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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JERRI MOORE, as successor-in-interest to
Marjorie Moore,

Plaintiff and Appellant,

v.

LPM HEALTHCARE, INC. et al.,

Defendant and Respondent.

B238702

(Los Angeles County
Super. Ct. No. VC058825)

COURT OF APPEAL - SECOND DISTRICT

FILED

MAR 27 2013

JOSEPH A. LANE Clerk

Deputy Clerk

APPEAL from an order of dismissal of the Superior Court of Los Angeles County.
Thomas I. McKnew, Jr., Judge. Affirmed.

Moran Law, Michael F. Moran and Lisa Trinh Flint for Plaintiff and Appellant.
Lewis Brisbois Bisgaard & Smith, George E. Nowotny, Kathleen M. Walker,
Clayton T. Lee, Lisa W. Cooney and Matthew B. Stucky for Defendant and Respondent
LPM Healthcare, Inc.

Cole Pedroza, Kenneth R. Pedroza, Matthew S. Levinson; La Follette, Johnson,
De Haas, Fesler & Ames, Dennis K. Ames and Wendy E. Coulston for Defendant and
Respondent Caremore Health Plan, Inc.

Murchison & Cumming, Dan L. Longo, Terry L. Kesinger and Robert S. Ackley
for Defendant and Respondent Care Dimensions, LLC.

Jerri Moore appeals from the order of dismissal entered after the trial court sustained demurrers without leave to amend to the elder abuse cause of action that she brought as the successor-in-interest to her late mother. Moore contends that the allegations in the operative second amended complaint are sufficient to state a cause of action for elder abuse and, therefore, that the trial court erred by sustaining without leave to amend the demurrers brought by defendants LPM Healthcare, Inc., doing business as Lakewood Park Manor; Caremore Health Plan, Inc., doing business as Caremore Touch; and Care Dimensions, LLC. Because we agree that the second amended complaint does not set forth facts stating an elder abuse cause of action, we affirm the order of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Original Complaint

On May 26, 2011, Moore filed a complaint against LPM Healthcare and Caremore, alleging on behalf of her mother causes of action against both defendants for elder abuse (Welf. & Inst. Code, § 15600 et seq.), negligence and willful misconduct, and against LPM Healthcare for breach of contract. Moore, in her individual capacity, also brought a cause of action against both defendants for wrongful death.

Moore alleged that her mother, when 87 years old, was a resident at LPM Healthcare's facility from May 24 to July 28, 2010. According to Moore, while her mother resided at the facility, both defendants "failed to continually assess and monitor [her mother] for skin breakdown, or change in health condition, and failed to implement physician's orders for wound care, which caused her [mother] to develop multiple Stage IV pressure sores on [mother's] right heel and coccyx area." On July 28, 2010, Moore's mother was "noted with a pressure sore on her left heel with slough, multiple pressure sores on her sacral area with slough and eschar, and a right heel wound. Due to [her] significant change in condition[,] which went unnoticed by [d]efendants . . . , she had to be transferred to Woodruff Convalescent for further wound care." "Due to the severity of the pressure sores, which resulted in her medical decline, [Moore's mother] was placed on hospice on August 3, 2010 and passed away on August 31, 2010."

Based on these allegations, Moore sought general, statutory and punitive damages, as well as attorney fees and costs.

2. *The First Amended Complaint and Demurrer Sustained With Leave to Amend*

Before defendants answered or otherwise responded to the complaint, Moore filed a first amended complaint. In the first amended complaint, Moore added Care Dimensions, LLC as a defendant, alleging causes of action against it on behalf of the mother for elder abuse, willful misconduct, negligence and on her own behalf for wrongful death. According to the first amended complaint, Care Dimensions was the home health agency contracted by Caremore to provide wound care to the mother at the LPM Healthcare facility.

Caremore filed a demurrer to, and accompanying motion to strike, the elder abuse, negligence, willful misconduct and wrongful death causes of action alleged against it. As to the elder abuse cause of action, Caremore maintained that, as a health plan, it did not own, operate or manage the facility where Moore's mother resided such that it could be liable for her care and that, in any case, Moore did not allege the requisite egregious conduct for elder abuse.

Care Dimensions filed a demurrer to the elder abuse and willful misconduct causes of action on the ground that Moore had failed to allege facts to sufficiently plead those causes of action. Like Caremore, Care Dimensions argued that the allegations did not amount to the requisite egregious conduct for elder abuse. Care Dimensions also moved to strike the portions of the first amended complaint, including the requests for relief, related to the elder abuse and willful misconduct causes of action.

