NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SUSAN ROGERS, Plaintiff and Appellant, v. RIDGECREST REGIONAL HOSPITAL, Defendant and Respondent.	F076751 (Super. Ct. No. BCV-17-100464) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Cal-Lawyer and Daniel Tripathi for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre, Tracy D. Forbath, Gregory G. Lynch, John J. Weber and Sheila J. Starvish for Defendant and Respondent.

-ooOoo-

The appellant was arrested for driving under the influence. She sued the hospital that treated an injury to her hand because, after she was treated and released, a hospital employee telephoned the police to report a suspicion that appellant was intoxicated and might drive under the influence. Appellant alleged causes of action for negligence and a violation of her rights under the Confidentiality of Medical Information Act, Civil Code

[*] Before Franson, Acting P.J., Peña, J. and Snauffer, J.

section 56, et seq.[1] The hospital filed a demurrer, relying on the absolute privilege provided by section 47, subdivision (b). The trial court concluded the privilege applied and sustained the demurrer without leave to amend. Plaintiff appealed.

The Confidentiality of Medical Information Act prohibits a provider of health care from disclosing "medical information regarding a patient of the provider … without first obtaining an authorization." (§ 56.10, subd. (a).) This nondisclosure provision is subject to many statutory exceptions, including a provision stating "[t]he information may be disclosed when the disclosure is otherwise specifically authorized by law." (§ 56.10, subd. (c)(14).) The question of statutory interpretation presented in this appeal is whether the staff's disclosure of information to the police was "otherwise specifically authorized by law"—that is, specifically authorized by section 47, subdivision (b).

It is well settled that section 47, subdivision (b) provides an absolute privilege to citizens who disclose information about potential criminal activity to the police. Here, the report made by hospital staff to the police department falls within the privilege contained in section 47, subdivision (b). In addition, we conclude the disclosures were "specifically authorized by law" for purposes of section 56.10, subdivision (c)(14) because of the privilege. Consequently, the hospital staff did not violate the Confidentiality of Medical Information Act. Accordingly, the trial court properly sustained the demurrer without leave to amend.

We therefore affirm the judgment of dismissal.

FACTS[2]

On March 7, 2015, plaintiff Susan Rogers suffered a hand injury and sought medical treatment at defendant Ridgecrest Community Hospital (Hospital). Plaintiff

---

[1] Unlabeled statutory references are to the Civil Code.

[2] The facts set forth below are taken from the operative complaint because, for purposes of a demurrer, the "facts alleged in the pleading are deemed to be true." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

received treatment from Hospital's staff. During the course of treatment, Hospital's staff developed a suspicion that plaintiff was intoxicated. Following plaintiff's discharge from Hospital, an emergency room employee telephoned the Ridgecrest Police Department to inform law enforcement personnel that Hospital's staff suspected plaintiff was intoxicated. Staff acted with malice as the police were called not to provide protection, but to punish plaintiff. Hospital's staff intentionally set up plaintiff, using the telephone call to the police as a means to inflict harm upon the plaintiff.

In making the report, the Hospital employee disclosed plaintiff's name, date of birth, a physical description of her person, and the reason plaintiff came for treatment. The staff member also disclosed that the treatment had been completed and that Hospital's staff suspected plaintiff was intoxicated. Hospital and the Doe defendants knowingly and willfully conspired to engage in a common enterprise or course of conduct to put plaintiff into harm's way and then contact law enforcement in order to subject her to ridicule and embarrassment. Hospital and the Doe defendants accomplished their purpose by concealing from plaintiff material information about her medical condition and eligibility to be discharged from the hospital. The conduct of Hospital and the Doe defendants was a substantial factor in causing plaintiff to be arrested for driving under the influence.

PROCEEDINGS

On March 7, 2017, exactly two years after the incident, plaintiff filed a complaint against Hospital for negligence per se, violation of the Confidentiality of Medical Information Act, and injunctive relief. Her negligence cause of action alleged (1) Hospital owed her "a duty of care in both providing medical care … and also in protecting [her] private medical information;" (2) plaintiff had a right to rely upon Hospital's discharge order as a "valid indication that she was in a suitable condition to drive home in a safe manner;" and (3) when Hospital's staff became concerned plaintiff remained in an intoxicated state, staff had a duty to notify the discharging physician and

other staff members to revoke plaintiff's discharge. Plaintiff alleged Hospital's staff took no steps to revoke her discharge and, therefore, staff's contacting law enforcement breached Hospital's duty of care and disclosed confidential information.

