate statement of undisputed material facts in support of its motion for summary judgment. None of these facts was disputed in Lindsey's separate statement in opposition to the motion.

was revived through administration of cardiopulmonary resuscitation (CPR). Henry was then transferred to a catheterization laboratory where an intra-aortic balloon catheter was inserted and angioplasty attempted.

The catheterization laboratory determined Henry had "[s]evere multiple vessel coronary artery disease," and his medical history showed diabetes, acute kidney failure, acute respiratory failure and aspiration pneumonia. A preliminary cardiac consultation performed on October 31, 2015 concluded Henry's prognosis was "very poor": "Mr. Chow has had [a] massive myocardial infarction. He has multivessel heavily calcified coronary stenosis and is presently in cardiogenic shock." Henry was transferred to the intensive care unit, where he remained until his death on November 6, 2015. During that time he was seen by a variety of medical specialists, including nephrology, cardiology, pulmonology and infectious disease physicians.

On November 5, 2015 an emergency "code blue" was called for Henry. CPR was again administered, and he was given three rounds of epinephrine. Henry regained a weak pulse. He was returned to a ventilator and treated once more with vasopressors. Following the code blue, Dr. Tao Nguyen, the hospitalist who had responded, discussed Henry's situation with William. William agreed to make Henry a DNR patient and signed the appropriate form. The DNR order instructed health care providers to allow a natural death and provide a comfort-focused treatment. Henry died on November 6, 2015. The final diagnosis was acute myocardial infarction, cardiogenic shock, acute kidney injury, diabetes mellitus, acute diastolic heart failure, aspiration pneumonia and sepsis.

2. Lindsey's Lawsuit

Lindsey and Susan, representing themselves, filed their original complaint on January 31, 2017, asserting causes of action for wrongful death, medical malpractice, negligence, "survival" (a claim under Code of Civil Procedure section 377.30 for damages suffered by Henry before his death) and false imprisonment arising from Henry's hospitalization and death. Their principal allegation was that care had been improperly withdrawn from Henry, who was allowed to die. Lindsey and Susan named as defendants Ma Leyba, a nurse who provided care for Henry; Dr. Nguyen; St. Vincent; and Verity Health System of California, a nonprofit health care organization that operated St. Vincent, among other hospitals.

After demurrers by the defendants to some, but not all, of the causes of action were sustained with leave to amend, Lindsey and Susan filed a first amended complaint, which added additional causes of action for elder abuse and intentional and negligent infliction of emotional distress. St. Vincent, Verity Health and Leyba's demurrers to the negligence and survival causes of action were sustained without leave to amend. The elder abuse and intentional infliction of emotional distress causes of action were struck as improperly added without leave of court. Demurrers to other causes of action were sustained with leave to amend.

The second amended complaint alleged causes of action for wrongful death, medical malpractice, negligent infliction of emotional distress and false imprisonment. St. Vincent, Verity Health and Leyba's demurrers to the cause of action for false imprisonment were sustained without leave to amend.

Demurrers to other causes of action were once again sustained with leave to amend.

On January 31, 2018 Lindsey and Susan moved for leave to amend their complaint to include a claim for punitive damages and new causes of action for medical battery, malfeasance and violation of informed consent. The court denied the motion.

On February 16, 2018 Lindsey and Susan filed amendments to their pleading naming eight physicians and nurses in place of Doe defendants, and on February 23, 2018 filed a third amended complaint alleging causes of action for wrongful death, medical malpractice, negligent infliction of emotional distress, false imprisonment and survival. New demurrers and motions to strike were filed. The court struck the false imprisonment cause of action against St. Vincent, Verity Health and Leyba. To the extent other demurrers were sustained, Lindsey and Susan were given leave to amend.

On March 23, 2018 Lindsey and Susan named William as a nominal defendant in place of Doe 9.

On May 29, 2018 Lindsey and Susan filed a fourth amended complaint (the operative pleading) with four causes of action: wrongful death, medical malpractice, negligent infliction of emotional distress and survival. St. Vincent demurred to the cause of action for negligent infliction of emotional distress. The other defendants demurred to all the causes of action. All defendants moved to strike the causes of action for medical malpractice and survival on the ground Susan, Henry's successor in interest, could not maintain those causes of action in propria persona. While the demurrers and motions to strike were pending, Lindsey and Susan moved for leave to file a fifth amended complaint to add a number of new causes of action,

including intentional torts and violation of religious freedom. The court denied the motion.

On June 17, 2019, following Susan's death several months earlier, Lindsey moved to substitute herself as Henry's successor in interest.³ The defendants opposed the motion, arguing a self-represented party who is not an attorney cannot appear as successor in interest and could not maintain Henry's survival and medical malpractice causes of action. The motion was denied without prejudice on July 22, 2019 (permitting the substitution if Lindsey retained an attorney).

Following argument the trial court sustained St. Vincent's demurrer to the cause of action for negligent infliction of emotional distress with leave to amend as to Lindsey and without leave to amend as to Susan. St. Vincent's motion to strike the claim for punitive damages was granted. St. Vincent's motion to strike the medical malpractice and survival causes of action based on Lindsay's self-represented status was denied on the ground she still had the option of retaining counsel to pursue those claims on Henry's behalf. The demurrers of all other defendants as to all causes of action were sustained without leave to amend. Lindsey elected not to further amend.

³ The lawsuit was stayed between September 10, 2018 and July 19, 2019 as a result of bankruptcy proceedings involving St. Vincent and Verity Health. Granting relief from the automatic stay, the bankruptcy court stated, "The State Court is the forum best suited to adjudicate Movants' claims, which all arise under non-bankruptcy law. Further, the State Court is already intimately acquainted with this matter, having ruled upon multiple Demurrers and Motions to Strike filed by the Debtors."

On November 26, 2019 St. Vincent, the only defendant still in the lawsuit, filed its answer to the fourth amended complaint, responding to the remaining causes of action for wrongful death, medical malpractice and survival. (The answer noted the causes of action for negligent infliction of emotional distress and false imprisonment, alleged in the fourth amended complaint, had been dismissed by the court.)

3. St. Vincent's Motion for Summary Judgment

St. Vincent moved for summary judgment on January 29, 2020, contending the medical care and treatment provided Henry met the standard of care and did not cause injury to him or his death. St. Vincent submitted with its motion the declaration of Andrew Wachtel, M.D., a board certified physician in internal medicine and pulmonary disease.

