NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BENJAMIN L. ANDERSON, Plaintiff and Appellant, v. FLAGER DIALYSIS, LLC, Defendant and Respondent.	E071706 (Super.Ct.No. RIC1713171) OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge. Affirmed.

Benjamin L. Anderson, in pro. per, for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Matthew S. Pascale, Jeffry A. Miller, and Mason T. Smith for Defendant and Respondent.

I. INTRODUCTION

On September 20, 2018, the trial court sustained a demurrer to a first amended complaint filed by Benjamin L. Anderson (plaintiff) without leave to amend. The

pleading attempted to allege causes of action for intentional infliction of emotional distress, slander, and libel against Flagler Dialysis, LLC (defendant), a dialysis clinic at which plaintiff was receiving ongoing treatment. Plaintiff appeals, presumably arguing the trial court erred in sustaining the demurrer and abused its discretion in denying leave to amend. After conducting our independent review of the first amended complaint, we find no error and no abuse of discretion and affirm the judgment.

II. ALLEGATIONS OF FIRST AMENDED COMPLAINT

The first amended complaint generally alleges that defendant and its staff members "embarked on a persistent ongoing campaign of disparagement of [plaintiff] while actively receiving life support dialysis almost back to back egregious experience . . . ."

A. Intentional Infliction of Emotional Distress Allegations

The pleading alleges defendant's conduct "caused [plaintiff] to suffer severe emotional distress." When plaintiff complained to the dialysis center's facility administrator, "he did nothing for Plaintiff." Defendant's employees "have knowledge of the Plaintiff, a dialysis patient with end-stage renal disease, particular susceptibility to emotional distress" and that defendant "acted with reckless disregard of the probability that Plaintiff would suffer emotional distress" and that "Defendant's conduct was a substantial factor in causing Plaintiff severe emotional distress." The pleading then contains more than eight pages of statements made by defendant's employees upon which plaintiff alleges constitute the outrageous conduct upon which the cause of action for

intentional infliction of emotional distress is premised. Each statement is purportedly quoted verbatim, attributed to a specific individual on a specific date.

Most of the statements are entirely innocuous absent any context.[1] A handful of the statements appear to contain insults referring to plaintiff as a "bitch-ass man." All of the statements are presented in isolation, without any allegations setting forth the context of any conversation or any of the surrounding acts being performed at the time the statements were made.

B. Slander Allegations

The first amended complaint also alleges that defendant's staff "harmed him by making all of the following statements." Again, the pleading set forth various statements in quotations, attributed to individuals by date. However, the statements are again provided in isolation, without the context of the conversations in which the statements were made or who was present at the time. Some of the statements express opinions

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[1] A sampling of these statements include " 'DaVita is willing to negotiate with you' "; " 'We're not going to back off of you . . . . We had you thinking that our religious people are telling us what to say to you' "; " 'We decided to back off of you now' "; " 'We are not willing to back off of you' "; " 'The Vet group is not going to give you any significant money' "; " 'Keep writing us up . . . we don't care . . . that Superior Court Judge is not going to do nothing' "; " 'Loma Linda still won't back off of you' "; " 'I thought that guy was going to file a little civil suit to see if he could get money' "; " 'That Vet Group is not going to negotiate any settlement with you' "; " 'He's not saying anything because the social worker called his daughter up and told her he was acting up' "; " 'DaVita ain't going to give you anything' "; " 'Your daughter is not going to be a witness' "; " 'That AME Church still won't do anything for you' "; " 'My Dad's eyes are like yours, blue, he's Spanish' "; " 'We don't give a damn if they (LLUMC) use those high-powered satellite transmissions on you here.' "

about persons or groups other than plaintiff.[2] The pleading alleges the statements were made at defendant's dialysis center which has "visitors, loved ones, scan health insurance nurses, EMS and transport people in and out of the dialysis are [*sic*] constantly." It states that all of these individuals "reasonably understand the statements are about [plaintiff]" and "because of the facts and circumstances known to the listeners of the statements, they tend to injure Plaintiff's reputation and name in his current potential as a minister and former Respiratory Therapist Director."

C. Libel Allegations

Finally, the first amended complaint purports to state a cause of action for libel based upon various notes which appear in plaintiff's patient chart. Specifically, the pleading sets forth excerpts from six notes in plaintiff's patient chart. Of the six notes, five detail instances in which plaintiff became angry, upset, or disruptive with staff members. The last note details a conversation in which a registered dietician heard plaintiff accuse another individual of passing out child pornography.