Hospital filed a demurrer, asserting plaintiff's causes of action (1) failed to state sufficient facts to constitute a claim against Hospital and (2) were barred by the one-year limitations period for medical malpractice claims set forth in Code of Civil Procedure section 340.5. Hospital argued reporting a potential crime to law enforcement was privileged under subdivision (b) of section 47 and the disclosure was authorized under section 56.10, subdivision (c)(14).

In July 2017, the trial court sustained the demurrer, but explicitly declined to rule on the issue of privilege. The court granted leave to amend the negligence cause of action "for the purpose of clarifying actions and theories, which occurred after professional services had been terminated by [Hospital], as part of relief being sought for alleged statutory violations by [Hospital]." The court also granted leave to amend to adequately plead malice, oppression or fraud as a basis for recovering punitive damages for the alleged violation of the Confidentiality of Medical Information Act.

Plaintiff filed a first amended complaint, which is the operative pleading in this appeal. The first amended complaint included a cause of action for negligence, labeled "Negligence Per Se," and a cause of action for a violation of the Confidentiality of Medical Information Act. The negligence cause of action stated (1) Hospital owed plaintiff a duty of care to protect her private medical information based on laws and regulations intended to prevent the unauthorized release of private medical information, (2) Hospital breached that duty, and (3) the breach was a substantial factor in causing plaintiff harm—specifically, her arrest for driving under the influence.

In August 2017, Hospital filed a demurrer, contending plaintiff had failed to state facts sufficient to constitute a cause of action. Hospital argued the telephone call to the Ridgecrest Police reporting the staff suspected plaintiff was intoxicated was absolutely

privileged under section 47, subdivision (b). Plaintiff's opposition to the demurrer argued the Hospital and its staff were aware that she was under the influence, ignored the multiple duties of care to their patient, and "breach[ed] their duties by disclosing the medical condition and impairment to law enforcement." Specifically, plaintiff asserted "the defendants divulged unnecessary and irrelevant information regarding the treatment rendered to [plaintiff] without her consent, in violation of privacy law and without any relevant exception to it." In September 2017, a hearing on the demurrer was held and counsel for both parties presented argument.

On October 17, 2017, the trial court signed and filed an order sustaining the demurrer to the first amended complaint without leave to amend. The order stated that "each cause of action is barred in that the communication to the police which is the subject of the action was absolutely privileged under Civil Code section 47, subdivision (b)" and the privilege applies "even if malice is the motive for the communication." The order also stated the privilege "overrides privacy privileges and the physician-patient privilege." The order concluded "the communication of confidential medical information to the police was allowed by Civil Code section 56.10, subdivision (c)(14)." On October 23, 2017, counsel for Hospital filed a notice of entry of the order.

On November 7, 2017, Hospital filed a notice of motion to dismiss the lawsuit. On November 13, 2017, before the order of dismissal was filed, plaintiff filed a notice of appeal on Judicial Council form APP-002 in which she had marked the box for a "[j]udgment of dismissal after an order sustaining a demurrer." Marking this box was inaccurate because no judgment of dismissal had been filed. Also, the notice of appeal incorrectly gave March 7, 2017, as the date of entry of the order or judgment being appealed. Plaintiff probably intended to refer to the order sustaining the demurrer without leave to amend filed on October 17, 2017.

On December 8, 2017, the trial court held a hearing on Hospital's motion to dismiss. The court granted the motion and filed the signed order of dismissal the same

day. On December 15, 2017, counsel for Hospital filed a notice of entry of order of dismissal.

In February 2018, plaintiff filed her "notice designating record on appeal" (capitalization omitted). Plaintiff entered "12/08/18" as the filing date for the "[j]udgment or order appealed from." The clerk of court recognized plaintiff's reference to the year contained a typographical error. As a result, the clerk's transcript includes the order of dismissal filed on December 8, 2017, and the related notice of entry.

DISCUSSION

I. APPELLATE REVIEW

A. Appealable Order

Hospital contends an order sustaining a demurrer without leave to amend is not an appealable order and argues the trial court's October 17, 2017, order should not be construed as an order of dismissal because it did not state the matter was dismissed. (See *Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1440 ["order sustaining demurrers without leave to amend is not an appealable order"]; Code Civ. Proc., §§ 581d [form, entry and effect of dismissal order], 904.1 [appealable orders].) Hospital contends the question whether an order is appealable goes to the jurisdiction of the appellate court and, "[w]here, as here, the order is not appealable, the court has no alternative and must dismiss the appeal." We disagree.