Dr. Wachtel explained he had reviewed Henry's medical records from St. Vincent beginning with Henry's arrival at the hospital on October 31, 2015 and opined the care and treatment Henry received in the emergency room met the standard of care: "The medical issues he presented with were properly and timely addressed, and proper medical interventions were undertaken. Furthermore, no act or omission on the part of hospital personnel while Mr. Chow was in the emergency room caused or contributed to his death on November 6, 2015." After describing Henry's treatment in the catheterization laboratory and the ICU following his transfer from the emergency room, Dr. Wachtel further opined that Henry "received extensive and appropriate care during his stay in the ICU." Dr. Wachtel then opined that, following the code blue on November 5, 2015, administration of CPR, use of epinephrine and placement of Henry back on a ventilator, "it was apparent that Mr. Chow was going to die, and

nothing could be done to save him.” “[I]t was appropriate and within the standard of care,” according to Dr. Wachtel, “for Dr. Nguyen to issue the DNR order upon obtaining Mr. Chow’s son’s consent, and for the hospital staff to carry out that order, which it did appropriately and within the standard of care.”

Summarizing his views, Dr. Wachtel opined, “[T]he medical staff at St. Vincent Medical Center met the standard of care in the medical treatment rendered to the decedent.” In addition, he declared, “[t]o a reasonable medical probability, no act or omission on the part of hospital personnel or any medical provider caused Mr. Chow’s condition to decline or his death.” He concluded his declaration by stating, “[T]o a reasonable medical probability, the placing of Mr. Chow on a DNR did not cause his death, because to a reasonable medical probability, he was going to die shortly after the November 5, 2015 Code Blue regardless of whether he was on a DNR or not. In other words, Mr. Chow had reached the end of his life, and to a reasonable medical probability further resuscitative efforts were not going to extend his life.”

Citing *Landeros v. Flood* (1976) 17 Cal.3d 399 and *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, St. Vincent argued, because it had submitted an expert declaration opining that it had met the standard of care when treating Henry and that to a reasonable medical probability placing him on a DNR did not cause his death, it was entitled to summary judgment unless Lindsey filed an expert declaration in opposition contradicting that opinion.

In her opposition papers Lindsey contended St. Vincent personnel had caused Henry’s death by unlawfully unplugging his life support without his consent and against his desire, which

she characterized as murder and euthanasia, as well as elder abuse. Lindsey submitted her own declaration, stating she was in Henry's room on the morning of November 6, 2015 and saw nurse Leyba sitting 12 to 20 feet away from Henry, not providing services, while Henry was gasping for air, unable to breathe. The ventilator was unplugged, the heart monitor removed and all alarms were turned off. According to Lindsey, her father's eyes were full of terror and fear.

4. The Trial Court's Ruling

Before turning to the merits of St. Vincent's motion, the trial court overruled Lindsay's objection to Dr. Wachtel's expert witness declaration, explaining, "[I]t appears to be an objection to his conclusion that 'no act or omission' caused the death on the grounds that such a declaration is not based on personal knowledge."⁴

Based on Dr. Wachtel's opinions, the court found St. Vincent had submitted competent evidence that its medical personnel had not breached a duty of care or caused Lindsey damages or Henry's death, carrying its initial burden on summary judgment. Lindsey, in contrast, failed to carry her burden. "Plaintiff failed to submit admissible competent evidence creating a triable issue of fact as to Defendant's submitted evidence that Defendant met the standard of care and that Defendant's care of Decedent was not the cause of Decedent's injury or death." Emphasizing that Lindsey did not submit an expert declaration controverting the opinions of Dr. Wachtel and

⁴ The court also noted that Lindsey's objection violated California Rules of Court, rule 3.1354(b) because it was included within her opposition memorandum, rather than having been filed separately.

ruling inapplicable the “common knowledge” exception to the general requirement that expert testimony is needed in medical malpractice cases, the court found Lindsey’s declaration did not constitute competent evidence: “Plaintiff’s arguments in opposition that Defendant’s treatment of Decedent constituted ‘intentional murder’ as opposed to negligence, whether conduct of Defendant’s staff caused Decedent’s death, and arguments relating to the DNR order and taking Decedent off the ventilator are irrelevant to her burden in opposing Defendant’s motion for summary judgment, for which she must submit expert testimony in support of her assertions.”

Judgment was entered in favor of St. Vincent on July 24, 2020. On the same date, but in a separate document, judgment was entered in favor of Verity Health and various individual defendants. William was dismissed from the action on July 24, 2020 for failure to prosecute pursuant to Code of Civil Procedure section 583.240, subdivision (a)(1).

Lindsey filed a timely notice of appeal, which appears to be limited to the judgment entered in favor of St. Vincent.

DISCUSSION

1. Standard of Review

A motion for summary judgment is properly granted only when “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).) A defendant may bring a motion on the ground the plaintiff cannot prove one of the required elements of the case or there is a complete defense to the action. (Code of Civ. Proc., § 437c, subds. (o)(1), (2) & (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

To carry its initial burden when the motion is directed to the plaintiff's case rather than an affirmative defense, the defendant must present evidence that either negates an element of the plaintiff's cause of action or shows that the plaintiff does not possess, and cannot reasonably obtain, evidence necessary to establish at least one element of the cause of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 853-854.) Only after the defendant carries that initial burden does the burden shift to the plaintiff "to show 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)(2).)

We review a grant of summary judgment *de novo* (*Samara v. Matar* (2018) 5 Cal.5th 322, 338) and, viewing the evidence in the light most favorable to the nonmoving party (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618), decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

2. Medical Negligence and the Need for Expert Testimony

"Generally, 'negligence' is the failure to exercise the care a reasonable person would exercise under the circumstances. [Citation.] Medical negligence is one type of negligence, to which general negligence principles apply." (*Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690, 694.) "The elements of a medical malpractice claim are: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection

between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.”” (Avivi v. Centro Medico Urgente Medical Center (2008) 159 Cal.App.4th 463, 468, fn. 2.) “Both the standard of care and [a defendant’s] breach must normally be established by expert testimony in a medical malpractice case.” (Id. at p. 467.)

“Because the standard of care in a medical malpractice case is a matter ‘peculiarly within the knowledge of experts’ [citation], expert testimony is required to ‘prove or disprove that the defendant performed in accordance with the standard prevailing of care’ unless the negligence is obvious to a layperson.” (Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 305; accord, Landeros v. Flood, supra, 17 Cal.3d at p. 410 [“[t]he standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman”].)⁵ Similarly, “[c]ausation must be proven within a

⁵ The Supreme Court in *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001, discussed a medical malpractice plaintiff’s need for expert testimony to oppose summary judgment and the obvious-to-a-layperson (common knowledge) exception to that requirement: ““The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.” [Citations.] [Citations.] The ‘common knowledge’ exception is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e.,

reasonable medical probability based upon competent expert testimony.” (*Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603; see *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542 [“[a]s a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff’s damages”]; see also *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1492-1493 [“a plaintiff who alleges a

when a layperson ‘is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.’ [Citations.] The classic example, of course, is the X-ray revealing a scalpel left in the patient’s body following surgery. [Citation.] Otherwise, “expert evidence is conclusive and cannot be disregarded.”” (Fn. omitted.)

