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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARGARET TOPETE et al.,

Plaintiffs and Appellants,

v.

SUTTER HEALTH SACRAMENTO SIERRA
REGION,

Defendant and Appellant.

C074716

(Super. Ct. No. 34-2011-
00099829-CU-MM-GDS)

After Jose Topete received electroconvulsive treatment (ECT) administered by doctors practicing at defendant Sutter Health Sacramento Sierra Region, doing business as Sutter Center for Psychiatry (Sutter Health), Topete sued Sutter Health and the doctors

for medical malpractice.¹ The trial court granted summary judgment as to Sutter Health only, and Topete appeals the resulting judgment.

On appeal, Topete contends the trial court erred by finding that: (1) the complaint failed to allege a cause of action for negligent hiring of one of the treating doctors, (2) the burden shifted to Topete to demonstrate a triable issue of material fact concerning whether Sutter Health was negligent, (3) there was no triable issue of material fact concerning whether Sutter Health negligently granted clinical privileges to one of the treating doctors, (4) the presidential pardon for a felony committed by one of the treating doctors was relevant, and (5) there was no triable issue of material fact concerning whether Sutter Health was liable for not sharing information with Topete about past complications from ECT.

Finding no prejudicial error, we affirm.

LEGAL BACKGROUND

“Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets ‘his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.’ (*Id.*, subd. (p)(2).) Once the moving party has met its initial burden, ‘the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.’ (*Ibid.*) [¶] We review the trial court’s grant of summary judgment de novo, independently evaluating the

¹ Margaret Topete appears both for herself (with an allegation of loss of consortium) and as guardian ad litem for her husband Jose Topete (on his negligence claims). However, in this opinion, for clarity of who the essential actors are, we refer only to Jose Topete as plaintiff, even though he has a guardian ad litem, because there is no separate contention pertaining to Margaret Topete’s loss of consortium claim.

correctness of the trial court's ruling and applying the same legal standards as the trial court. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) In so doing, we consider all of the evidence offered by the parties in connection with the motion, except that which the trial court properly excluded. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)” (*California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 165-166.)

FACTUAL AND PROCEDURAL BACKGROUND

Topete received ECT at Sutter Health. He alleges that, as a result of the treatment, he suffered loss of cognitive abilities, including complete loss of almost all memory from before the treatment and difficulty forming new memories after the treatment. He claims that, because of the treatment, he cannot balance his checkbook, requires assistance in taking medications properly, and requires assistance in personal hygiene.

Topete sued Sutter Health, along with several doctors, for professional negligence, and, after discovery, Sutter Health filed a motion for summary judgment.

The trial court ruled as follows:

- Sutter Health submitted evidence that it was not negligent and not liable to Topete. This evidence was sufficient to meet Sutter Health's burden of making a prima facie showing of no liability and to shift the burden to Topete to demonstrate that triable issues of material fact remained.
- Topete's argument in opposition to the summary judgment motion that Sutter Health should be liable for negligent hiring of Dr. Theodore Goodman is outside the scope of the pleadings and cannot, therefore, be a basis for Sutter Health's liability.
- In any event, there is no evidence that Sutter Health's alleged negligence in hiring Dr. Goodman, who had a felony conviction for sale of government property (later pardoned), caused Dr. Goodman's alleged negligence in giving the ECT.

- Topete failed to demonstrate a triable issue that Sutter Health did not comply with informed consent requirements or that Sutter Health had an independent duty to question or challenge whether informed consent had been obtained.
- Topete failed to demonstrate a triable issue that the doctors who provided treatment were actual or ostensible agents of Sutter Health.
- Topete failed to demonstrate a triable issue that Sutter Health’s alleged failure to report ECT complications for the three years before Topete’s treatment caused Topete’s injuries or damages.

Having granted Sutter Health’s summary judgment motion, the trial court entered judgment in favor of Sutter Health.

We recount facts included in the trial court filings as they become relevant to the discussion of issues raised by Topete on appeal.

