1st Civil No. A099472

STATE OF CALIFORNIA

COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION FOUR

AMARECH LEGESSE,

Plaintiff and Appellant,

vs.

HERRIC HOSPITAL PSYCHIATRIC FACILITY,

Defendant and Respondent.

Appeal from the Alameda County Superior Court
Honorable Cecilia P. Castellanos, Honorable Barbara J. Miller,
Honorable Judith Ford, Judges
Alameda County No. H2194273

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant, Amerech Legesse, appearing in propria persona, has filed a notice of appeal from an order dismissing her lawsuit. The dismissal followed the sustaining of respondent's demurrer to her *third* amended complaint. She has now filed a document entitled "Appellant's Opening Brief." Apart from its title, however, the document fails to qualify as such, being wholly deficient in both form and substance, and satisfying none of the requirements of rule 14 of the California Rules of Court. Appellant's propria persona status cannot excuse these deficiencies. (*Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125-1126.)

A litigant who chooses to appear in propria persona "is entitled to the same, *but no greater,* consideration than other litigants and attorneys . . . [and] is held to the same restrictive rules of procedure as an attorney." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639 (emphasis added); *Bianco v. California Highway Patrol, supra*, 24 Cal.App.4th at pp. 1125-1126.) Despite this well-established rule, the trial court did give exceptional consideration and deference to appellant's propria persona status. Appellant was given repeated opportunities to amend her complaint, and was strongly urged to seek legal advice, although it was patently obvious, from the time the original complaint was filed, that appellant

lacked standing to bring the action she had filed, and that she would be unable to state facts sufficient to support any action she might have standing to bring. The trial court ultimately so concluded, sustaining respondent's demurrer without leave to amend only after appellant's three attempts to amend still failed to produce a viable complaint.

It is axiomatic that the trial court's judgment is presumed correct in the absence of an affirmative showing of prejudicial error. (*Bianco v. California Highway Patrol, supra*, 24 Cal.App.4th at p. 1125.) Appellant's "Brief" contains no citations to the record, cites no pertinent legal authority, and articulates no legal theories upon which she might prevail. It fails to demonstrate *any* error by the trial court, let alone prejudicial error. The judgment, therefore, should be summarily affirmed.

STATEMENT OF THE CASE AND THE FACTS

A. Appellant's Recitation Of Procedural And Substantive Facts.

Appellant's Opening Brief consists entirely of a 3 page "INTRODUCTION." The allegations of the Brief are as follows: The

appeal is from a May 8, 2002, order sustaining demurrer without leave to amend, and dismissing appellant's complaint. (AOB 1.)

Appellant asserts that her daughter, Helena, who died on October 20, 2000, was a patient in the Herrick Hospital psychiatric unit in June 2000. The Brief further alleges that during that hospitalization Helena was mentally incompetent and that she was "coerced to undergo CRIMINAL abortion" to which appellant strongly objected. Appellant claims that when Helena became pregnant, appellant had agreed to help her raise the child. She asserts that the abortion violated *Helena's* constitutional right to bear a child. (AOB 1-2.)

Appellant asserts that she sued respondent (1) for breaches of duties owed directly to herself "which caused great inflection [sic] of emotional distress to the plaintiff and the rest of the family (Ochoa vs. Superior Court (1985) 39 Cal.3d 159)" and "(2) proximately caused aggravation of plaintiff's daughter [sic] depression." (AOB 2-3.) The Brief does not identify what "duties" appellant claims respondent owed to directly to appellant.

Appellant has appended as an "Exhibit" to her Brief a document entitled "Report of LPS Conservatorship Investigation" which was never submitted to the trial court during any of the demurrer proceedings

conducted below. The document made its first appearance in the litigation as an attachment to appellant's notice of appeal. (CT 221, 228-233, 236.)[1/]

B. Facts Relating To The Demurrer And Judgment Of Dismissal

Respondent demurred to appellant's original complaint based on general allegations of insufficiency and uncertainty (Code Civ. Proc., § 430.10, subds. (e) & (f)); on specific allegations as to appellant's lack of standing to bring an action for alleged injuries to appellant's daughter or her daughter's unborn child, and her inability to state a cause of action for the wrongful death of an unborn child under California law. (CT 6, 9-11.) The court found that appellant had failed to allege facts which gave her standing to bring suit, and that she could not state a cause of action for wrongful death of an unborn child. The demurrer was sustained with leave to amend. (CT 23.)

