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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL FOUSE, Plaintiff and Appellant, v. DON SHIN et al., Defendants and Respondents.	B194495 (Los Angeles County Super. Ct. No. PC037736)

APPEAL from a judgment of the Superior Court of Los Angeles County. Melvin Sandvig, Judge. Affirmed in part and reversed in part.

Novak & Ben-Cohen and Sean M. Novak for Plaintiff and Appellant.

Keller, Price & Moorhead and Jeffrey C. Sparks for Defendants and Respondents.

According to plaintiff and appellant Michael Fouse, pharmacist Don Shin and Walgreen Company (defendants and respondents in this appeal) violated plaintiff's civil

rights under the Unruh Civil Rights Act (the Unruh Act) and committed other tortious acts when Shin refused to fill plaintiff's prescription for a medication to treat plaintiff's acquired immune deficiency syndrome (AIDS) and divulged plaintiff's medical condition to those at the pharmacy. The trial court dismissed plaintiff's first amended complaint on alternative grounds—it sustained defendants' demurrer without leave to amend and granted their motion to dismiss pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP statute). In plaintiff's timely appeal, he contends the trial court erred in finding his lawsuit to be a SLAPP suit and awarding attorney fees thereon and in finding no triable issues of fact in the operative pleading. We agree with plaintiff that the anti-SLAPP statute did not apply to defendants' alleged misconduct. As to the demurrer, we hold the trial court erred in dismissing the Unruh Act claim and the claim for intentional infliction of emotional distress, but the court ruled correctly in dismissing the claims for violation of the California Medical Information Act, fraud, and negligence.

PROCEDURAL HISTORY

Plaintiff filed his complaint against defendants on October 31, 2005, alleging a violation of the Unruh Act (Civ. Code, § 51 et seq.) and the California Confidentiality of Medical Information Act (CMIA) (Civ. Code, §§ 56.10 et seq.), along with claims for fraud, intentional infliction of emotional distress, and negligence. After the trial court sustained defendants' demurrer with leave to amend on June 8, 2006, plaintiff filed his first amended complaint, alleging the same five causes of action with additional factual allegations. Defendants simultaneously filed another demurrer and a special motion to strike. In the latter, supported in part by a declaration by Shin, defendants argued that Shin's conduct and statements to plaintiff were mandated by Medi-Cal regulations, and were therefore constitutionally protected. In the former, defendants argued none of the claims stated a valid cause of action. In opposition to the anti-SLAPP motion, plaintiff attached his own declaration and one from his wife.

A hearing on both motions took place on September 1, 2006. The trial court sustained the demurrer without leave to amend. It also ruled in defendants' favor on the anti-SLAPP motion, having granted defendants' evidentiary objections as to portions of the declarations of plaintiff and his wife, and denied plaintiff's objections as to Shin's declaration. Defendants were awarded $15,600 in attorney fees, pursuant to the anti-SLAPP statute. Plaintiff timely appealed the judgment sustaining the demurrer, granting the anti-SLAPP motion, and the award of attorney fees.

Allegations in the First Amended Complaint

Plaintiff is a 50-year-old African-American male, who had been diagnosed with AIDS. On the evening of November 2, 2004, plaintiff was discharged from the hospital, after a lengthy stay for treatment of AIDS-related complications. His doctors prescribed the antibiotic Itraconazole, a generic form of Sporanox,[1] as an essential component of the treatment regime for plaintiff's AIDS condition.[2] The doctors instructed plaintiff to have the prescription filled "immediately." At approximately 10:00 p.m., plaintiff and his wife entered a Walgreens pharmacy in Arleta and waited patiently in line with other customers.

When it was plaintiff's turn to be served, he gave his prescription and insurance information to Shin, who was the pharmacy manager. Without giving any reason or justification, Shin refused to fill the prescription. When plaintiff insisted on having it filled immediately, Shin again refused and demanded in a loud, hostile tone to know whether plaintiff had AIDS or cancer. Plaintiff initially declined to answer because he

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[1] Although plaintiff refers to the drug as "Irraconazole" in the pleading, he also refers to it as "Itraconazole" in his declaration. It appears that the latter spelling is correct.

[2] In Shin's declaration in support of defendants' anti-SLAPP motion, the pharmacist states that Sporanox is an antifungal medication, not an antibiotic.

felt "embarrassed and shocked" by having the inquiry as to his medical condition "broadcast[ed]" to the other customers. Eventually, however, plaintiff confirmed that he had AIDS "and needed the antibiotics to live." Plaintiff also alleged that while he was at the pharmacy, other patrons who had arrived before and after plaintiff received their medications without being questioned or refused service.