DISCUSSION

I

Negligent Hiring Claim

Dr. Theodore Goodman, who provided some of Topete’s ECT, had a prior felony conviction that was later pardoned by the President of the United States. In Topete’s opposition to the motion for summary judgment, Topete argued that, because Dr. Goodman was previously convicted of a felony involving the practice of medicine, Sutter Health was negligent in granting clinical privileges to Dr. Goodman. The trial court rejected this argument because this alleged basis for liability was outside the scope of the pleadings. On appeal, defendant contends the trial court erred in so finding. The contention is without merit.

“ ‘ “The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues . . . ” ’ and to frame ‘the outer measure of materiality in a summary judgment proceeding.’ . . . Accordingly, the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff’s theories of liability as

alleged in the complaint; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings. [Citations] [¶] Furthermore, “ “[t]he [papers] filed in response to a defendant’s motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings.” ’ [Citation.]’ [Citation.]” (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493; see also *Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 290, italics omitted.)

The facts relating to Dr. Goodman’s prior felony conviction are as follows: Dr. Goodman is not and never was an employee of Sutter Health. Instead, Sutter Health has granted him clinical privileges. In 1981, Dr. Goodman was convicted for the unauthorized sale to independent laboratories of human organs, tissues, and fluids removed in autopsies at a Veterans Administration (VA) hospital. In 1999, Dr. Goodman received a presidential pardon for that crime. The pardon came after Dr. Goodman was initially granted clinical privileges at Sutter Health in 1991 but before Dr. Goodman provided treatment to Topete in 2009.

In his opening brief, Topete concedes that he did not state a cause of action for negligent hiring (technically, granting of clinical privileges, but Topete refers to it as hiring in his complaint), but he claims that this failure is irrelevant because the parties “understood” that the negligent hiring theory was subsumed in Topete’s negligence cause of action against Sutter Health. In essence, he argues that a negligence cause of action that does not mention negligent hiring is sufficient to allege negligent hiring as long as the parties “understood” the basis for the negligence cause of action. For this argument, Topete provides no authority. And we know of none. Accordingly, Topete has failed to show that the trial court erred. (See *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

In any event, the complaint does not allege that Sutter Health negligently hired Dr. Goodman or negligently granted clinical privileges to him. Since this theory was not

subsumed in the complaint, the trial court was correct in determining that Topete could not argue the theory to defeat the summary judgment motion. A defendant moving for summary judgment is not required to go beyond the pleadings and negate new theories that could have been pled but were not. (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421.)

Topete's complaint alleged, simply, that all defendants were health care providers, and all provided care that fell below the standard of care. As noted, the trial court found that the individual doctors were neither actual nor ostensible agents of Sutter Health, so Sutter Health could not be held vicariously liable for the negligence of the treating doctors. Still, Topete did not seek to amend the complaint to include a negligent hiring or negligent granting of clinical privileges cause of action. Therefore, the trial court properly found that such theories were outside the scope of the pleadings.

II

Shifting of Burden

As noted above, the burden to demonstrate triable issues of material facts shifts to the plaintiff if a moving defendant shows that a cause of action has no merit. (Code Civ. Proc., § 437c, subd. (p)(2).) The trial court found that the burden shifted to Topete because Sutter Health showed that the negligence cause of action had no merit. On appeal, Topete contends that this finding and shifting of the burden was improper as to the negligence of Sutter Health in hiring or granting clinical privileges to Dr. Goodman. This contention is without merit because: (1) negligent hiring or granting of clinical privileges was outside the scope of the pleadings and (2) Sutter Health provided evidence that the granting of clinical privileges to Dr. Goodman was not negligent.

First, who has the burden with respect to a cause of action for negligent hiring or granting of clinical privileges cause of action is immaterial here because, as the trial court properly found, that theory was not subsumed in the pleadings.

And second, Sutter Health provided evidence that granting clinical privileges to Dr. Goodman was not negligent.

