



LIU v. JANSSEN RESEARCH & DEVELOPMENT, LLC

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MARION LIU, SUCCESSOR-IN-INTEREST TO AUGUSTINE LIU, II, DECEASED, Plaintiff and Appellant, v. JANSSEN RESEARCH & DEVELOPMENT, LLC, Defendant and Respondent.

Court of Appeals of California, Second District, Division Five.

Filed March 23, 2017.

Attorney(s) appearing for the Case

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LIU v. JANSSEN RESEARCH & DEVELOPMENT, LLC

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KIN, J.

INTRODUCTION

Plaintiff and appellant Marion Liu (plaintiff), as successor-in-interest to her deceased son, Augustine Liu, II (decedent), appeals from various orders of the trial court concerning defendant and appellant Janssen Research & Development, LLC (defendant). Defendant contends the appeal is untimely and should therefore be dismissed for lack of jurisdiction.

We conclude that all of plaintiff's claims on behalf of her son's estate were resolved by a judgment in favor of defendant, entered February 14, 2013. Plaintiff previously appealed from that judgment and then voluntarily dismissed that appeal on November 20, 2013. Because plaintiff filed her notice of appeal for the instant appeal on August 24, 2015, we dismiss this appeal as untimely.

FACTUAL BACKGROUND

Decedent suffered from schizophrenia. Madeleine Valencerina (Valencerina), a psychiatrist and former codefendant, conducted clinical drug studies as a principal investigator. In that capacity, she recruited decedent to participate in a drug study of defendant's new formulation of the antipsychotic drug, risperidone.

On February 19, 2009, an electrocardiogram (ECG) performed on decedent indicated that he had an "abnormal" heart condition with "sinus tachycardia; old myocardial infarction" and "non-specific T wave abnormalities possibly secondary to heart disease." A blood test also showed that decedent's liver enzymes were elevated. Valencerina nevertheless concluded that decedent was "asymptomatic," based on his denial of any family history of cardiovascular problems, and admitted him to the study.

On February 22, 2009, decedent entered former codefendant College Hospital as a study participant. On February 23, 2009, another blood test showed that decedent's liver enzymes were abnormally high. One-half hour after that blood test, decedent was injected with a one milligram dose of risperidone. About two hours after the risperidone was administered, another ECG showed that decedent's cardiac condition was worsening.

On February 25, 2009, after another blood test showed that his liver enzymes were increasing significantly, decedent was transferred from College Hospital to an acute-care hospital. He died 17 hours later on February 26, 2009. There was evidence that decedent's death was the result of cardiomyopathy in conjunction with other factors, including multiple organ failures and pneumonia.

PROCEDURAL BACKGROUND

A. The Causes of Action Against Defendant

This action was filed in February 2010 by Marion Liu and her husband in their individual capacities and as the successors-in-interest to decedent's estate. The original complaint asserted 21 causes of action against ten different defendants, including various doctors, health care providers, and entities involved in the manufacture or sale of pharmaceuticals, which included defendant.

After the trial court sustained, in part, various demurrers by the various defendants, which led to the filing of subsequent amended complaints, on February 28, 2011, plaintiff filed a fourth amended complaint, which asserted eight remaining causes of action against defendant. Of note, plaintiff asserted a second cause of action for negligence and a third cause of action, entitled "Survival Action Based on Negligence," against defendant.

The second cause of action for negligence alleged, inter alia, that: "As a proximate result of the negligence of [defendant] . . . and of the [d]ecedent's death, [p]laintiffs have been deprived of [d]ecedent[']s . . . society, comfort, attention, services and support to their damage which is ongoing. [¶] As a further proximate result of the negligence of [defendant] . . . and the death of [d]ecedent . . ., [p]laintiffs have incurred funeral and burial expenses." (Italics added.)

The third cause of action, denominated by plaintiff as a "survival action based on negligence," re-alleged and incorporated by reference the same allegations forming the basis for negligence asserted in the second cause of action. As for damages, however, plaintiff alleged that: "As a further proximate result of the conduct of [defendant] . . . the *decedent incurred general damages. . .*" (Italics added.)