The trial court ruled on Caremore's demurrer and motion to strike, granting both with leave to amend. As to the elder abuse cause of action, the court concluded "that the factual allegations, taken as true, do not rise to the level of egregiousness necessary to support a finding of elder abuse. The elder abuse statute does not apply to simple or even gross negligence. [Citation.] The (alleged) facts that the physician ordered the wounds to be treated and that it appears that they were not sufficiently treated may establish that the staff was negligent, but does not satisfy the intentional misconduct or recklessness

element of an elder abuse claim. [Citation.] The Court will allow plaintiff an opportunity to amend the pleading to allege additional facts, if they exist, supporting the elements of elder abuse as against the moving defendant.”

3. *The Operative Second Amended Complaint and Demurrers Sustained Without Leave to Amend*

Based on the trial court’s ruling on Caremore’s demurrer and motion to strike, Moore filed the operative second amended complaint, and Care Dimensions took its then-pending demurrer and motion to strike off calendar. The second amended complaint alleged the same causes of action and sought the same relief. As to LPM Healthcare, Moore claimed that, from July 14 to 28, 2010, the facility “and its staff failed to continually monitor or assess [mother] for skin breakdown despite knowing that she was at risk for skin breakdown and was supposed to be receiving treatment to her right heel pressure sore. Further, there is no indication that [the facility] attempted to contact [Caremore] or [Care Dimensions] to have them come in and provide wound care” Moore alleged that Caremore, as the health plan, “did not coordinate any care to have a home health agency assigned to [her mother] to carry out the physician’s order or did not send any of their nurses to provide wound care” within an appropriate time after the physician ordered wound care for her mother. Although a Caremore nurse practitioner visited Moore’s mother on July 7 and 14, no care was provided between July 15 and July 27. As to Care Dimensions, Moore alleged that, when Caremore referred Care Dimensions to provide wound care, Care Dimensions “failed to follow [the] physician’s order and breached [its] Service Plan by only providing 2 weeks of skilled [nursing]/wound care, not 4 weeks as required.” Although the mother’s condition worsened, Care Dimensions failed to notify her physician, complete the four weeks of wound care or coordinate additional wound care.

Caremore filed a demurrer to, and accompanying motion to strike, the second amended complaint, again as to the four causes of action asserted against it for elder abuse, willful misconduct, negligence and wrongful death. Regarding the elder abuse cause of action, Caremore maintained that it was not a care custodian subject to liability

for elder abuse and, to the extent the allegations referred to conduct of Caremore's nurse practitioners, such conduct still did not rise to the level of egregiousness required to proceed on an elder abuse cause of action.

LPM Healthcare then filed a demurrer to the elder abuse and willful misconduct causes of action in the second amended complaint on the grounds that the facts alleged did not state those causes of action. As to the elder abuse cause of action, LPM Healthcare argued that the allegations did not amount to the requisite egregious conduct, nor did they show the necessary involvement in the abuse by a corporate officer, director or managing agent. At the same time, LPM Healthcare moved to strike Moore's requests for damages and other relief based on the elder abuse and willful misconduct causes of action.

Care Dimensions also filed a demurrer to, and accompanying motion to strike, the second amended complaint with respect to the elder abuse and willful misconduct causes of action. Care Dimensions argued that Moore could not pursue her elder abuse cause of action because she alleged merely that, although Care Dimensions "was contracted to provide wound care for four weeks, it only did so for two and, when the patient's condition did not improve, it told the patient to contact her doctor rather than contact the doctor directly. In other words, [Care Dimensions] allegedly committed malpractice." "[T]he allegations essayed against [Care Dimensions] sound in professional negligence and do not rise to the level of elder abuse and/or willful misconduct."

The trial court ruled on all three demurrers and motions to strike. As to Caremore, the court sustained the demurrer without leave to amend and granted the motion to strike as to the elder abuse and willful misconduct causes of action, but overruled the demurrer as to the negligence and wrongful death causes of action. As to LPM Healthcare and Care Dimensions, the court sustained the demurrer and granted the motion to strike as to the elder abuse and willful misconduct causes of action. Addressing the elder abuse cause of action, the court stated Moore "alleges that defendants failed to treat decedent's heel wounds[,] which developed into Sta[g]e IV sores. The Court has reviewed the allegations . . . and finds that they do not rise to the level of egregiousness sufficient to

support an elder abuse cause of action.” “[A]n elder abuse plaintiff must plead and prove more than even gross negligence; the [elder abuse statute] requires a showing of egregious abuse. The facts alleged do not support relief under the statute. [Citation.] There are also no specific facts alleging ratification by an officer, director or managing agent. Finally, defendant Caremore is not a care custodian, but (as alleged) a health care plan, so that [the] Welfare [and] Institutions Code does not apply.”