Nothing in the trial court record would support a finding the proper treatment of a DNR patient with Henry’s multiple problems falls within this common knowledge exception to the need for expert testimony in a medical malpractice case. (See *Bardessono v. Michels* (1970) 3 Cal.3d 780, 792-793 [jury could rely on common knowledge where alleged malpractice did not involve a complex procedure, but rather a simple treatment for commonplace problem where untoward, extremely rare result occurred]; *Davis v. Memorial Hospital* (1962) 58 Cal.2d 815, 818 [trial court erred in failing to instruct jury on *res ipsa loquitur* when it was matter of common knowledge that procedure is not ordinarily harmful in the absence of negligence]; see also *Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 801 [“[t]he more complex or unusual the medical process, the more likely it is that expert testimony will be required to establish whether or not the injury was the result of negligence”].)

statutory cause of action for wrongful death arising from medical negligence must prove by reasonable medical probability based on competent expert testimony that a defendant's acts or omissions were a substantial factor in bringing about the decedent's death"].)

"Whenever the plaintiff claims negligence in the medical context, the plaintiff must present evidence from an expert that the defendant breached his or her duty to the plaintiff and that the breach caused the injury to the plaintiff." (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 153.) A medical malpractice defendant who supports a summary judgment motion with applicable expert declarations "is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.)

3. *Lindsey Failed To Demonstrate a Triable Issue of Material Fact as to St. Vincent's Breach of Duty, an Essential Element of Her Causes of Action*

In appellate briefs devoid of any citation to the record (see generally Cal. Rules of Court, rule 8.204(a)(1)(C) [any reference to a matter in the record must be supported by a specific citation]), Lindsey contends the motion for summary judgment was improperly granted because St. Vincent's medical personnel committed a deliberate act of euthanasia (murder) outside the standard of care. Although we do not question the depth of Lindsey's anguish over the death of her father, because she failed to present expert medical testimony in opposition to St. Vincent's motion, her briefs fail to provide any ground for reversal of the trial court's judgment.

Lindsey advances four basic arguments in her briefs. First, asserting murder is not mere negligence, Lindsey contends her

declaration described deliberate acts intended to kill Henry (unplugging the ventilator, removing the heart monitor and turning off alarms); and she suggests, as a consequence, well-established rules governing medical malpractice cases are somehow inapplicable to her lawsuit. Lindsey's argument misperceives the nature and elements of her causes of action for wrongful death and medical malpractice. (The survival action is simply Henry's claim for malpractice.) As to each, the issue is not whether St. Vincent's actions were deliberate or accidental—there is no dispute they were intentional—but whether they were performed in accordance with the applicable standard of care and, therefore, not tortious or otherwise wrongful.⁶ Dr. Wachtel testified they complied with that standard, based on his review of Henry's medical records, as well as Dr. Wachtel's own extensive training and experience. As discussed, absent an expert declaration contradicting Dr. Wachtel's opinion, that evidence is conclusive; and the trial court was required to grant St. Vincent's motion.

⁶ To reiterate, breach of duty and causation are essential elements of a claim for medical negligence (malpractice). (See, e.g., *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509 [a medical malpractice plaintiff “must show that defendants’ breach of the standard of care was the cause, within a reasonable medical probability, of his injury”].) Similarly, the elements of a wrongful death cause of action directed to a health care provider include “(1) a ‘wrongful act or neglect’ on the part of one or more persons that (2) ‘cause[s]’ (3) the ‘death of [another] person’ [citation]—on legal theories of negligence and strict liability.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 390.)

Lindsey's challenge to the admissibility of Dr. Wachtel's declaration because he did not have personal knowledge of Henry's treatment, relying instead on Henry's medical records, is misplaced. "Expert opinion testimony may be based upon information furnished to the expert by others so long as the information is of a type reasonably relied upon by professionals in the relevant field." (*Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 821; accord, *Zuniga v. Alexandria Care Center, LLC* (2021) 67 Cal.App.5th 871, 887; see Evid. Code, § 801, subd. (b) [expert opinion may be based on matter, including the expert's experience, training and education, perceived by or personally known to the witness, "or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon which the subject to which his testimony relates"].) Henry's medical records were submitted with St. Vincent's motion papers, authenticated by the custodian of medical records for St. Vincent, and properly before the trial court as business records within the meaning of Evidence Code section 1271. "They are the type of records on which medical experts may and do rely in order to give expert testimony in a medical malpractice case." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 876; see *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 506 ["The court found in its order of May 14, 2010, that the medical records in support of Dr. Warren's motion were properly authenticated. Accordingly, the foundational facts and medical records on which Dr. Ostegard relied as stated in his declaration were before the court to support his expert opinion"].)

Lindsey also argues summary judgment should have been denied because the bankruptcy court, when lifting the automatic stay of the case imposed following Verity Health's bankruptcy filing in September 2018, found her claims had merit. The bankruptcy court made no such finding, as the trial court explained when rejecting this same contention. The bankruptcy court noted that Lindsey and Susan alleged the debtors "euthanized Henry . . . as a cost-saving measure"—language that Lindsey quotes without indicating it was a description of her allegation—but ruled only that state court, not federal bankruptcy court, was the forum better suited to adjudicate Lindsey's state law claims.

Finally, Lindsey contends Henry's death certificate, which stated the immediate cause of death was cardiogenic shock and acute myocardial infarction, established that Henry did not die from natural causes. But the meaning of those medical terms in the context of an evaluation of St. Vincent's treatment and care of Henry, just as Lindsey's claims that St. Vincent's conduct violated various federal laws regarding euthanasia and constituted Medicare fraud, required expert testimony. In the absence of expert testimony, St. Vincent was entitled to summary judgment.

DISPOSITION

The judgment is affirmed. St. Vincent is to recover its costs on appeal.


PERLUSS, P. J.

We concur:


SEGAL, J.


FEUER, J.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
Superior Court of California
County of Los Angeles

JUL 22 2019

DEPARTMENT 71

Sherri R. Carter, Executive Officer/Clerk
By A. Barton Deputy

~~TENTATIVE~~ RULING

SUSAN CHAN CHOW, et al.,

Case No.: BC648838

vs.

MA LEYBA, et al.