With regard to his Unruh Act claim, plaintiff alleged these facts showed that Shin had no legitimate basis for refusing to serve him. "As a result, Plaintiff is informed and believes, and thereupon alleges that Plaintiff's characteristics relating to his race, disability and (perceived) sexual orientation were the sole reason for" denying him service. Plaintiff alleged defendants' actions caused him loss of earnings and earning capacity.

Regarding the claim for violation of the CMIA, plaintiff alleged Shin, without authorization, disclosed plaintiff's confidential medical information—that he had AIDS. Specifically, plaintiff alleged Shin on behalf of the pharmacy had plaintiff's medical information relating to his condition as an AIDS sufferer. During the November 2, 2004 incident, he intentionally disclosed or published that confidential information to "customers, patrons, employees and other members of the general public" for no legitimate purpose, but rather to "harass, humiliate, embarrass, and otherwise harm" plaintiff.

In plaintiff's fraud cause of action, he alleged defendants falsely represented to the public that all Walgreens stores are "open to all members of the public," when in fact defendants "routinely engage in a pattern and practice of discriminating against minorities and the disabled." Plaintiff, relying on that general representation, entered the Walgreens pharmacy on November 2, 2004, in the belief that he would have his prescription filled. When it was not, plaintiff suffered unidentified physical and other harm due to the delay in obtaining the "necessary medications." Plaintiff also alleged four specific misrepresentations that Shin made to him with the intent of justifying Shin's refusal to serve plaintiff.

Regarding the claim for intentional infliction of emotional distress, plaintiff alleged defendants' conduct on November 2, 2004, was "intentional and outrageous." More specifically, "defendants' refusal to provide necessary and essential medications to an individual with a life threatening illness is shocking, and reprehensible and inexcusable." In addition, Shin's "loud and hostile questioning of Plaintiff whether he had 'AIDS' or cancer is extreme conduct that shocks the senses and conscious [*sic*] of a community." It caused plaintiff "great physical and mental pain and suffering," including "physical illness, loss of sleep, anxiety, depression, headaches and other physical symptoms," along with the "exacerbation of his AIDS related conditions."

The final cause of action—for negligence—contains no specific factual allegations, but merely incorporates the allegations from the other claims and characterizes them in conclusory fashion as negligent acts or omissions.

Defendants' Evidence in Support of the Anti-SLAPP Motion

For purposes of supporting their Code of Civil Procedure section 425.16 motion to dismiss, defendants submitted a declaration by Shin, setting forth his version of events, along with a declaration by counsel. According to Shin, plaintiff presented two prescriptions for filling at the Walgreens pharmacy on November 2, 2004, one for a blood pressure medication and the other for the antifungal medication Sporanox/Itraconazole. The former could be filled without any restrictions. The latter, however, was subject to a Medi-Cal "Code 1" restriction, requiring documentation from the prescribing doctor that the patient had been diagnosed with cancer or an HIV condition before it could be dispensed pursuant to the Medi-Cal prescription program. The dosage sought in plaintiff's prescription would have cost approximately $1,500.

At approximately 7:00 p.m., Shin told plaintiff the blood pressure medication could be filled immediately, but he could not dispense the Sporanox without confirmation from the prescribing doctor's office. Shin would contact the physician the

following morning and advise plaintiff accordingly. Plaintiff "became upset" and asked Shin to return the prescription, saying that he would have it filled elsewhere. Shin gave plaintiff the prescription and plaintiff left the pharmacy.

Plaintiff returned with his prescription between 9:30 and 10:00 that evening. He was alone and there were no other customers nearby. Shin explained the Medi-Cal restriction on the dispensing of the Sporanox and read to plaintiff the relevant provision from the Medi-Cal regulations from a booklet in Shin's possession. Shin repeated his offer to fill the blood pressure medication. The pharmacist also offered to provide plaintiff with a two-day supply of the Sporanox if plaintiff would confirm his diagnosis for HIV or cancer. Plaintiff reluctantly confirmed that he had HIV. Although plaintiff appeared "annoyed," both of their voices remained calm and there was no one else in their "immediate vicinity." Shin told plaintiff that it would take 20 to 30 minutes to fill the prescription. Shin was in the process of completing his shift. When plaintiff approached to see if the medication was ready, he saw Shin conversing with the overnight pharmacist. Plaintiff became "agitated" and "very upset." He cancelled his order and demanded Shin return his prescription. Shin further denied addressing plaintiff in a loud, hostile manner and denied making the statements attributed to him in the amended complaint. He sought confirmation of plaintiff's diagnosis because of the Medi-Cal requirements, not because plaintiff appeared to be an African-American with HIV.