Less than four weeks after plaintiff's premature notice of appeal was filed, the trial court filed an order of dismissal. California Rules of Court, rule 8.104(d) gives appellate courts the discretion to treat the prematurely filed notice of appeal as taken from a later filed order of dismissal. The facts of this case are similar to the facts in *Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, where the plaintiff filed his notice of appeal three days after the order sustaining the demurrer and about six weeks before the court entered an order of dismissal. (*Id*. at p. 1310, fn. 2.) Based on the interests of justice and the

absence of any prejudice to the respondent, the Second District construed the appeal as taken from the order of dismissal, which is an appealable order. (*Ibid*.; see Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1).) We do the same here. The substantive issues raised in this appeal have been fully briefed and Hospital has not shown any prejudice would result if the appeal was deemed taken from the December 8, 2017, order of dismissal. Accordingly, we treat the notice of appeal as filed immediately after entry of the appealable order of dismissal. (Cal. Rules of Court, rule 8.104(d).) Consequently, we conclude plaintiff's appeal is taken from an appealable order.

B. Standard of Review for Demurrers

1. Stating a Cause of Action

When a demurrer is sustained, appellate courts conduct a de novo review to determine whether the pleading alleges facts sufficient to state a cause of action under any legal theory. (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204.) Appellate courts treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. (*Ibid*.) The pleader's contentions or conclusions of law are not controlling because appellate courts must independently decide questions of law without deference to the legal conclusions of the pleader or the trial court. (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1304.)

Sometimes, the ability to state a cause of action depends on how a statute is interpreted. (E.g., *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1242.) The interpretation of a statute or the application of a statutory provision to facts assumed to be true at the pleading stage present questions of law subject to independent review. (*Ibid*.; *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, 754.)

2. Leave to Amend

When, as here, a demurrer is sustained without leave to amend, the appellate court decides "whether there is a reasonable possibility that the defect can be cured by amendment." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Ordinarily, the plaintiff must carry the burden of demonstrating a reasonable possibility. (*Ibid*.) If that threshold is satisfied, the judgment of dismissal is reversed and the matter remanded with directions to grant the plaintiff leave to amend. (*Ibid*.)

II. PRIVILEGED DISCLOSURES OF CONFIDENTIAL INFORMATION

A. Statutory Text

1. Section 47

Section 47 creates or codifies privileges for publications and broadcasts. Subdivision (b) of section 47 covers publications and broadcasts made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [a writ of mandate]." The exceptions contained in subdivision (b)(1)-(4) of section 47 are not relevant in this proceeding and those exceptions do not refer to disclosures that violate a confidentiality requirement.[3]

2. Confidentiality of Medical Information Act

Section 56.10, subdivision (a) provides: "A provider of health care, health care service plan, or contractor shall not disclose medical information regarding a patient of

---

[3] We note that section 47, subdivision (d)(1) applies the privilege to statements made "[b]y a fair and true report in, or a communication to, *a public journal*, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." (§ 47, subd. (d)(1), italics added.) In contrast to subdivision (b), the exceptions in subdivision (d) of section 47 explicitly state it does not "make privileged any communication to a *public journal* that does any of the following: [¶] … [¶] Violates *any requirement of confidentiality* imposed by law." (§ 47, subd. (d)(2)(C), italics added.)

the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization, except as provided in subdivision (b) or (c)."

The authorization of disclosures relevant to this appeal is contained in section 56.10, subdivision (c)(14), which provides: "The information *may* be disclosed when the *disclosure is otherwise specifically authorized by law*, including, but not limited to, the voluntary reporting, either directly or indirectly, to the federal Food and Drug Administration of adverse events related to drug products or medical device problems, or to disclosures made pursuant to subdivisions (b) and (c) of Section 11167 of the Penal Code by a person making a report pursuant to Sections 11165.9 and 11166 of the Penal Code, provided that those disclosures concern a report made by that person."