Hearing Date: July 22, 2019

Plaintiff Lindsey Chow's motion to substitute as successor-in-interest to deceased Plaintiff Susan Chan Chow is denied without prejudice.

and Henry Chow

Plaintiff Lindsey Chow ("Lindsey") moves for an order, pursuant to C.C.P. §377.31, substituting her, in her capacity as successor-in-interest to deceased Plaintiff Susan Chan Chow ("Susan"), as plaintiff in this action, on the grounds that Susan passed away on March 23, 2019. (Notice of Motion, pgs. 1-2.) Lindsey, as the surviving daughter of Susan and Henry Chow ("Henry") moves to substitute and succeed to their interests in the instant action.

By way of background, Lindsey is already a plaintiff in the operative pleading, which includes causes of action for wrongful death, medical malpractice, negligent infliction of emotional distress, and survival action, brought in connection with the end of life treatment rendered to Henry while he was a patient at Defendant St. Vincent Medical Center ("St. Vincent"). Prior to her death, Susan had been maintaining the causes of action for medical malpractice and survival action as Henry's successor-in-interest. (Opposition, pg. 2.)

C.C.P. §377.31 provides, as follows: "On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest."

Lindsey submitted evidence her mother, Susan, passed away on April 16, 2014. (Decl. of Lindsey ¶15, Exh. 2.) Lindsey also submitted evidence suggesting she is the successor-in-interest of both Susan and Henry. (Successor in Interest Decl. ¶¶12-8, Exh. 1.) (See C.C.P. §377.11 (“For the purposes of this chapter, ‘decendent’s successor in interest’ means the beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.”).)


In opposition, Defendants St. Vincent, Verity Health System of California, Ma Leyba, Fernando Lopez, RCP, Daniel Vue, Mariana Juarez, RN, Dejan Markovic, RCP, Lydia Barrios, RN, and Lucio S. Ramirez, RCP (collectively, “Defendants”) argue Lindsey cannot maintain Henry’s survival and medical malpractice causes of action since a pro per plaintiff cannot prosecute causes of action on behalf of a decedent. (Opposition, pgs. 2-3; See *Hansen v. Hansen* (2003) 114 Cal.App.4th 618, 619 (“a conservator, executor, or personal representative of a decedent’s estate who is unlicensed to practice law cannot appear in propria persona on behalf of the estate in matters outside the probate proceedings.”).)

Lindsey’s argues in reply that the rule articulated in *Hansen* does not bar self-representation by a representative of a decedent’s estate if that person is also the sole beneficiary of the estate because such a person would only be representing his or her own interests, not the interests of others. (Reply, pgs. 5-8.) *Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1524, cited by Lindsey is inapposite as *Aulisio* involved a trust where the pro per litigant was the sole grantor, trustee and trust beneficiary. Indeed *Aulisio* explained:

“It is critical here that Aulisio is the sole trust settlor. In a revocable trust, the ‘trustee owes a fiduciary duty to the settlor, not to the beneficiaries, as long as the settlor is alive. During that time, the trustee needs to account to the settlor only and not also to the beneficiaries. When the settlor dies, the trust becomes irrevocable, and the beneficiaries’ interest in the trust vests.’ [Citation.] Thus, if Aulisio were not the settlor, but only the trustee and sole beneficiary of a revocable trust settled by someone else, he could not purport to litigate trust matters in propria persona because the interests at stake in protecting the trust corpus would belong to the settlor, not Aulisio. He would not be representing his own interests, but rather his fiduciary duty as the trustee would run to another person, the settlor. By purporting to litigate in propria person, he actually would be engaged in the unauthorized practice of law.” (*Id.* 230 Cal.App.4th 1525.)

Based on the foregoing, Lindsey's motion is denied without prejudice.

Dated: July 22, 2019


Hon. Monica Bachner
Judge of the Superior Court

Appendix D

SUPREME COURT
FILED

Court of Appeal, Second Appellate District, Division Seven - No. B307432 AUG 10 2022

S274863

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA

Deputy

En Banc

LINDSEY CHOW, Plaintiff and Appellant,

v.

MA LEYBA et al., Defendants and Respondents.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

FILED
Superior Court of California
County of Los Angeles

DEPARTMENT 71

SEP 13 2019

TENTATIVE RULING

Sherril R. Carter, Executive Officer/Clerk of Court
By Anthony He, Deputy

SUSAN CHAN CHOW, et al.,

Case No.: BC648838

vs.

MA LEYBA, et al.

Hearing Date: September 13, 2019

Defendants Verity Health System of California, Lucio S. Ramirez, Ma Leyba, Fernando Lopez, Daniel Vue, Mariana Juarez, Dejan Markovic, and Lydia Barrios's demurrer to the fourth amended complaint is sustained without leave to amend. Defendants' motion to strike is moot.

Defendant St. Vincent Medical Center's demurrer to the 3rd COA is sustained with leave to amend as to Plaintiff Lindsey Chow and sustained *without leave* to amend as to Plaintiff Susan Chan Chow.

St. Vincent's motion to strike is granted as to the allegations pertaining to and prayer for punitive damages and denied as to the 2nd and 5th COAs.

Defendants Verity Health System of California, a California Regional Healthcare System ("Verity"), Ma Leyba ("Leyba"), Fernando Lopez, RCP ("Lopez"), Daniel Vue, RCP ("Vue"), Mariana Juarez, RN ("Juarez"), Dejan Markovic, RCP ("Markovic"), Lydia Barrios, RN ("Barrios"), and Lucio S. Ramirez ("Ramirez") (collectively "Defendants") demur to the 1st (wrongful death), 2nd (medical malpractice), 3rd (negligent infliction of emotional distress ("NIED")), and 5th (survival action) causes of action in the fourth amended complaint of Plaintiffs Susan Chan Chow ("Susan") and Lindsey Chow ("Lindsey") (collectively "Plaintiffs"). Defendant St. Vincent Medical Center ("St. Vincent") demurs *only* to the 3rd (NIED) cause of action in Plaintiffs' fourth amended complaint. Defendants and St. Vincent argue Plaintiffs failed to allege sufficient facts to constitute the causes of action and/or the causes of action are time-barred. (Notice of Demurrer, pg. 2.) [Note: Plaintiffs struck the 4th (false imprisonment) cause of action from the fourth amended complaint but did not change the numeration as to the 5th (survival action) cause of action; accordingly,

the survival action is actually the 4th COA but for consistency, this ruling will refer to it as the 5th COA.] In addition, Defendants and St. Vincent move to strike the following from the fourth amended complaint: (1) the claim for punitive and exemplary damages; (2) the 2nd (medical malpractice) cause of action in its entirety; and (3) the 5th (survival) cause of action in its entirety. (Notice of Motion, pg. 2; Notice of Addendum to Motion, pg. 2; C.C.P. §§425.13, 435, 436, 437.)