B. The Trial Court's Dismissal of Claims Against Defendant

Following additional demurrers and motions to strike concerning the fourth amended complaint, on May 9, 2011, the trial court dismissed all but three claims against defendant: (1) the second cause of action for negligence; (2) the ninth cause of action for products liability failure to warn; and (3) the tenth cause of action for negligent failure to warn. Notably, the trial court sustained defendant's demurrer to the third cause of action (survival action based on negligence). The trial court concluded that the third cause of action was insufficiently pled because Code of Civil Procedure section 377.34 specifically sets forth the damages recoverable in survival actions, but plaintiff only alleged "general damages in an amount to be determined" and "failed to specify the type of damages [d]ecedent purportedly suffered before his death as a result of [defendant's] negligence." Further, with respect to the third cause of

action, the trial court ruled that "[i]n that this is the [f]ourth [a]mended [c]omplaint, [p]laintiff[] will not be given any further leave to amend."

On January 9, 2013, the trial court granted defendant's motion for summary judgment or adjudication, thereby dismissing the three remaining claims against defendant.

C. Plaintiff's Writ Petition

On January 29, 2013, plaintiff filed in this court a petition for writ of mandate seeking to set aside the trial court's grant of summary judgment in favor of defendant and others. On April 19, 2013, this court granted, in part, and denied, in part, plaintiff's petition, directing the trial court to vacate its grant of summary adjudication as to the second cause of action for negligence, but otherwise leaving undisturbed the trial court's grant of summary adjudication on the other causes of action.

On August 14, 2013, the Supreme Court denied defendant's petition for review of our ruling on plaintiff's writ petition. On August 30, 2013, this court issued a remittitur to the trial court in the writ proceeding.

D. Plaintiff's Initial Appeal

During the pendency of the writ proceeding, on February 14, 2013, the trial court entered judgment in favor of defendant based on its order granting summary judgment on the remaining three claims. On March 1, 2013, defendant served notice of entry of that judgment. On April 29, 2013, plaintiff filed an appeal from that judgment.

After the Supreme Court denied defendant's petition for review of this court's partial grant of plaintiff's writ petition, on October 30, 2013, plaintiff requested dismissal of the initial appeal. On November 20, 2013, plaintiff's appeal from the February 14, 2013, judgment was dismissed.

E. Proceedings on the Second Cause of Action

Following the remittitur in the writ proceeding, litigation resumed in the trial court on plaintiff's newly revived second cause of action for negligence. The matter proceeded to trial in September 2015, and a jury returned a verdict in favor of plaintiff. The jury found that plaintiff suffered \$8 million in damages for the "loss of [decedent's] love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance" and that defendant was 70 percent at fault (with codefendant doctor Valencerina 30 percent at fault). Thus, plaintiff received a judgment for \$5.6 million (representing 70 percent of \$8 million) against defendant.

Notably, plaintiff's recovery did not include punitive damages. Moreover, plaintiff did not recover any damages on behalf of decedent's estate as the successor-in-interest. With respect to both issues, defendant had brought related motions in limine prior to trial: (1) to preclude plaintiff from presenting any evidence or argument in support of awarding punitive damages; and (2) to preclude plaintiff from referencing or claiming that there was any plaintiff other than

Marion Liu, individually. With respect to punitive damages, defendant argued that the remaining second cause of action was an individual claim for wrongful death—a cause of action for which punitive damages are not legally permitted. With respect to Marion Liu being the only plaintiff remaining, defendant argued that the second cause of action was brought by Marion Liu in her individual capacity and that the decedent's estate "ha[d] no remaining claim in this action." Defendant noted this distinction was "critically important," because "[w]ithout the estate, this is simply a wrongful death action in which there is no possibility for recovering punitive damages."