Soon after the trial court’s ruling, Caremore and Care Dimensions answered the second amended complaint, the negligence and wrongful death causes of action remaining against them. LPM Healthcare also filed an answer, addressing the remaining negligence, wrongful death and breach of contract causes of action against it.

On December 22, 2011, Moore filed a voluntary request for dismissal with prejudice of the cause of action for negligence against all defendants and the breach of contract cause of action against LPM Healthcare. The clerk entered the dismissal as requested. Moore then filed a notice of appeal.¹

¹ Moore’s notice of appeal, filed on January 23, 2012, indicates that she is appealing from a judgment of dismissal under Code of Civil Procedure section 581d entered on December 22, 2011. At the time she filed her notice of appeal, however, the record did not contain a dismissal under Code of Civil Procedure section 581d. The December 22, 2011 date referenced in her notice of appeal is the date the clerk entered her voluntary request for dismissal of the negligence and breach of contract causes of action. The clerk’s entry of the voluntary request for dismissal of the negligence and breach of contract causes of action did not address the elder abuse cause of action Moore seeks to pursue as successor-in-interest to her mother by virtue of her appeal and, in any case, is not a written order signed by the court as contemplated by section Code of Civil Procedure section 581d. In addition, the November 21, 2011 order sustaining the defendants’ demurrers to the elder abuse and willful misconduct causes of action is not an appealable order. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) At our request, on January 17, 2013, Moore obtained from the trial court an order of dismissal of the action as to the elder abuse, willful misconduct, breach of contract and negligence causes of action she brought against defendants as successor-in-interest to her mother. We liberally construe Moore’s premature January 23, 2012 notice of appeal as an appeal from the subsequently entered order of dismissal. (See *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 202; *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1353, fn. 5; Cal. Rules of Court, rules 8.100(a)(2) & 8.104(d)(2).) We note that, although the trial court sustained the demurrers to the willful misconduct cause of action,

DISCUSSION

1. *Standard of Review*

In reviewing a judgment following the sustaining of a demurrer without leave to amend, we decide de novo whether the complaint states facts sufficient to state a cause of action. (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.) We treat the demurrer as admitting all facts properly pleaded, but we do not assume the truth of contentions, deductions or conclusions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) “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.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) If we agree the complaint does not state a cause of action, we review the trial court’s denial of leave to amend for an abuse of discretion. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1381.) The plaintiff has the burden to demonstrate that she can amend her complaint to cure the legal defects in the pleading. (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 959.)

2. *The Trial Court Properly Sustained Demurrers to the Second Amended Complaint*

a. *Pleading Requirements for an Elder Abuse Cause of Action*

The Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (Act) permits “private, civil enforcement of laws against elder abuse and neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) The Act provides enhanced remedies to a plaintiff who proves “by clear and convincing evidence” that a defendant committed physical abuse or neglect of a person 65 years of age or older and that the

as well as the elder abuse cause of action, Moore does not argue on appeal that she has stated a cause of action for willful misconduct. We thus do not address willful misconduct. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [“Issues not raised in an appellant’s brief are deemed waived or abandoned”].) According to the parties, the court stayed Moore’s individual cause of action for wrongful death pending this appeal. It, therefore, also is not part of the appeal.

defendant acted with “recklessness, oppression, fraud, or malice” in the commission of such abuse or neglect. (Welf. & Inst. Code, § 15657.)²

Under the Act, neglect is “[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” (Welf. & Inst. Code, § 15610.57, subd. (a)(1).) “Neglect includes, but is not limited to, all of the following: [¶] (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. [¶] (2) Failure to provide medical care for physical and mental health needs. . . . [¶] (3) Failure to protect from health and safety hazards. [¶] (4) Failure to prevent malnutrition or dehydration. . . .” (*Id.* at § 15610.57, subd. (b) (1)-(4).) The “statutory definition of ‘neglect’ speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care. [Citation.]” (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783.) Consequently, the Act does not apply to negligent acts in the rendition of medical care. (*Delaney v. Baker, supra*, 20 Cal.4th at p. 34.)