By way of background, Defendants and St. Vincent filed the instant demurrer and motion to strike on June 29, 2018, and the addendum to motion to strike on August 20, 2018, for a hearing date set on September 12, 2018. Defendant Tao Nguyen, M.D. ("Dr. Nguyen") also filed a demurrer and motion to strike for the same hearing date. At the September 12, 2018 hearing, the Court provided the parties with copies of its Tentative Ruling and took the matter under submission. (Court's 9/12/18 Minute Order.) On September 25, 2018, the Court noted that it was in receipt of a Notice of Stay filed on September 10, 2018 by St. Vincent and Verity, and accordingly, set aside and vacated its September 12, 2018 order taking the demurrers and motions to strike under submission, ordered the demurrers and motions to strike off calendar, and ordered the case stayed in its entirety pending bankruptcy. (Court's 9/25/18 Minute Order.) On January 16, 2019, the Court lifted the stay as to Dr. Nguyen only, deemed his demurrer and motion to strike submitted as of that date, and sustained his demurrer to Plaintiffs' fourth amended complaint without leave to amend. (Court's 1/16/19 Minute Order.) The Court lifted the bankruptcy stay on July 22, 2019. (Court's 7/22/19 Minute Order.) On July 22, 2019, the Court also denied Lindsey's motion to substitute herself as successor-in-interest to Susan, who had passed away on March 23, 2019, and had been maintaining causes of action for medical malpractice and survival action as the successor-in-interest to Henry Chow ("Henry" or "Decedent"), Susan's husband. (Court's 7/22/19 Minute Order.) In denying Lindsey's motion, the Court ruled that as a pro per plaintiff, Lindsey is barred from prosecuting causes of action on behalf of a decedent. (Court's 7/22/19 Ruling & Minute Order.) As of the date of this hearing, a successor-in-interest has not been appointed to maintain Susan's causes of action and Lindsey is still a self-represented litigant.

A. Demurrer

Verity (1st, 2nd, 3rd, and 5th COAs)

Plaintiffs failed to allege sufficient facts to suggest Verity played a role in the alleged wrongful conduct and/or is responsible for the alleged wrongful

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conduct of St. Vincent and/or its employees. Plaintiffs alleged Decedent was admitted to St. Vincent for treatment on October 31, 2015 and passed away on or about November 6, 2015 due to the illegal acts of St. Vincent staff and the complete withdrawal of care by the St. Vincent staff. (4AC ¶¶23-85.) Plaintiffs alleged Dr. Nguyen was employed to provide services on behalf of St. Vincent and Verity, Verity is the parent company of St. Vincent, and St. Vincent is a subsidiary of Verity. (4AC ¶¶4, 19.) However, "the law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities" and Plaintiffs did not allege facts suggesting St. Vincent and Verity are alter egos. (*Cascade Energy & Metals Corp. v. Banks* (10th Cir. 1990) 896 F.2d 1557, 1576.) (See also *Laird v. Capital Cities/Abc* (1998) 68 Cal.App.4th 727, 742, and *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 537-540.) Plaintiffs' conclusory allegations that Verity assumed the risk for all liability when it decided to use St. Vincent as an agent for rendering healthcare services, that Verity has a right of control over St. Vincent's actions, and that Verity's directors and managers have a fiduciary duty to ensure policies and procedures are in place and complied with to ensure the safety of patients and compliance with all healthcare statutes and licensing requirements are insufficient to establish Verity is somehow responsible for the alleged acts of St. Vincent and its employees. (4AC ¶¶20-22.)

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Based on the foregoing, Verity's demurrer to the fourth amended complaint is sustained without leave to amend.

Statute of Limitations – (1st, 2nd, 3rd and 5th COAs) – Defendants (Excluding St. Vincent and Verity)

C.C.P. §340.5 provides, in pertinent part, as follows: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have

committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence."

Plaintiffs' 1st (wrongful death), 2nd (medical malpractice), and 5th (survival action) causes of action are all based on Defendants' negligent treatment of Decedent and his resulting injury and/or death during and after such treatment. Accordingly, these causes of action are time-barred under C.C.P. §340.5 on the face of the fourth amended complaint. The allegations in the fourth amended complaint show Plaintiffs were aware of the facts giving rise to the wrongful death cause of action on the date of Decedent's death – November 6, 2015. Specifically, Plaintiffs alleged facts suggesting they were aware that Decedent was intentionally being denied life support and medical care before he died. (4AC ¶¶23-78.) Plaintiffs filed the instant action on January 31, 2017, more than one year after they discovered or through the use of reasonable diligence should have discovered the injury. (C.C.P. §340.5.) Plaintiffs' conclusory allegations of fraud, intentional concealment, and the presence of lines/tubing/clamps left inside Decedent's body are insufficient to support a claim for tolling. (C.C.P. §340.5.)

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Unlike Plaintiffs other causes of action, Plaintiffs' 3rd (NIED) cause of action is alleged on Lindsey's behalf as a witness and bystander of the Defendants' negligent acts that Plaintiff alleges caused Decedent's death. (See 4AC ¶98; see also *Smith v. Pust* (1993) 19 Cal.App.4th 263, 273 ("Where there is a claim for the 'negligent infliction of emotional distress,' the plaintiff must be either a 'direct victim' of the wrongful conduct, or, with certain qualifications, a bystander, (i.e., 'percipient witness to the injury of another'). [Citation]")) Plaintiffs' NIED cause of action appears to be based on Leyba's alleged conduct (i.e. attacking Decedent's ability to breath when she administered anesthesia in front of Lindsey and William Chow ("William")). (4AC ¶¶98-100.) However, notwithstanding Lindsey's assertion of NIED on her own behalf as a bystander, the NIED cause of action is also time-barred on the face of the fourth amended complaint. The cause of action is based upon an injury, Lindsey's emotional distress, that resulted from health care providers alleged professional negligence, or acts carried out in the rendering of professional services. (See C.C.P. §340.5; see also *Campanano v. California Medical Center* (1995) 38 Cal.App.4th 1322, 1328-1329 ("The emotional distress must occur 'as a result' of a plaintiff's presence at the injury-producing event and contemporaneous awareness that the event is causing injury to the victim. A plaintiff may not recover for all emotional distress suffered as a result of the victim's injury. Instead, the plaintiff may recover only for the emotional distress suffered as a result of plaintiff's presence at the injury-producing event and the contemporaneous awareness that the injury was being suffered. [Citation.]

Accordingly, the cause of action accrues at the time of the injury-producing event.”.) Here, based on the allegations, Lindsey’s cause of action accrued when she witnessed Leyba administer anesthesia, on or about November 5, 2015, and prior to Decedent’s death on November 6, 2015. (4AC ¶¶62-66, 74, 98.)