B. The Litigation Privilege and Reports to Police

1. Legal Principles

In this proceeding, Hospital has relied on the litigation privilege, which is codified in the statutory text referring to a "publication or broadcast" made in any "judicial proceeding." (§ 47, subd. (b)(2).) This text has been interpreted broadly to "encompass[] not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361 (*Hagberg*).) In *Hagberg*, our Supreme Court concluded the litigation privilege contained in section 47, subdivision (b) shields "a citizen's report to the police concerning suspected criminal activity of another person." (*Hagberg*, *supra,* at p. 375.) Thus, "communications are privileged under section 47(b) when they are intended to instigate official governmental investigation into wrongdoing, including police investigation." (*Id.* at p. 370; *Cox v. Griffin* (2019) 34 Cal.App.5th 440, 442–443 [when a citizen contacts law enforcement to report a suspected crime, the privilege in

§ 47, subd. (b) bars causes of action for false imprisonment and intentional infliction of emotional distress].)

In parallel with the litigation privilege, many cases interpreting the privilege for statements made "in any other official proceeding authorized by law" (§ 47, subd. (b)(3)) have concluded "the official proceeding privilege applies to a communication intended to prompt an administrative agency charged with enforcing the law to investigate or remedy a wrongdoing." (*Hagberg*, *supra*, 32 Cal.4th at p. 362.) Thus, "the privilege protect[s] communications to and from governmental officials which may precede the initiation of formal proceedings." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 156.)

2. Application of Privilege

In *McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154 (*McNair*), the First District considered the application of the litigation privilege to a letter written by the plaintiff's doctor to the Department of Motor Vehicles disclosing the plaintiff's confidential medical history and health conditions. (*Id*. at p. 1156.) The letter resulted in the plaintiff's commercial driver's license being temporarily revoked and, as a result, he lost his job as a bus driver. (*Ibid*.) The plaintiff sued the doctor for breach of contract and intentional tort. (*Id*. at p. 1157.) The First District concluded the litigation privilege barred both claims. (*Ibid*.)

McNair set forth the basic principles that define the litigation privilege, discussed the purpose of the privilege, and then stated: "Application of this analytical framework to the present case leads us easily to the conclusion that the litigation privilege bars McNair's cause of action for intentional tort." (*McNair*, *supra*, 5 Cal.App.5th at p. 1163.)

The application of the principles defining the litigation privilege to the facts of this case are equally straightforward. The disclosure by a Hospital employee to the police department falls within the scope of the litigation privilege codified in section 47,

subdivision (b)(2). (Cf. *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303 [husband's voluntary report to Department of Motor Vehicles regarding wife's drug usage and its effect on her ability to operate a motor vehicle fell within litigation privilege].)

C. Disclosures Authorized by Law

Whether the report violated the Confidentiality of Medical Information Act's general rule of confidentiality depends on the application of the exception in section 56.10, subdivision (c)(14). Under that exception, confidential medical "information may be disclosed when the disclosure is otherwise specifically authorized by law."[4] (*Ibid.*)

McNair, also addressed the relationship between the litigation privilege and the Confidentiality of Medical Information Act. The court concluded that the doctor's disclosure of medical information to the Department of Motor Vehicles was authorized under subdivision (c)(14) of section 56.10. (*McNair*, *supra*, 5 Cal.App.5th at p. 1168.)

In *Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406, a police officer in the San Francisco Police Department sued his dentist for violating the Confidentiality of Medical Information Act, invasion of privacy and intentional infliction of emotional distress. (*Id*. at p. 1410.) The dentist had reported to the police department that the officer might be dependent upon prescription pain medication. (*Ibid*.) The appellate court stated, "[t]he issue presented is whether a dentist treating a police officer who he suspects may have a problem with prescription drugs, can, without violating the C[onfidentiality of Medical

---

[4] California's anti-SLAPP statute, Code of Civil Procedure section 425.16, uses the phrase "authorized by law" twice. "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding *authorized by law*, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding *authorized by law*, …." (Code Civ. Proc., § 425.16, subd. (e)(1), (2).)

Information Act], advise the officer's department of that suspicion." (*Id*. at p. 1408.) The court concluded the dentist's disclosures were covered by subdivision (c)(14) of section 56.10 and, therefore, were not actionable. (*Shaddox*, *supra*, at p. 1408.) As a separate and independent ground, the court also concluded the dentist's communication with the police department enjoyed an absolute statutory immunity under section 47, subdivision (b)(3). (*Shaddox*, *supra*, at pp. 1408–1409.)

Based on *McNair* and *Shaddox*, we conclude the report by an employee of the Hospital to the police department did not violate the Confidentiality of Medical Information Act because the disclosure qualified for the exception in subdivision (c)(14) of section 56.10.