Sutter Health provided the declaration of Kristine Wakefield in support of its motion for summary judgment. She is Sutter Health's manager of medical staff and credentialing services. She stated that granting clinical privileges to Dr. Goodman did not violate Sutter Health's bylaws, and clinical privileges were granted to him only after a thorough investigation. His prior felony conviction was not grounds for automatic disqualification, either under Sutter Health bylaws or under state or federal laws.

Despite this declaration submitted by Sutter Health, Topete claims that Sutter Health violated the standard of care. But to make this claim he relies on a declaration he submitted in opposition to the motion for summary judgment. Arthur Shorr, a hospital administration expert, stated that it was below the standard of care to grant clinical privileges to Dr. Goodman because it violated Sutter Health's bylaws after he had disclosed that he had been convicted of a felony.

After summarizing Shorr's declaration, Topete writes: "Therefore, under *Aguilar v. Atlantic Richfield* the burden of proof should have never been switched to [Topete] on summary judgment." This statement betrays counsel's misapprehension of what triggers the shifting of the burden of proof. The burden of proof shifts if the moving defendant shows that a cause of action has no merit. (Code Civ. Proc., § 437c, subd. (p)(2).) Sutter Health did so here by submitting Wakefield's declaration that granting clinical privileges to Dr. Goodman did not violate the bylaws or the standard of care. That Topete submitted a declaration attempting to refute Wakefield's declaration did not mean that Sutter Health did not show that the cause of action has no merit; instead, submitting Shorr's declaration in opposition to Wakefield's declaration, at most, raised a triable issue of fact.

We therefore conclude that the trial court did not err by ruling that the burden shifted to Topete to demonstrate a triable issue of material fact.

III

Asserted Triable Issue of Fact—Granting of Privileges

Topete contends that, even if the trial court properly shifted the burden to him to demonstrate that there was a triable issue of material fact concerning whether granting clinical privileges to Dr. Goodman was negligent, the trial court erred by finding that there was no triable issue of material fact. In support of this argument, he cites the Shorr declaration, as well as the declaration of Dr. Peter R. Breggin that “the felony conviction of Dr. Goodman for selling human organs to private labs while doing autopsies for the VA hospital and knowingly providing a lab with a list of fake names of decedents is a crime of moral turpitude within his profession that would necessarily be determined to ‘not adhere to the lawful ethics of his profession as defined in 3.02-2(b)’ of the Sutter Health By-laws” We conclude that Topete failed to demonstrate a triable issue of material fact because: (1) negligent hiring or granting of clinical privileges was outside the scope of the pleadings and (2) there is insufficient evidence that Sutter Health’s granting of clinical privileges to Dr. Goodman proximately caused Topete’s alleged injuries.

First, Sutter Health’s negligent granting of clinical privileges to Dr. Goodman cannot be the basis of liability because, as the trial court properly found, that theory was not subsumed in the pleadings.

And second, there is insufficient evidence that Sutter Health’s allegedly negligent granting of clinical privileges to Dr. Goodman proximately caused Topete’s injuries. Dr. Breggin’s declaration stated that Dr. Goodman, in Dr. Breggin’s words, “should never have been hired,” and it was his opinion that “Sutter Health’s improper hiring of Dr. Goodman a convicted felon in violation of their own by-laws caused the onset or severe worsening of dementia to be suffered by Jose Topete during and after the ECT treatment with [Dr.] Goodman” This bald declaration of causation has no basis and is neither reasonable nor credible. The trial court agreed: “[Topete] fail[ed] to explain how Dr.

Goodman's prior conviction for sale of government property has any connection with his purported professional negligence in conducting the ECT or in obtaining informed consent."

A hospital may be liable for negligence in granting clinical privileges if that negligence caused injury to the plaintiff. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346.) However, that Dr. Goodman would not have treated Topete if Sutter Health had not granted clinical privileges to Dr. Goodman is too attenuated to give rise to liability because it does not rise to the level of proximate cause. (See *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 835 [proximate cause analysis requires cause-in-fact, plus liability only for causes closely connected with result].) Topete provides no argument or authority for the proposition that Sutter Health should be held liable for injuries sustained as a result of Dr. Goodman's treatment simply because Sutter Health, for reasons wholly unrelated to the treatment of Topete, breached a standard of care in granting clinical privileges to Dr. Goodman.