To establish a defendant’s culpability, “a plaintiff must prove more than simple or even gross negligence in the provider’s care or custody of the elder. [Citations.]” (*Carter v. Prime Healthcare Paradise Valley LLC, supra*, 198 Cal.App.4th at p. 405.) Recklessness, although not defined in the Act, has been interpreted as “a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur[.]” (*Delaney v. Baker, supra*, 20 Cal.4th at p. 31.) “Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’ [Citation.]” (*Id.* at pp. 31-32.) “Oppression,

² A split of authority exists “on whether the . . . Act creates an independent cause of action or merely provides additional remedies for some other cause of action. [Citations.]” (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 403, fn. 6.) We need not resolve that issue because, even assuming the Act creates an independent cause of action, Moore’s allegations do not state a claim for elder abuse against any of the defendants. (See *id.* at pp. 403-404, fn. 6.)

fraud and malice ‘involve “intentional,” “willful,” or “conscious” wrongdoing of a “despicable” or “injurious” nature.’ [Citation.]” (*Carter*, at p. 405, quoting *Delaney*, at p. 31.)

In summary, to plead a cause of action for elder abuse under the Act based on neglect, a plaintiff must allege facts establishing that the defendant: “(1) had responsibility for meeting the basic needs of the elder or dependent adult,” including medical care; “(2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs”; and “(3) denied or withheld goods or services necessary to meet the elder or dependent adult’s basic needs, either with knowledge that injury was substantially certain . . . or with conscious disregard for the high probability of such injury” (*Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th at pp. 406-407.) A plaintiff also must allege facts demonstrating that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering such that the causal link between the neglect and injury is specifically alleged. (*Id.* at p. 407.)

In addition, to pursue a cause of action against an employer based on the acts of one or more employees, a plaintiff must plead facts that would permit imposition of punitive damages against an employer as specified in Civil Code section 3294, subdivision (b). (Welf. & Inst. Code, § 15657, subd. (c).) Such facts are that (1) “the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others”; or (2) the employer “authorized or ratified the wrongful conduct”; and (3) the employer’s conduct was “on the part of an officer, director, or managing agent of the corporation.” (Civ. Code, § 3294, subd. (b).)

b. *Application of the Pleading Requirements to LPM Healthcare*

Moore contends that the allegations that LPM Healthcare “failed to continually monitor and assess [her mother] for skin breakdown, and failed to provide personal hygiene care, which led to the development of the Stage IV pressure sore on [the mother’s] coccyx and progression of the Stage IV pressure sore of her right heel” are

sufficient to plead neglect. And she suggests that LPM Healthcare's knowledge of her mother's skin breakdown and the plan for wound care treatment is sufficient to plead recklessness. We disagree.

Even assuming Moore could pass the threshold for neglect, her allegations do not amount to recklessness on the part of LPM Healthcare. (Moore does not argue she has pleaded acts of oppression, fraud or malice.) LPM Healthcare's knowledge of the mother's wound, by virtue of the fact that its caregiver discovered it, and of the plan to administer wound care, as a result of the LPM Healthcare caregiver informing the doctor about the wound, does not allege a conscious disregard of the mother's needs with knowledge of a serious danger. Indeed, no allegations point to LPM Healthcare caregivers consciously acting in any way other than to discover a wound on mother and report it to her doctor.

Moreover, Moore failed to allege the requisite culpability for punitive damages. None of the allegations shows ratification by an officer, director or managing agent of conduct by an LPM Healthcare employee, in other words, that an officer, director or managing agent confirmed and accepted the alleged wrongful conduct with knowledge of its outrageous character. (See *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168.) No allegations suggest that an officer, director or managing agent had actual knowledge of failures to follow up with the outside providers charged with administering wound care to the mother or give proper hygiene care. Moore claims that she has pleaded ratification based on allegations that LPM Healthcare's facility was understaffed and that managing agents knew about this understaffing because they developed an action plan to correct it. Any such corrective action plan, however, does not demonstrate that a managing agent confirmed and accepted the alleged failures of unspecified LPM employees with respect to Moore's mother.

c. *Application of the Pleading Requirements to Caremore*

Even assuming, as with LPM Healthcare, Moore sufficiently pleaded neglect and properly alleged that Caremore had care or custody of her mother as required by the Act, she again did not allege conduct amounting to recklessness. Moore acknowledges that