Accordingly, the statute ran, at latest, on November 6, 2016, prior to Plaintiffs filing the instant action on January 31, 2017. In addition, Lindsey cannot allege facts supporting a theory of tolling, since an NIED cause of action is based on the actual witnessing of the harm, not learning about the harm later, and as alleged, Lindsey witnessed the harm on or about November 5, 2015.

[Note: St. Vincent does not argue Plaintiffs’ causes of action are time barred as to it on the face of the fourth amended complaint since Plaintiffs alleged that they gave St. Vincent notice of intent to commence action, which extends the statute of limitations as to St. Vincent by 90 days under C.C.P. §364. Accordingly, Plaintiffs filed their action within the extended statute of limitations. (See Demurrer, pg. 6; 4AC ¶78.)]

Based on the foregoing, Leyba, Lopez, Vue, Juarez, Markovic, Barrios, and Ramirez’s demurrer to the fourth amended complaint, based on the statute of limitations, is sustained without leave to amend.

NIED (3rd COA) – St. Vincent

A. Susan’s NIED cause of action

As noted above, prior to the hearing on the instant motion, Susan passed away on March 23, 2019. To the extent Susan asserted a NIED cause of action against Defendants on her own behalf, this cause of action does not survive her death since, by definition, it is barred by C.C.P. §377.34 because its damages only consist of emotional suffering. (See C.C.P. §377.4 (“In an action... by a decedent’s... successor in interest on the decedent’s cause of action, the damages recoverable... do not include damages for pain, suffering, or disfigurement”); See also *Carr v. Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 892.)

Based on the foregoing, St. Vincent’s demurrer to the 3rd cause of action, as asserted by Susan, is sustained without leave to amend.

B. Lindsey’s NIED Cause of Action

"The Supreme Court has established a three-part test which must be satisfied in order for a plaintiff to state a cause of action for 'bystander' [NIED]: 'In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.'" (*Campanano v. California Medical Center, supra*, 38 Cal.App.4th at 1326, citing *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647.)

Lindsey did not allege sufficient facts to constitute a cause of action for NIED against St. Vincent. Specifically, Lindsey did not allege facts suggesting she witnessed the injury-producing event at the time it occurred with an awareness that it was causing injury to Decedent. Lindsey alleged that on November 4, 2015, an employee of St. Vincent caused Decedent's life support to be discontinued, without notifying Lindsey of the decision. (4AC ¶40.) Lindsey alleged that the next day, on November 5, 2015, she observed that the life support *had* been unplugged. (4AC ¶35.) Accordingly, Lindsey was not present for and did not witness the unplugging of Decedent's life support equipment. (See 4AC ¶¶28, 59.) To the extent Lindsey's NIED cause of action is based on emotional distress caused by the unplugging of Decedent's life support, she has not alleged sufficient facts to support the cause of action as her allegations make clear she did not witness the event. Lindsey also alleged that she witnessed Leyba administer Decedent an injection that caused him to fall asleep. (4AC ¶66.) Lindsey alleged that at the time she was worried the injection causing Decedent to sleep would suffocate him. (4AC ¶66.) Lindsey alleged that the "action of administering a sleeping agent was to asphyxiate [Decedent] and hasten his death[.]" (4AC ¶66.) However, Lindsey failed to allege facts suggesting she knew the purpose and/or effect of the injection as causing an injury to Decedent to support a cause of action for NIED. (See *Morton v. Thousand Oaks Surgical Hospital* (2010) 187 Cal.App.4th 926, 929 (the court found plaintiffs' allegations that "they were 'experienced in the medical field and understood and appreciated the dangers faced by their mother' in the event remedial action was not taken [to be] insufficient to establish that [plaintiffs] knew and appreciated the medical circumstances affecting their mother.") Lindsey alleged that the immediate result of the administering of the anesthesia was that Decedent fell asleep, however, Lindsey failed to allege facts suggesting she had knowledge or actually perceived the anesthesia causing an injury to Decedent at the time it was administered.

Based on the foregoing, St. Vincent's demurrer to the 3rd cause of action, as asserted by Lindsey, is sustained with leave to amend.

B. Motions to Strike

In light of the ruling on the demurrer as to Defendants, Defendants' motion to strike is moot.

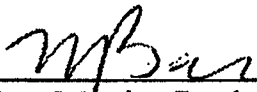
St. Vincent's motion to strike the allegations pertaining to and prayer for punitive damages is granted. C.C.P. §425.13(a) provides that, "[i]n any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint... unless the 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... The court shall not grant the 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 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." Here, the Court denied Plaintiffs' motion to seek punitive damages since it was filed less than nine months before the date the matter was first set for trial and alternatively found that Plaintiffs did not submit admissible evidence showing there is a substantial probability they will prevail on the claim for punitive damages pursuant to Civil Code §3294. (See Court's 6/21/19 Ruling.) Accordingly, the inclusion of allegations of punitive damages in Plaintiffs' fourth amended complaint are improper and subject to a motion to strike.

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St. Vincent's motion to strike the 2nd and 5th causes of action is denied. The Court notes that a "conservator, executor, or personal representative of a decedent's estate who is unlicensed to practice law cannot appear in propria persona on behalf of the estate in matters outside of the probate proceedings." (*Hansen v. Hansen* (2003) 114 Cal.App.4th 618, 689.) However, Lindsey still has the option to retain counsel in order to pursue her 2nd and 5th causes of action on Decedent's behalf and the Court declines to strike the causes of action altogether at this time.

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Dated: September 13, 2019


Hon. Monica Bachner
Judge of the Superior Court

Appendix E

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Attorneys for the Chapter 11 Debtors and
Debtors In Possession

FILED & ENTERED

APR 09 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re

VERITY HEALTH SYSTEM OF
CALIFORNIA, INC., *et al.*,

Debtors and Debtors In Possession.