Plaintiff's Evidence in Opposition to the Anti-SLAPP Motion

Plaintiff supported his opposition to the anti-SLAPP motion with his own and his wife's declarations.[3] Plaintiff declared that he and his wife arrived at the Walgreens at

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[3] As the trial court granted defendants' evidentiary objections as to both declarations—rulings plaintiff does not challenge on appeal—we refer only to the aspects of the declarations ruled admissible.

approximately 9:00 p.m.,[4] having just been released from the hospital for treatment of his AIDS-related complications. His physicians had given him a prescription for Itraconazole. After waiting in line at the pharmacy, plaintiff gave his prescription and Medi-Cal insurance information to Shin. Plaintiff insisted on having the prescription filled immediately as he was very ill, having just been discharged from the hospital. Plaintiff showed his hospital release forms to Shin.[5] The pharmacist, however, did not relent, but "inquired in a loud, demanding, and hostile tone" whether plaintiff had AIDS or cancer. Plaintiff declined to answer Shin's inquiries because he was embarrassed and shocked by Shin's statements and conduct. Nevertheless, "to prevent further publication of [plaintiff's] personal information to the customers," plaintiff truthfully responded that he had AIDS "and needed the antibiotics to live." Shin, however, refused to fill the prescription.

"Feeling embarrassed, harassed, and discriminated against" by Shin's actions, plaintiff left the Walgreens store at approximately 9:00 p.m., and returned approximately one hour later with an empty prescription bottle for Itraconazole that had been previously filled for plaintiff at a different pharmacy. He presented it to Shin to prove that he truly was suffering from AIDS and took the medication regularly "in order to live." Shin, however, refused to fill the prescription "clearly based solely on [plaintiff's] race, sexual orientation, and medical disability." Plaintiff left the store without having his prescription filled. Shin never offered to provide plaintiff with any amount of Itraconazole on a temporary basis, until the prescription could be filled. In her declaration, plaintiff's wife corroborated most of plaintiff's statements concerning Shin's statements and actions.

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[4] Plaintiff's declaration actually states that he arrived at 10:00 p.m.; however, based on plaintiff's subsequent statements and those of his wife, it appears he had meant to state 9:00 p.m.

[5] The forms attached to plaintiff's declaration appear to be dated October 10, 2004, however.

DISCUSSION

The Anti-SLAPP Ruling

In granting defendants' anti-SLAPP motion, the trial court found that Shin, as a licensed pharmacist acting on behalf of Walgreens, was exercising his free speech rights when he asked plaintiff whether he had AIDS or cancer, as required by Medi-Cal prescription regulations. It further found that such questioning was in the public interest or amounted to protected comment on a public issue. Having determined that the demurrer to the first amended complaint should be sustained without leave to amend, the court found plaintiff failed to carry his burden of demonstrating a probability of prevailing on the merits. However, we agree with plaintiff's contention that defendants failed to make the required threshold showing that Shin's speech and conduct during the November 2, 2004 incident qualified as protected activity for purposes of Code of Civil Procedure section 425.16. Accordingly, we do not reach the question of whether plaintiff adequately demonstrated a probability of prevailing on the merits. We therefore reverse the granting of the anti-SLAPP motion and the award of attorney fees.

"In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Under Code of Civil Procedure section 425.16 '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike. . . .' (Code Civ. Proc., § 425.16, subd. (b)(1).)" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) "If the court finds the defendant has made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 67.) 'In order to establish a probability of prevailing

on the claim (Code Civ. Proc., § 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must "'state[ ] and substantiate[ ] a legally sufficient claim.'" [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.]' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)" (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056.) "[A] plaintiff opposing a section 425.16 motion must support its claims with admissible evidence." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1237.)