III. DISCUSSION

A. We Exercise Discretion to Consider the Merits of Plaintiff's Appeal

"The general rule of appealability is . . . '[a]n order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal

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[2] For example, the allegedly slanderous statements include: " 'I'll do and say whatever I want to say, we don't care about those crazy AME Church folks and what they think about us' "; " 'We don't care about the AME Church group.' " Some of the statements appear to include insults, calling plaintiff a "bitch-ass man" and stating " 'He's got a pair of girl legs on him.' "

on such an order.' [Citation.] But 'when the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment.' [Citation.]" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527, fn. 1.) Indeed, in such cases, "the better course is for the Court of Appeal to deem the order sustaining the demurrer to incorporate a judgment of dismissal, and proceed with the merits of the appeal. [Citation.]" (*Kruss v. Booth* (2010) 185 Cal.App.4th 699, 712, fn. 12, italics omitted.)

As a preliminary matter, we note that plaintiff appeals from the trial court's order sustaining the demurrer to the first amended complaint, which is not technically appealable. Nevertheless, since the trial court's order effectively disposed of all causes of action in the operative pleading, we exercise our discretion to deem the order sustaining the demurrer to incorporate the subsequent judgment and proceed to consider the merits of plaintiff's appeal.

B. General Legal Principles and Standard of Review

" 'Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether or not the [] complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]' [Citation.]

'Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]' " (*Total Call Internat. Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166 (*Total Call Internat. Inc.*).)

"Under the first standard of review, 'we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]' [Citation.]" (*Total Call Internat. Inc.*, *supra*, 181 Cal.App.4th at p. 166.) "Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. [Citation.] 'To meet this burden a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action.' [Citation.]" (*Ibid.*)

C. Sustaining the Demurrer to Plaintiff's First Amended Complaint Was Not Erroneous

1. Intentional Infliction of Emotional Distress Was Not Sufficiently Pleaded

" ' ' "A cause of action for intentional infliction of emotional distress exists when there is ' " ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the

plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." ' " ' [Citations.] A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' [Citation.] And the defendant's conduct must be ' " 'intended to inflict injury or engaged in with the realization that injury will result.' " ' [Citation.]" ' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 355 (*Barker*).) " ' "Liability for intentional infliction of emotional distress ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." [Citation.]' " ' " (*Ibid.*, citing *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) "While . . . cases say that it is 'usually' a question of fact, many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law. [Citations.]" (*Barker*, at p. 356.)

Upon review of the operative complaint, we find no error in the trial court's decision to sustain the demurrer to plaintiff's cause of action for intentional infliction of emotional distress. The cause of action is based entirely on alleged statements made by defendant's employees. It is a rare case in which statements alone can give rise to tort liability for intentional infliction of emotional distress, since mere insults, indignities, and even threats are not sufficient absent any other facts to indicate a heightened degree of outrageousness. Moreover, the operative pleading presents these statements without any

context from which to infer outrageousness.[3] Nor are there any allegations that these statements were combined with actions which might somehow render the situation outrageous. There are no allegations that the actual medical care which plaintiff received at defendant's facility fell below the applicable standard of care. Thus, the trial court's order sustaining the demurrer to this cause of action was not erroneous. Absent exceptional circumstances, words alone—even if insulting or threatening—do not give rise to a cause of action for intentional infliction of emotional distress.

2. The First Amended Complaint Fails to Adequately Plead a Defamation Claim

Both slander and libel are species of defamation, with slander claims based upon an oral communication and libel claims based upon a written communication. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259-1260 [libel is an unprivileged, false written communication]; *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 867 [slander is form of oral defamation].) " ' "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." ' [Citations.]" (*Jackson v. Mayweather*, at p. 1259.)

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[3] For example, plaintiff identifies statements such as: " 'That's why they told us to do whatever it takes to you, to wear you down' "; " 'That's why that San Diego VA group did you like that' "; " 'Da Vita is willing to negotiate with you' "; " 'The ninth circuit won't be willing to cheat you anymore' "; " 'You are supposed to forgive us' "; " 'That's why we decided not to treat you any better' "; " 'Would you be willing to see a Psychiatrist' "; " 'That's why they told us to make you go' "; " 'Loma Linda still won't back off of you' "; and " 'That's why we keep teasing you.' " Absent context it is entirely unclear whether such statements could even be considered insults.