Caremore, as the health plan covering her mother, approved orders for wound care and on at least two occasions sent nurse practitioners to evaluate her mother's condition. She claims that the wound care did not begin as early as it should have and that Caremore did not monitor the care, even though it had approved orders for the care. But nothing in her allegations sets forth facts that unnamed Caremore administrators made a conscious choice to take a course of action that they knew created a serious danger to Moore's mother. Moore also asserts that the nurse practitioners did not indicate that they had conducted a full body assessment of the mother when they examined her. That assertion, however, simply is a claim that the nurse practitioners did not undertake the proper care, not that they failed to provide care. As such, the assertion does not amount to actionable elder abuse. (*Covenant Care, Inc. v. Superior Court*, *supra*, 32 Cal.4th at p. 783.)

Moore also failed to allege conduct or ratification of conduct by an officer, director or managing agent of Caremore. According to Moore, Caremore's "acts and omissions were ratified through the conduct of its [n]urse [p]ractitioners who are the highest nurses employed by [Caremore], and are [Caremore's] managing agents." Although Moore makes the conclusory statement that the nurse practitioners are managing agents, she does not set forth facts that the nurse practitioners are "corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567; see also *Cruz v. HomeBase*, *supra*, 83 Cal.App.4th at pp. 167-168 ["'managing agent' is one with substantial authority over decisions that set these general principles and rules" that guide a corporation and are followed over time].) In fact, the allegations in the second amended complaint belie the assertion that the nurse practitioners were managing agents of Caremore, as Moore acknowledges that their position entailed visiting residential facilities to examine and treat patients. Such a position does not suggest the nurse practitioners set corporate policy as managing agents.

d. *Application of the Pleading Requirements to Care Dimensions*

Moore contends that Caremore assigned Care Dimensions to provide wound care to her mother and that care was to take place three days a week for four weeks but occurred for only two weeks, despite the continuing presence of a pressure sore on the mother's right heel. During the two weeks that Care Dimensions did not treat Moore's mother, it failed to explain why it was not administering the care, coordinating another facility to provide the care or reporting to the doctor, instead advising Moore to contact her doctor regarding her condition. These allegations, even if they set forth facts sufficient to show negligence on the part of Care Dimensions, do not rise to the level of recklessness such that Care Dimensions consciously acted in a manner that it knew presented a high probability that Moore's mother would suffer further injury. Indeed, Moore acknowledges that Care Dimensions visited her mother six times in two weeks and during that time advised her to "follow up with her physician" when the nurse noted drainage from the wound. Whether Care Dimensions should have done more to address the mother's condition and completed four weeks of care, rather than two, is perhaps a question of negligence but does not amount to egregious abuse. (See *Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th at p. 408 [plaintiff failed to state cause of action for elder abuse based on hospital admission when hospital did not administer necessary antibiotics or have proper equipment because, although such acts might constitute professional negligence, they do not arise to the egregious abuse required to pursue elder abuse].)

In addition, Moore also failed to allege conduct or ratification of conduct by a Care Dimensions officer, director or managing agent. As with Caremore, Moore alleged that the nurses from Care Dimensions who visited her mother were the "highest nurses" employed by Care Dimensions and thus are its managing agents. Such allegation, however, does not set forth facts demonstrating that the nurses were directing or establishing corporate policy so that they could be considered managing agents.

(*White v. Ultramar, Inc., supra*, 21 Cal.4th at pp. 566-567; *Cruz v. HomeBase, supra*, 83 Cal.App.4th at pp. 167-168.)³

3. *No Basis Exists to Afford Moore Leave to Further Amend the Complaint*

On appeal, as in the trial court, Moore contends that the second amended complaint sufficiently sets forth facts to state an elder abuse cause of action against defendants. She nevertheless maintains that, if we conclude the second amended complaint is “defective and needs to be amended, then [she] should be granted leave to do so.” She, however, does not provide any additional facts that she could allege to cure the deficiencies in the second amended complaint. Accordingly, Moore has not satisfied her burden to demonstrate grounds for leave to amend.

DISPOSITION

The order of dismissal is affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

³ Because the trial court properly sustained the demurrers to the elder abuse cause of action, we need not address Moore’s argument that the court erred by striking her claim for punitive damages, which she premised on the elder abuse allegations.