Implicitly acknowledging that a wrongful death action by plaintiff in her individual capacity would not support a claim for punitive damages, plaintiff instead argued in opposition to the motions that her second cause of action included a survival claim on behalf of the decedent's estate, which thus supported an award of punitive damages. Specifically, plaintiff contended that the second cause of action was "expressly labeled as being brought by '[p]laintiffs,' plural" and was "not designated as relating only to a wrongful death claim." (Italics omitted.) Thus, according to plaintiff, "since the [s]econd [c]ause of [a]ction is designated as a general negligence claim brought by plaintiffs (plural), the plaintiffs who . . . brought that action must necessarily be Marion Liu, both as an individual and as the successor-in-interest to her son's [e]state."

During a hearing on the motions in limine, the trial court told plaintiff, "I think that it's probable that there are no punitive damages left in this case based upon [prior rulings of the original judge]." The trial court added that "[i]t's difficult for me to conceive that, in the face of [the prior judge]'s ruling, the plaintiff conceived that they [sic] still had a claim for punitive damages." After hearing further argument from the parties, the trial court again stated that "I think punitive damages are probably out," but continued the hearing when plaintiff indicated she intended to file a motion to amend the operative complaint.

Thereafter, plaintiff filed a motion to amend the second cause of action to include, inter alia, an explicit allegation that "plaintiff[], as successor-in-interest, suffered damages, including ... punitive or exemplary damages." As plaintiff explained, "even if those [survival] claims are not currently an express part of the [s]econd [c]ause of [a]ction, amendment should be permitted in order to clarify that the survival claims (including the claim for punitive damages) are included in that cause of action."

At a further hearing on June 25, 2015, the trial court maintained its view that punitive damages were out of the case and denied plaintiff's motion for leave to amend.

F. Current Appeal

On August 24, 2015, plaintiff filed a notice of appeal from: (1) the May 9, 2011, order sustaining defendant's demurrers to various causes of action in the fourth amended complaint; (2) the January 9, 2013, order granting summary adjudication of the fourth and fifth causes of action in the revised fourth amended complaint; (3) the trial court's grant of the motions in

limine concerning punitive damages and the remaining plaintiff in the second cause of action; and (4) the June 25, 2015, denial of plaintiff's motion to amend the operative complaint to add decedent's estate as party to the second cause of action.

Defendant moved to dismiss the appeal as untimely and taken from nonappealable orders. We denied the motion, citing *Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, at page 40, which held that, when a motion to dismiss an appeal on jurisdictional grounds requires examination of the record on appeal, a ruling on appealability should be deferred and considered together with the merits of the appeal.

DISCUSSION

Having examined the record on appeal in light of the parties' contentions, we hold that we lack jurisdiction over this appeal.

A. Legal Principles

In a case involving multiple parties, such as the instant one, an order or judgment that resolves all the issues between a plaintiff and one of the defendants is final as between those parties and therefore directly appealable. "As stated in *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 [139 Cal.Rptr. 97, 565 P.2d 122], disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171 [216 Cal.Rptr. 661, 703 P.2d 1], it has long been the settled rule that in a case involving multiple parties, a judgment is final and appealable when it leaves no issues to be determined as to one party." (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 506.)

"Under [California Rules of Court,] rule 8.104, a notice of appeal must be filed within 60 days after service (whether by the superior court clerk or by a party) of a notice of entry of judgment or a file-stamped copy of the judgment. (Rule 8.104(a).) If there is no notice, the notice of appeal must be filed within 180 days after `entry of judgment.' (Rule 8.104(a)(3).) . . . [¶] These time limits are jurisdictional. We are powerless to extend the time to file a notice of appeal, or to hear untimely appeals. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51], 56] [61 Cal.Rptr.2d 166, 931 P.2d 344]; *Kimball Avenue v. Franco* (2008) 162 Cal.App.4th 1224, 1228 [78 Cal.Rptr.3d 352] (*Kimball Avenue*).)" (*In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1101-1102.)

When no appeal is taken from an appealable judgment or order within the statutory time limit, that judgment or order cannot be reviewed on an appeal from a subsequent order or judgment. "The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken. [Citations.]" (*Woodman v. Ackerman* (1967) 249 Cal.App.2d 644, 648 [57 Cal.Rptr. 687].) Specifically, Code of Civil Procedure section 906, pertaining to the powers of an appellate court states in relevant part: `The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken.'" (*In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119.)