Appellant filed a first amended complaint (CT 14) to which respondent again demurred on the aforementioned grounds (CT 25, 27, 29-30) and on the further ground that appellant had failed to allege facts sufficient to state a cause action for infliction of emotional distress. (CT 28,

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1/ The designation "CT" refers to the Clerk's Transcript on appeal.

30-31.) At an October 11, 2001, hearing on said demurrer, the court advised appellant of her lack of standing to sue on behalf of her deceased daughter, strongly advised appellant to seek professional legal representation, but cautioned her that if she remained in propria persona, she would be held to the same standards as an attorney and would have to satisfy the legal requirements for maintenance of an action. (CT 131, 133-134.) Appellant informed the court that she was going to file a probate action to generate standing to sue on behalf of her daughter, but that she could not afford to hire a lawyer. (CT 137, 139.) The demurrer to the first amended complaint was sustained on grounds of uncertainty, but once again appellant was granted leave to amend. (CT 62-63.)

Appellant filed a second amended complaint (CT 41), to which respondent again demurred based upon appellant's lack of standing to sue for injuries to her daughter, unavailability of an action for wrongful death of an unborn child, and failure to state facts sufficient to support a cause of action for infliction of emotional distress. (CT 47, 54-56.) The court again sustained the demurrer on grounds of uncertainty and reiterated appellant's lack of standing to bring an action for injuries to her daughter. Over respondent's objections, the court allowed appellant a final opportunity to amend to allege any breaches of duty owed directly to appellant which might have given rise to a cause of action for infliction of emotional

distress. However, the court's order admonished that conclusory allegations would not suffice, but that appellant would have to plead facts sufficient to support any allegations of direct duties to herself, breach, causation and damages. The court warned that if she could not do so, the action would be dismissed. (CT 151-153, 155, 157-158, 160.) The court again advised her to seek legal advice. (CT 156-157.)

Appellant advised the court that she had filed a probate petition, on which there had as yet been no ruling, for the purpose of enabling her to sue on behalf of her daughter. (CT 161-163.)

Appellant filed a third amended complaint which sought damages for defamation, assault and battery, and "lost society and comfort." (CT 92.) This pleading once again asserted injuries to appellant's daughter and failed to plead facts giving rise to breach of any duty owed directly to appellant. Although the pleading alleged that respondent had coerced Helena to consent to an abortion, it also alleged that the abortion was performed not by respondent, but at a referral clinic, and that Helena's father was present for the procedure. (CT 100, 102.)

Respondent once again demurred, alleging that appellant's adult daughter had competently elected to undergo an abortion, in consultation with her father. (CT 108-109.) The demurrer again asserted appellant's lack of standing to pursue an action for injuries to her daughter or for

wrongful death of the fetus; appellant's failure to plead a cause of action for emotional distress to herself; and that the third amended complaint was uncertain within the meaning of Code of Civil Procedure section 430.10, subdivision (f). (CT 110-115.)

At the hearing on respondent's demurrer, the court again advised appellant that she lacked standing to pursue an action for injuries to her daughter and that she had failed to plead facts sufficient to state a cause of action personal to herself. Appellant reiterated that she had filed a probate action to enable her to represent her daughter's estate, which was still pending. (CT 225.) Appellant did *not* contend that she had adequately pleaded any cause of action personal to herself. (CT 224-226.) The court announced that it was sustaining the demurrer without leave to amend and dismissed the action. (CT 226.)