D. Plaintiff's Arguments

1. Applicability of Case Law

Plaintiff argues the holdings in *McNair* and *Shaddox* narrowly apply to a health care practitioner's disclosure of a diagnosis of an ongoing threat to public safety reported to an administrative body. In plaintiff's view, the facts critical to the outcome in those cases were (1) the medical information was released by a doctor, (2) the information was provided to an administrative body, (3) the information included the doctor's expert assessment of an ongoing threat, and (4) the threat related to the safety of the general public.

We reject plaintiff's narrow reading of *McNair* and *Shaddox* because the litigation privilege is not limited to medical professionals who use their expertise in evaluating the public safety risk posed by the patient. The Supreme Court has interpreted section 47, subdivision (b) to shield "a citizen's report to the police concerning suspected criminal activity of another person." (*Hagberg*, *supra*, 32 Cal.4th at p. 375.) We have identified no basis for narrowly interpreting the term "citizen's report" to mean only reports of

doctors or experts. Instead, the term is broad and encompasses nonexperts who report suspected criminal activity.

2. Malicious or Negligent Discharge

Plaintiff also asserts that Hospital, "after observing her for a significant amount of time, deemed her fit for discharge and did release her from its care without a doctor obtaining informed consent" to the disclosure. Plaintiff argues that Hospital should not be protected by the privilege because it was at fault—specifically, it was negligent in treating, obtaining and then disclosing her medical information at a time when she was walking out of the hospital. Stated another way, plaintiff argues "Hospital cannot fail at establishing ethical discharge protocols for intoxicated patients and hide behind the shield of absolute privilege for its ER employees as they guess at possible crimes yet to be committed."

Interpreting these arguments and statements made during oral argument, we conclude plaintiff is not asserting she stated a valid claim for medical malpractice involving a negligent discharge from Hospital's care. Such a cause of action would raise the statute of limitations bar asserted in Hospital's first demurrer, and plaintiff does not contend she has alleged a timely medical malpractice cause of action. Instead, plaintiff is asserting a legal argument about the proper scope of the privilege set forth in section 47, subdivision (b). Slightly rephrasing plaintiff's arguments, she is contending that when a hospital's personnel maliciously (or even negligently) discharge a patient and thereby create the potential for the crime subsequently reported to law enforcement, the privilege should not be extended to protect the hospital or its personnel. In short, reporting a crime is protected, but protecting people who set up a third party, such as plaintiff, through malice or negligence and then report the crime should not be privileged.

While plaintiff's argument raises policy considerations that support limiting the privilege, such a limitation is difficult to square with the general principle that the

litigation privilege set forth in section 47, subdivision (b) is "is absolute in nature, applying 'to *all* publications, irrespective of their maliciousness.' [Citation.]" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) Therefore, we again follow the Supreme Court's interpretation of section 47, subdivision (b), which shields "a citizen's report to the police concerning suspected criminal activity of another person." (*Hagberg*, *supra*, 32 Cal.4th at p. 375.) In other words, we conclude the manner in which Hospital handled plaintiff's discharge does not provide a basis for concluding Hospital's conduct in reporting the suspected crime is beyond the reach of the litigation privilege.

3. Unnecessary Disclosure of Confidential Information

Plaintiff contends the Hospital employee disclosed specific and detailed private medical information to the police that was wholly unnecessary to initiate a driving under the influence investigation. In addition to disclosing plaintiff's name, date of birth and a physical description, the employee disclosed the reasons for medical attention and the course of treatment applied to her hand injury.

Here, plaintiff's first amended complaint describes the harm she suffered as being "arrested for driving under the influence." Her first amended complaint has not identified a separate injury resulting from the disclosure of the additional information about her injury and its treatment. Similarly, on appeal, plaintiff has not shown that she could plead causation and an injury from the disclosure of confidential information unnecessary to the police's investigation. Therefore, assuming the disclosure to medical information unrelated to the suspicion that plaintiff might drive while intoxicated was not covered by the litigation privilege of section 47, subdivision (b), plaintiff has not carried her burden of demonstrating an amendment could supply the missing elements of causation and injury. (See *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318 [plaintiff has the burden of

demonstrating a reasonable possibility an amendment will cure a defect in the complaint].)

In summary, we conclude the trial court did not err in determining (1) plaintiff's causes of action were barred by the litigation privilege and (2) Hospital did not violate the Confidentiality of Medical Information Act because the disclosure qualified for the exception in subdivision (c)(14) of section 56.10.

DISPOSITION

The judgment is affirmed. Hospital shall recover its costs on appeal.