Lead Case No. 2:18-bk-20151-ER

Jointly Administered with:

Case No. 2:18-bk-20162-ER
Case No. 2:18-bk-20163-ER
Case No. 2:18-bk-20164-ER
Case No. 2:18-bk-20165-ER
Case No. 2:18-bk-20167-ER
Case No. 2:18-bk-20168-ER
Case No. 2:18-bk-20169-ER
Case No. 2:18-bk-20171-ER
Case No. 2:18-bk-20172-ER
Case No. 2:18-bk-20173-ER
Case No. 2:18-bk-20175-ER
Case No. 2:18-bk-20176-ER
Case No. 2:18-bk-20178-ER
Case No. 2:18-bk-20179-ER
Case No. 2:18-bk-20180-ER
Case No. 2:18-bk-20181-ER

Chapter 11 Cases
Hon. Ernest M. Robles

**ORDER ON NOTICES OF MOTIONS AND
MOTIONS FOR RELIEF FROM THE
AUTOMATIC STAY UNDER 11 U.S.C. § 362
(ACTION IN NON-BANKRUPTCY FORUM)
FILED BY SUSAN CHAN CHOW AND
LINDSEY CHOW**

Hearing:

DATE: April 3, 2019
TIME: 10:00 a.m.
PLACE: Courtroom 1568
255 East Temple Street
Los Angeles, California 90012-3300

- ☐ Affects All Debtors
- ☒ Affects Verity Health System of California, Inc.
- ☐ Affects O'Connor Hospital
- ☐ Affects Saint Louise Regional Hospital
- ☐ Affects St. Francis Medical Center
- ☒ Affects St. Vincent Medical Center
- ☐ Affects Seton Medical Center
- ☐ Affects O'Connor Hospital Foundation
- ☐ Affects Saint Louise Regional Hospital Foundation
- ☐ Affects St. Francis Medical Center of Lynwood Foundation
- ☐ Affects St. Vincent Foundation
- ☐ Affects St. Vincent Dialysis Center, Inc.
- ☐ Affects Seton Medical Center Foundation
- ☐ Affects Verity Business Services
- ☐ Affects Verity Medical Foundation
- ☐ Affects Verity Holdings, LLC
- ☐ Affects De Paul Ventures, LLC
- ☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors In Possession.

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(213) 623-9300

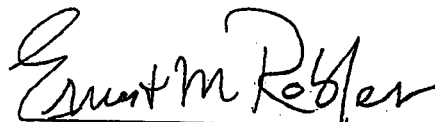
DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 The *Notices Of Motions And Motions For Relief From The Automatic Stay Under*
2 *11 U.S.C. § 362 (Action In Non-Bankruptcy Forum) Filed By Susan Chan Chow And Lindsey*
3 *Chow* [Docket Nos. 1614 and 1629] (the "Motions"), came on regularly for hearing at 10:00 a.m.
4 on April 1, 2019, before the Honorable Ernest M. Robles, United States Bankruptcy Judge, in
5 Courtroom 1568, United States Bankruptcy Court, Edward R. Roybal Building, 225 E. Temple
6 Street, Los Angeles, California 90012. Lindsey Chow appeared *in pro per*. John A. Moe, II, of
7 Dentons US LLP, appeared on behalf of Debtors, Verity Health System of California, Inc., and
8 St. Vincent Medical Center. Having reviewed the Motions, the *Debtors' Response To Motion For*
9 *Relief From The Automatic Stay Under 11 U.S.C. § 362 Filed By Susan Chan Chow And Lindsey*
10 *Chow* and the accompanying *Declarations of Janee Tomlinson and Andrew Wachtel, M.D.*
11 [Docket No. 1835], and the *Answer To Debtors' Response To Our Motion For Relief From The*
12 *Automatic Stay* [Docket No. 1900], the statements of Lindsey Chow and John A. Moe, II, at the
13 hearing, and for the reasons set forth in the Court's tentative rulings (Docket Nos. 2035 and 2034),
14 which the Court adopts as its final rulings and which are incorporated by reference, and good
15 cause appearing therefor,

16 IT IS HEREBY ORDERED that the Motions for relief from the automatic stay are granted,
17 effective July 19, 2019.

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24 Date: April 9, 2019

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Ernest M. Robles
United States Bankruptcy Judge

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, April 3, 2019

Hearing Room 1568

10:00 AM

2:18-20151 Verity Health System of California, Inc.

Chapter 11

#15.00 Hearing

RE: [1614] Notice of motion and motion for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM.

FR. 4-1-19

Docket 1614

Tentative Ruling:

4/2/2019

See Cal. No. 14, above, incorporated in full by reference.

Party Information

Debtor(s):

Verity Health System of California,

Represented By

Samuel R Maizel

John A Moe II

Tania M Moyron

Claude D Montgomery

Sam J Alberts

Shirley Cho

Patrick Maxcy

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, April 3, 2019

Hearing Room 1568

10:00 AM

2:18-20151 Verity Health System of California, Inc.

Chapter 11

#14.00 Hearing

RE: [1629] Notice of motion and motion for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: Susan Chan Chow, et al. v. Ma Leyba, et al. (St. Vincent) BC648838 .

FR. 4-1-19

Docket 1629

Tentative Ruling:

4/2/2019

For the reasons set forth below, the Motions are GRANTED; however, the order granting the Motions shall not take effect until **July 19, 2019**.

Pleadings Filed and Reviewed:

- 1) Notice of Motion and Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 [as to Debtor Verity Health System, Inc.] [Doc. No. 1614]
- 2) Notice of Motion and Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 [as to Debtor St. Vincent Medical Center] [Doc. No. 1629]
- 3) Official Committee of Unsecured Creditors' Response to Motions for Relief from Stay (Non-Bankruptcy Forum) Filed by Susan Chan Chow and Lindsey Chow [Doc. No. 1834]
- 4) Debtors' Response to Motion for Relief from the Automatic Stay Filed by Susan Chan Chow and Lindsey Chow [Doc. No. 1835]
- 5) Answer to Debtor's Response to Our Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 and § 523(a)(6) and § 523(a)(4) [Doc. No. 1900]

I. Facts and Summary of Pleadings

On August 31, 2018 (the "Petition Date"), Verity Health Systems of California ("VHS") and certain of its subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On August 31, 2018, the Court entered an order granting the Debtors' motion for joint administration of the Debtors' Chapter 11

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, April 3, 2019

Hearing Room 1568

10:00 AM

CONT... Verity Health System of California, Inc.

Chapter 11

cases. Doc. No. 17.

Susan Chan Chow and Lindsay Chow ("Movants"), proceeding *in pro se*, seek stay-relief, pursuant to § 362(d)(1), for the purpose of continuing to litigate an action for wrongful death, medical malpractice, and negligent infliction of emotional distress against Debtors St. Vincent Medical Center ("St. Vincent") and Verity Health System, Inc. ("VHS") (collectively, the "Debtors") in the Los Angeles Superior Court (the "State Court Action"). The State Court Action was filed on January 31, 2017. Prior to the Petition Date, St. Vincent and VHS filed Demurrers and Motions to Strike; as a result, Movants have been required to file First, Second, Third, and Fourth Amended Complaints. A hearing on a Demurrer and Motion to Strike filed by St. Vincent and VHS with respect to the Fourth Amended Complaint was set for September 12, 2018, but was taken off calendar as a result of the bankruptcy filing.

In support of the Motions, Movants allege, *inter alia*, that the Debtors euthanized Henry Chow (the father of Movant Lindsey Chow and the spouse of Movant Susan Chow) as a cost-saving measure.