On May 8, 2002, the court issued a signed order sustaining the demurrer without leave to amend and dismissing the action. The court's order cited appellant's lack of standing, her failure to state a legally cognizable cause of action, and the uncertainty of the third amended complaint. (CT 210.) Notice of entry of the order was filed on May 17, 2002. Appellant's notice of appeal was filed on July 8, 2002. (CT 221.) A formal judgment of dismissal was filed July 12, 2002. (CT 234.)

LEGAL ARGUMENT

I. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT'S OPENING BRIEF FAILS TO DEMONSTRATE ANY ERROR BY THE TRIAL COURT.

A. The Brief Is Deficient

The judgment of the trial court is presumed correct. It is the responsibility of the appellant to affirmatively demonstrate prejudicial error by way of a competent Opening Brief. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Michelson v. Hamada* (1994) 29 Cal. App. 4th 1566, 1589; *Bianco v. California Highway Patrol, supra*, 24 Cal.App.4th at p. 1125; *Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835.) That requirement applies no less to a propria persona appellant than to one represented by counsel. (*Bianco v. California Highway Patrol, supra*, 24 Cal.App.4th at pp. 1125-1126; *Nelson v. Gaunt, supra*, 125 Cal.App.3d 638-639.)

The California Rules of Court provide that an appellant's opening brief must: begin with a table of contents and table of authorities (rule 14(a)(1)(A)); provide a procedural statement of the case and a statement of appealability (rule 14(a)(2))(A)(B); provide a statement of pertinent facts, limited to matters in the record, *and supporting any reference to the record*

by an appropriate citation to the record (rules 14(a)(1)(C), 14 (a)(2)(C)); state each legal point under a separate heading, summarizing the point and supporting it by citation of pertinent authority (rule 14(a)(1)(B)).

Appellant's Opening Brief satisfies *none* of these requirements. It contains no tables; no statement of procedural facts or appealability; not a single reference to the record on appeal; nor any statement of legal points or articulation of legal argument, let alone one demonstrating error on the part of the trial court. It contains a single case citation (*Ochoa v. Superior Court, supra*, 39 Cal.3d 159), but no showing that the case has any relevance to appellant's situation. (AOB 1-3.)

An appellate court is not required to search the record to determine whether or not it supports the appellant's claim of error. Rather, it is appellant's duty to refer the reviewing court to any portions of the record which support her position. (*Michelson v. Hamad*a, 29 Cal. App. 4th 1566, 1589; *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal. App. 3d 584, 600; *Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835.) Appellant's failure to do so in her Opening Brief compels the summary affirmance of the judgment entered in favor of respondent.

B. The "Exhibit" Is Incompetent

In addition to failing to make proper reference to the record on appeal, the Appellant's Opening Brief is further defective in that it includes an "Exhibit" which is not properly part of the record on appeal. An appellant may append a document as an exhibit to a brief only if it is properly part of the record on appeal. (Cal. Rules of Court, rule 14(d).) Appellant's "exhibit" is an unauthenticated document entitled "Report of LPS Conservatorship Investigation;" however, that document was never offered in evidence nor included in the pleadings in any of the demurrer proceedings below. Appellant produced it in the trial court only as an attachment to her notice of appeal. (CT 221, 228-233, 236.) Since it was never submitted for the trial court's consideration, it is not properly part of the record on appeal.

Appellant has not requested the court to take judicial notice of the document, nor does her Opening Brief contain any showing that the document meets the standards for judicial notice. (Evid. Code, §§ 350, 450, 452, 453, 459.) This Court should, therefore, ignore it.

Furthermore, on the off chance that this Court might nonetheless wish to consider the document for whatever face value it may have, it in no way supports appellant's position on appeal. It recites that appellant's

daughter was 23 years old at the time of her admission to respondent's facility; that she was pregnant at the time of her admission; that she consented to an abortion; and that her doctor felt she was competent to make this decision. (Exh. p. 3.) Thus, the report does not support appellant's position.

II. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT LACKS STANDING TO SEEK REDRESS FOR INJURIES TO HER DAUGHTER OR OTHER FAMILY MEMBERS.