We therefore agree with the trial court that Topete failed to demonstrate a triable issue of material fact that Sutter Health's granting of clinical privileges to Dr. Goodman supported a cause of action against Sutter Health.

IV

Relevance of Pardon

In its ruling on the summary judgment motion, the trial court took judicial notice of Dr. Goodman's presidential pardon and concluded that, at the time of Topete's alleged injuries, Dr. Goodman was not a felon. Topete argues that the trial court erred by considering Dr. Goodman's pardon because: (1) the evidence of the pardon was not submitted until Sutter Health's reply to the opposition to summary judgment and (2) it was not the same as a pardon based on actual innocence under California law. Neither argument is persuasive.

First, evidence of Dr. Goodman’s pardon was presented for the first time in the reply to the opposition to the motion for summary judgment because Dr. Goodman’s felony conviction was raised by Topete for the first time in his opposition to the motion for summary judgment. Topete provides no authority for ignoring the pardon.

And second, we need not delve into whether the presidential pardon is to be treated the same as a California pardon based on actual innocence because, as we noted above, Topete failed to proffer evidence and reasonable argument that granting of clinical privileges to Dr. Goodman proximately caused Topete’s alleged injuries.

V

Asserted Triable Issue of Fact—Reporting Concerning Past Complications

In a one-paragraph, perfunctory argument, citing no authority, Topete contends, in his words, “[a] triable issue of fact existed whether the failure of Sutter Health to accurately report adverse effects of the ECT treatment constituted medical malpractice by Sutter Health.”

We need not address perfunctory contentions made without citation to authority. (*People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2; *Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.) Therefore, the contention is forfeited.

In any event, even if we were to consider the contention, Topete appears to be arguing that Sutter Health had some information concerning past complications of ECT that it did not share with Topete before his treatment and that Shorr (Topete’s hospital administration expert) testified that failure to share this information fell below the standard of care and, in Shorr’s opinion, Margaret Topete would not have allowed Topete to receive ECT if Sutter Health had shared the information. There are two problems with this argument.

First, Topete does not explain why it is relevant that Margaret Topete would not have allowed Topete to have treatment. The contention that Sutter Health may be held liable for failing to share information concerning past complications is without merit

because Topete does not cite to any evidence that *he* would have decided against receiving ECT if that information had been shared.

And second, Topete provided no evidence that any failure to share information caused his alleged injuries. In its ruling on the motion for summary judgment, the trial court wrote: “To the extent [Topete] argues that [Sutter Health] breached the standard of care by failing to report any complications attributable to ECT for 3 years before Mr. Topete started treatment, [Topete] fail[s] to demonstrate a triable issue of material fact that [Sutter Health’s] actions caused or contributed to [Topete’s] injury or damages. [Record citations.] Indeed, in response to [Sutter Health’s] argument that the care and treatment provided by it did not cause or contribute to any of [Topete’s] alleged injuries or damages, [Topete] merely argue[s] that Sutter was negligent in hiring Dr. Goodman and that Dr. Goodman’s treatment caused or worsened Mr. Topete’s dementia. However, as noted above, Sutter’s purported negligent hiring is not at issue here because it was not framed by the pleadings. Additionally, Dr. Goodman’s purported negligence cannot be imputed on Sutter, as the Court has found that [Topete] failed to demonstrate a triable issue of material fact that he was not [Sutter Health’s] actual or ostensible agent. *Notably, [Topete] do[es] not argue that [Sutter Health’s] purported failure to report the complications attributable to ECT caused [Topete’s] injuries.*” (Italics added.)

As in the trial court, Topete fails here to establish that the alleged failure to share information caused his injuries. Accordingly, even assuming for the purpose of argument that Topete did not forfeit this contention by failing to adequately support it with argument and authority, the trial court did not err by granting summary judgment.

DISPOSITION

The judgment is affirmed. Sutter Health is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, J.

We concur:

RAYE, P. J.

ROBIE, J.