B. Analysis

The trial court's January 9, 2013, order granting summary judgment in favor of defendant resolved all remaining claims between defendant and the decedent's estate. Thus, when the trial court entered judgment on February 14, 2013, that judgment against the estate was directly appealable. Defendant gave notice of entry of that judgment on March 1, 2013, which triggered the 60-day time limit within which to appeal from that judgment. As a result, plaintiff, in her capacity of successor-in-interest to decedent, was required to file an appeal on behalf of decedent's estate on or before April 30, 2013. Plaintiff timely filed such an appeal on April 29, 2013, but plaintiff voluntarily dismissed the appeal on November 13, 2013.

Thus, the instant appeal, instituted years later by plaintiff's filing of a notice of appeal on August 24, 2015, is untimely and must be dismissed for lack of jurisdiction. (*In re Marriage of Mosley*, *supra*, 190 Cal.App.4th at pp. 1101-1102.)

To avoid dismissal, plaintiff argues that the second cause of action for negligence, which was revived by our partial grant of plaintiff's petition for writ of mandate, encompassed a survival claim on behalf of the decedent. If that is true, then the February 14, 2013, judgment did not resolve all claims between decedent's estate and defendant, thereby potentially unwinding the finality and effect of that judgment, the attendant time limits to appeal, and any preclusive effects of the initial appeal and plaintiff's voluntary dismissal of it. We need not, however, address the legal ramifications of plaintiff's theory, because we conclude plaintiff's second cause of action for negligence was only between plaintiff individually and defendant.

Our review of the second cause of action makes clear that the only plaintiffs asserting the negligence claim therein were Marion Liu and her husband, in their individual capacities. Paragraph 118 of the fourth amended complaint explicitly refers to the "[p]laintiffs" in the second cause of action as decedent's "parents and caregivers" on whom decedent "was dependent . . . for his support and maintenance." Consistent with decedent's parents being the only plaintiffs with respect to the second cause of action are the attendant allegations for causation and damages. The second cause of action explicitly alleges that due to decedent's death, the plaintiffs were "deprived of [decedent's] society, comfort, attention, services, and support" and "incurred funeral and burial expenses." Those allegations logically could have only referred to damages suffered by decedent's parents, and not decedent or his estate. It would be nonsensical for decedent (via his estate) to claim he was damaged by his own absence, or that decedent was out-of-pocket for funeral-related expenses that could only have arisen after decedent passed. Moreover, other than these damage and causation allegations relating to decedent's parents only, the second cause of action contains no other damage and causation allegations.

Our view of the second cause of action draws further support from a comparison to the third cause of action, which merely consists of two one-sentence paragraphs (paragraphs 122 and 123). Plaintiff explicitly labeled the third cause of action as a "survival action based on negligence," whereas the second cause of action nowhere mentions a survival claim, which strongly indicates that there was no survival cause of action contained therein. In addition,

paragraph 122 merely realleges and incorporates all the preceding paragraphs of the complaint and contains no additional allegations concerning defendant's purported negligence. If, in fact, the second cause of action also encompassed an unspoken, implicit survival claim, then the third cause of action setting forth identical allegations of negligence for its explicit survival claim would have been entirely redundant and superfluous. (Cf. *Bernard v. Foley* (2006) 39 Cal.4th 794, 810-811 [noting that interpretation of statutory provisions that would render other provisions "surplusage or redundant is to be avoided"].) It strains credulity to credit plaintiff's assertion that she intended to plead redundant causes of action.

Further, paragraph 123 alleges that "the decedent" incurred general damages arising from the survival claim alleged in the third cause of action, demonstrating that plaintiff knew how to—and did—identify the particular plaintiff damaged by the cause of action at issue. In light of this, the most logical and reasonable interpretation of the absence of any damage allegation concerning decedent in the second cause of action is that plaintiff did not in fact intend to include the decedent's estate as a plaintiff for the second cause of action. (Cf. *People v. Arriaga* (2014) 58 Cal.4th 950, 960 ["It is a settled statutory interpretation that if a statute contains a provision regarding one subject, that provision's omission in the same or another statute regarding a related subject is evidence of a different legislative intent"].)