The cornerstone of Appellant's Opening Brief is her allegation that her daughter was mentally incompetent to consent to the abortion, that respondent "coerced" Helena's consent to the abortion, and that the abortion deprived *Helena* of her constitutional right to bear a child. Even if true, these allegations would give rise only to a cause of action by Helena, or by her personal representative after her death. The allegations did not give rise to a cause of action by appellant. (Code Civ. Proc., § 367 [Every action must be prosecuted in the name of the real party in interest.].) Appellant lacks standing to pursue an action in her own name to redress purported violations of her daughter's rights.

Furthermore, even if appellant had been successful in having herself appointed as the representative of Helena's estate--something the record

does not establish--she would still lack standing to maintain the lawsuit in propria persona. A person may represent his or her own interests in legal proceedings, but may not represent another person in legal proceedings unless he or she is an active member of the State bar. (*Drake v. Superior Court* (1994) 21 Cal.App.4th 1826, 1830; *J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 965; *Abar v. Rogers* (1981) 124 Cal.App.3d 862, 865.) In keeping with this rule, a non-lawyer parent cannot represent a child. (*In re Gordon J.* (1980) 108 Cal.App.3d 907, 914.) Nor can a non-lawyer acting as conservator or executor of a relative's estate, appear in propria persona on behalf of the estate. (*City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 779.) Thus, even if appellant had succeeded in having herself appointed as the personal representative of Helena's estate, she would still have lacked standing to maintain the action in propria persona, and she repeatedly stated that she would not hire a lawyer.

Similarly, a non-lawyer cannot represent his or her spouse. (*Abar v. Rogers, supra,* 124 Cal.App.3d at p. 865.) Thus, appellant lacks standing to pursue her claim that respondent caused emotional distress to other members of her family. (AOB 3.)

III. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT HAS FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR LEGALLY COGNIZABLE INJURIES TO HERSELF.

The Appellant's Opening Brief asserts that respondent breached duties owed directly to appellant and thereby inflicted emotional distress on her. She cites *Ochoa v. Superior Court, supra,* 39 Cal.3d 159, but presents *no* facts which would establish her claim that respondent owed her any duty, let alone that respondent breached such duty. (AOB 1-3.)

Furthermore, the prerequisites enumerated in *Ochoa* were expanded by the Supreme Court in *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667-668. In order to recover damages for emotional distress caused by observing a negligently inflicted injury to a relative, the plaintiff must show that she was present at the scene of the injury-producing event at the time it occurred and was then aware that it was causing injury to the third party victim. Appellant does not identify what she deems to be the injury-producing event. Appellant does not assert that she was present when Helena underwent the abortion or even that she was present when respondent counseled Helena to have the abortion. She has not asserted any facts which could support her allegation of coercion. (AOB 1-3.) She has, therefore, wholly failed to demonstrate that she has or could have pled a

cause of action for infliction of emotional distress under *Thing v. La Chusa*, *supra*.

Appellant also cannot state a cause of action personal to herself for the death of her unborn grandchild, since California recognizes no cause of action for the wrongful death of an unborn fetus. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 567, disapproved on unrelated ground in *Ochoa v. Superior Court, supra,* 39 Cal.3d at 171.)

Appellant cites no authority for the proposition that a health care provider has a duty to the parent of an adult child not to counsel the adult child with respect to the option of having an abortion. Moreover, any such claim would be constitutionally untenable as it would interfere with a pregnant woman's constitutionally guaranteed right to terminate a pregnancy. (*Roe v. Wade* (1973) 410 U.S. 113, 129.) For this reason also appellant cannot state a cause of action for infliction of emotional distress.

CONCLUSION

The judgment should be summarily affirmed because the appellant's Opening Brief fails to satisfy even the most rudimentary requirements for demonstrating error by the trial court. Furthermore, the record demonstrates, as a matter of law, that appellant lacks standing to maintain

an action to vindicate rights personal to her deceased daughter and that appellant has failed and is unable to plead facts sufficient to show a breach of duty owed to herself. For these reasons, the judgment must be affirmed.

Dated: January 22, 2003

Respectfully submitted,

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