Debtors dispute Movants' allegations with respect to Mr. Chow's death. Debtors oppose stay-relief at this time, explaining that they would be required to spend significant time defending against the State Court Action if the stay were lifted. Debtors request that the stay remain in place until October 15, 2019, so that the Debtors can focus upon selling their remaining hospitals.

For the same reasons, the Official Committee of Unsecured Creditors (the "Committee") asserts that the Motion should be denied without prejudice.

In their Reply in support of the Motions, Movants request that the Bankruptcy Court conduct a jury trial of the claims asserted in the State Court Action in June or July. Movants assert that Mr. Chow died under suspicious circumstances and that a speedy trial is necessary to protect the public.

II. Findings and Conclusions

The Court declines to conduct a jury trial of the claims asserted in the State Court Action. The State Court is the forum best suited to adjudicate Movants' claims, which all arise under non-bankruptcy law. Further, the State Court is already intimately acquainted with this matter, having ruled upon multiple Demurrers and Motions to Strike filed by the Debtors.

As explained by the Ninth Circuit Bankruptcy Appellate Panel in *Kronemyer v. American Contractors Indemnity Co. (In re Kronemyer)* (internal citations omitted): "What constitutes 'cause' for granting relief from the automatic stay is decided on a

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, April 3, 2019

Hearing Room 1568

10:00 AM

CONT... Verity Health System of California, Inc.

Chapter 11

case-by-case basis. Among factors appropriate to consider in determining whether relief from the automatic stay should be granted to allow state court proceedings to continue are considerations of judicial economy and the expertise of the state court, ... as well as prejudice to the parties and whether exclusively bankruptcy issues are involved." 405 B.R. 915, 921. The factors articulated in *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984) and adopted by the bankruptcy court in *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc)*, 311 B.R. 551, 559-60 (Bankr. C.D. Cal. 2004) are also "appropriate, nonexclusive factors to consider in deciding whether to grant relief from the automatic stay to allow pending litigation to continue in another forum." *Kronemyer*, 405 B.R. at 921. The *Curtis* factors are as follows:

- 1) Whether the relief will result in a partial or complete resolution of the issues;
- 2) The lack of any connection with or interference with the bankruptcy case;
- 3) Whether the foreign proceeding involves the debtor as a fiduciary;
- 4) Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
- 5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
- 6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
- 7) Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;
- 8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);
- 9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);
- 10) The interests of judicial economy and the expeditious and economical determination of litigation for the parties;
- 11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial, and
- 12) The impact of the stay on the parties and the "balance of hurt."

Plumberex, 311 B.R. at 599.

The most important of the twelve factors is the effect of the non-bankruptcy litigation on the administration of the estate. *Curtis*, 40 B.R. at 806. The *Curtis* court

**United States Bankruptcy Court
Central District of California
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Courtroom 1568 Calendar**

Wednesday, April 3, 2019

Hearing Room 1568

10:00 AM

CONT... Verity Health System of California, Inc.

Chapter 11

held that “[e]ven slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit.” *Id.*

Because Movants have not agreed to limit recovery to insurance, granting stay-relief at this time would require the Debtors to defend against the State Court Action. Although it would certainly be possible for the Debtors to mount a defense at this time, requiring them to do so would nonetheless interfere with the case by distracting the Debtors’ professionals from other pressing matters. While it is true that primary responsibility for the Debtors’ defense could be assigned to special litigation counsel, the Debtors’ general bankruptcy counsel would still be required to monitor the litigation.

An auction of four of the Debtors’ hospitals is set to occur on April 8–9, with a hearing to approve the results of the auction set for April 17, 2019. To successfully prosecute the case for the benefit of creditors, Debtors will be required to devote substantial resources to the auction and the subsequent hearing to approve the results of the auction. Granting stay-relief at this juncture would require the Debtors to divert their attention from issues pertaining to the sale, which would be detrimental to creditors. Even after the auction has been completed, Debtors will be required to devote substantial attention to issues arising in connection with the California Attorney General’s review of the sale.

In view of the findings set forth above, *Curtis* factors two, five, seven, and eleven weigh against granting stay-relief at this time. Although the relevant *Curtis* factors do not warrant stay-relief now, stay-relief will be warranted as of **July 19, 2019**.

Granting stay-relief now would interfere with the bankruptcy case by distracting the Debtors’ professionals from other pressing matters (the second *Curtis* factor). With respect to factor five, the damages sought in the State Court Action are substantial; Movants have not agreed to limit recovery to applicable insurance; and it is therefore not known whether available insurance proceeds will be sufficient to cover any judgment Movants may obtain. Factor five therefore weighs against granting immediate stay-relief. The litigation’s interference with the case has the potential to reduce creditor recoveries; therefore, factor seven weighs against granting immediate stay-relief. The State Court Action has not reached the trial stage, so factor eleven also weighs against granting immediate stay-relief.

Factor twelve—the balance of the hurt—weighs in favor of the Debtors. As discussed, granting immediate stay-relief will harm the Debtors by distracting the Debtors’ professionals from other pressing matters. On the other hand, the Court acknowledges that Movants will suffer some prejudice as a result of further delay.

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, April 3, 2019

Hearing Room 1568

10:00 AM

CONT... Verity Health System of California, Inc.

Chapter 11

However, in assessing the prejudice to Movants, the Court notes that Movants have not yet succeeded in putting the claims in the State Court Action at issue, even though the action was filed approximately eighteen months before the Petition Date. Given this fact, the prejudice to the Debtors from granting the Motion now outweighs the prejudice to Movants resulting from some additional delay.

To the extent that they apply, the remaining *Curtis* factors weigh in favor of immediate stay-relief. The State Court Action will completely resolve the issues (factor one); the State Court is a the tribunal best suited to hear the Movant's claims (factor three); and lifting the stay would result in a more expeditious determination of the State Court Action (factor ten). Nonetheless, these factors are outweighed by the harm that immediate stay-relief would impose upon the Debtors.

Having considered the applicable *Curtis* factors, the Court finds that Movants are entitled to stay-relief, effective as of **July 19, 2019**. This result gives the Debtors some breathing space to achieve their objectives, while at the same time delaying Movants' ability to proceed with the State Court Action only briefly.

III. Conclusion

Based upon the foregoing, the Motions are GRANTED; however, the order granting the Motion shall not take effect until **July 19, 2019**. Debtors shall submit an order, incorporating this tentative ruling by reference, within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Jessica Vogel or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Verity Health System of California,

Represented By
Samuel R Maizel
John A Moe II

**United States Bankruptcy Court
Central District of California
Los Angeles
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CONT...

Verity Health System of California, Inc.

Chapter 11

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