We therefore conclude the second cause of action did not include a survival claim by decedent's estate. Accordingly, because our decision on the writ petition revived only the second cause of action brought by Marion Liu in her individual capacity, it had no effect upon the February 14, 2013, final judgment resolving all claims between defendant and decedent's estate. As a result, plaintiff's current appeal is untimely and must be dismissed for the reasons set forth above.

DISPOSITION

The appeal is dismissed. Defendant is awarded costs on appeal.

KRIEGLER, Acting P. J. and BAKER, J., concurs.

FootNotes

* Judge of the Superior Court of the County of Los Angeles, appointed by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1. Defendant was formerly known and originally sued as Johnson & Johnson Pharmaceutical Research & Development, LLC.

2. Because we resolve the appeal on jurisdictional grounds, we briefly summarize the background facts from our unpublished opinion in the prior writ proceeding—case number B246461—to provide context for the discussion that follows.

3. Plaintiff's husband died during the pendency of the action in the trial court.

4. Code of Civil Procedure section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."

5. Prior to plaintiff's fourth amended complaint, other defendants had successfully challenged plaintiff's allegations in preceding complaints concerning lost earnings and medical expenses, and the trial court had granted plaintiff leave to amend to attempt to address such pleading deficiencies.

6. Codefendant Valencerina initially moved in limine to exclude evidence of punitive damages. Defendant joined in that motion and submitted additional briefing in support thereof.

7. "California statutes and decisions. . . have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) [17 Cal.3d 425](#), 450.) However, "[d]amages for a survivor claim include punitive damages." (*San Diego Gas & Electric Co. v. Superior Court* (2007) [146 Cal.App.4th 1545](#), 1553; see also Code Civ. Proc., § 377.34.)

8. After reviving the second cause of action via the writ proceeding, plaintiff exercised a challenge to the judge who had, among other things, dismissed the third cause of action (Judge White). The matter was reassigned to a different judge (Judge Fruin) on September 19, 2013.

9. In response to the trial court's May 9, 2011, grant of demurrers to various causes of action, on May 17, 2011, plaintiff filed a revised fourth amended complaint, which essentially renumbered and realleged the remaining causes of action against defendant from the fourth amended complaint (i.e., the second, ninth, and tenth) as follows, respectively: (1) negligence (second cause of action); (2) products liability for failure to warn (fourth cause of action); and (3) negligent failure to warn (fifth cause of action).

10. Even if plaintiff's appeal were timely, it would still be subject to dismissal on the ground that the judgment against decedent's estate became final when plaintiff dismissed the initial appeal in 2013, and no further appeal concerning claims by the decedent's estate could be taken. (Code Civ. Proc., § 913 ["The dismissal of an appeal shall be with prejudice to the right to file another appeal within the time permitted, unless the dismissal was expressly made without prejudice to another appeal."]; see also *Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) [132 Cal.App.4th 666](#), 677; *Lyons v. Security Pacific Nat. Bank* (1995) [40 Cal.App.4th 1001](#), 1017–1018.)

11. We accordingly do not reach defendant's other contention that we must dismiss the appeal as one taken from nonappealable orders. We note, however, that, even if plaintiff could appeal from the trial court's June 2, 2015, denial of leave to amend the complaint to add a survival cause of action, it was not an abuse of discretion to deny leave. (*Leader v. Health Industries of America* (2001) [89 Cal.App.4th 603](#), 613 ["unwarranted delay" in proposing amendment "may—of itself—be a

valid reason for denial"].) Plaintiff sought leave to amend approximately five years after the trial court's May 9, 2011, dismissal of the survival claim in the third cause of action. Moreover, in the interim, plaintiff appealed from the February 14, 2013, judgment; did not challenge the May 9, 2011, dismissal order in that appeal; and instead voluntarily dismissed the appeal.