Further, defamation claims are subject to a different standard of pleading and proof where the defamation is per se versus per quod. "The term 'per se' when used in describing the effect of allegedly slanderous words means that the utterance of such words is actionable without proof of special damage. [Citations.]" (*Correia v. Santos* (1961) 191 Cal.App.2d 844, 851, italics omitted.) "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. [Citation.]" (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 367 (*Regalia*).) These four categories include statements which (1) accuse an individual of a crime, (2) impute a person with an infectious disease, (3) tend to directly injure the individual's professional reputation, and (4) impute a want of chastity or impotence. (Civ. Code, § 46.) "A slander that does not fit into these four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander. [Citation.]" (*Regalia,* at 367.)

Likewise, "[a] statement is libelous 'per se' when on its face the words of the statement are of such a character as to be actionable without a showing of special damage. A libel 'per quod,' on the other hand, requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154; Civil Code, § 45a.) Generally, " 'If the defamatory character is not apparent on its face and requires an explanation of the surrounding circumstances (the "innuendo") to make its meaning clear, it is not libelous per se, and is not actionable

without pleading and proof of special damages." (*Barker, supra*, 240 Cal.App.4th at p. 351; Civil Code, § 45a.)

Here, plaintiff alleged a cause of action for slander based on various statements made by employees of defendant. After setting forth the alleged defamatory statements, plaintiff alleges simply that the statements "tend to injure Plaintiff's reputation and name in his current potential as a minister and former Respiratory Therapist Director." However, none of the statements reference plaintiff's profession as a minister or respiratory therapist, nor do the statements on their face mention anything that would reasonably be associated with performing the functions of those professions. In fact, the complaint on its face admits that the statements are defamatory only "because of the facts and circumstances known to the listeners of the statements." We therefore understand plaintiff's cause of action to be one for slander per quod, since the defamatory nature of the statements can only be recognized if provided appropriate context. Such a claim requires pleading special damages proximately caused by the defamation. No such facts are pleaded and as a result, it was not erroneous for the trial court to sustain the demurrer to this cause of action.

Likewise, plaintiff's claim for libel is premised upon various notes that appear in his medical records. However, none of the notes appear on their face to state anything defamatory. Of the six notes set forth in the complaint, five of them simply document instances in which plaintiff was rude, upset, or angry at dialysis staff members. The last note identifies an instance in which plaintiff was confrontational and accused someone

else of a crime (i.e. passing out child pornography). Where the defamatory nature of the published statements are not apparent on their face, the claim is one for libel per quod. " 'In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts.' " (*Bartholomew v. YouTube, LLC* (2017) 17 Cal.App.5th 1217, 1232.) The complaint here contains no facts to provide any context for the court to infer that any of the notes contain statements which can be understood as defamatory. Nor does the complaint set forth facts explaining the specific damage proximately caused by any of these notes. Accordingly, the trial court did not err in sustaining the demurrer to this cause of action.

D. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend

Finally, we review the trial court's denial of further leave to amend for abuse of discretion and find no abuse of discretion here. "[N]otwithstanding the liberal policy favoring amendment of complaints, upon sustaining a demurrer to a first amended complaint, the court may deny leave to amend when the plaintiff fails to demonstrate the possibility of amendments curing the first amended complaint's defects. [Citation.]" (*Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 579.) " 'To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] The assertion of an abstract right to amend does not satisfy this burden. . . . Allegations must be factual and specific, not vague or conclusionary. . . . Where the appellant offers no allegations to

support the possibility of amendment . . . there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]' " (*Ibid.*, citing *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

Here, plaintiff has not set forth in his briefing any specific facts which he can add to the complaint to cure the defects in his purported causes of action. Nor has plaintiff attached a proposed amended complaint for our consideration.[4] This is not surprising considering the trial court specifically asked plaintiff at the time of oral argument to provide any additional facts plaintiff believed could be added in support of his claims and plaintiff was unable to do so. Plaintiff has not met his burden to show an abuse of discretion in the trial court's denial of leave to amend.

IV. DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

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FIELDS
J.

We concur:

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[4] Plaintiff has attached what appears to be a hand-written document entitled "Complaint—DOJ" which purportedly alleges a claim for "Criminal Invasion of Privacy" against Loma Linda University Medical Center. It is unclear why plaintiff has attached this document to his brief. However, even if we were to assume this was an attempt to proffer a proposed amended complaint for our consideration, we find no abuse of discretion. Leave to amend following sustaining of a demurrer does not constitute leave to add new defendants or new causes of action. (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) Thus, plaintiff does not meet his burden to establish an abuse of discretion by offering an entirely new pleading, stating a new cause of action against a new defendant.

McKINSTER
Acting P. J.

RAPHAEL
J.