We independently review the question of plaintiff's causes of action arising from protected activity. (*Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1577; *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1396; *ComputerXpress, supra,* 93 Cal.App.4th at p. 999.) The Code of Civil Procedure provides that for purposes of an anti-SLAPP motion, an "'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," under Code of Civil Procedure section 425.16, subdivision (e)(3) "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" or, under subdivision (e)(4), "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Initially, we note that defendants are mistaken in asserting that the gravamen of plaintiff's pleading was the legitimacy of Shin's inquiry into whether plaintiff had AIDS or cancer. Rather, as the pleading and plaintiff's declaration make clear, plaintiff alleged actionable conduct based on the refusal to fill the prescription. He also alleged the manner of the inquiry was actionable—there is a factual dispute concerning whether Shin's questioning was so loud and hostile as to cause emotional distress to plaintiff. More fundamentally, defendants' position rests on a basic misunderstanding of the anti-

SLAPP law's "public interest" requirement, along with the statute's overarching purpose. To establish a prima facie showing that their challenged speech was protected, defendants would have to demonstrate that plaintiff's medical condition was a matter of public interest. That is, even accepting the trial court's finding that Shin was legally obligated to verify whether the Sporanox had been prescribed to treat plaintiff's AIDS or cancer, we find no authority supporting a determination the public had a legitimate interest in knowing whether plaintiff had been diagnosed with either condition.

Defendants presented no evidence to support a finding that the Walgreens pharmacy was a public forum. A public forum is traditionally defined as "'"a place that is open to the public where information is freely exchanged."'" (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576 (*Ampex*), quoting *ComputerXpress, supra,* 93 Cal.App.4th at p. 1006.) The essential factor is "whether the means of communicating the statement permits open debate." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 897 (*Wilbanks*); see also *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476.) The notion that a pharmacist/patient colloquy concerning the filling of a prescription is geared to the facilitation of open debate is dubious at best, and nothing in the record dispels that doubt.

"The most commonly articulated definitions of 'statements made in connection with a public issue' focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations.] As to the latter, it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate. (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107 (*Du Charme*) [report that an employee was removed for financial mismanagement was informational, but not connected to any discussion, debate or controversy]; *Consumer*

Justice Center v. Trimedica International, Inc. (2003) 107 Cal.App.4th 595, 601 [advertisements about a pill offering a natural alternative to breast implants are not about the general topic of herbal supplements]; *Rivero* [*v. American Federations of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913,] 924 [reports that a particular supervisor was fired after union members complained of his activities are not a discussion of policies against unlawful workplace activities].)" (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 898.)

In the same manner, the mere fact that the Medi-Cal guidelines requiring Shin's inquiry into plaintiff's medical condition were presumably designed to further a legitimate public purpose does not mean that the inquiry itself was a matter of public interest or debate. There is nothing inherent in pharmacies to support the notion that they are recognized destinations for public debate about drug policy or patron's own medical conditions. Nor did defendants present any evidence that the Walgreens in Arleta was such a place. Of course, there was no evidence that plaintiff was a public figure or that the public was interested in his medical condition.

Defendants' reliance on *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307 (*ARP*) is entirely misplaced. In *ARP*, Division Four of this court held unconstitutional Civil Code section 2527, which required prescription drug claims processors to provide pharmacy fee reports to insurers. The *ARP* court found the reporting requirement violated the drug claims processors' free speech rights under the California Constitution. Moreover, in connection with the claims processors' anti-SLAPP motion, the *ARP* court found "[t]heir refusal to comply with the compelled speech requirement of the statute is an act in furtherance of respondents' right of free speech in connection with an issue of public interest, within the meaning of Code of Civil Procedure section 425.16." (*Id.* at pp. 1322-1323.) Defendants nowhere explain how *ARP*'s recognition of drug processors' constitutional right to refuse government-compelled disclosure of proprietary information supports a finding that a pharmacist has a constitutionally protected right to publicize a client's medical history.

Having found defendants failed to satisfy the threshold requirement of showing that the challenged causes of action arose from protected activity, we need not reach the question of whether plaintiff demonstrated a probability of prevailing on the claims. (See, e.g., *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 67.) The dismissal of the first amended complaint under Code of Civil Procedure section 425.16 must be reversed. It follows that the award of attorney fees to defendants as prevailing parties (Code Civ. Proc., § 424.16, subd. (c)), based on the trial court's erroneous granting of the anti-SLAPP motion, must be reversed as well.

The Demurrer Ruling

We now address the trial court's alternative basis for dismissing the first amended complaint—the sustaining of the demurrer without leave to amend.

In determining whether plaintiff stated a claim for relief, we treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiff is entitled to a reasonable interpretation of the complaint, read as a whole and in context. (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1126; *Friedman v. Southern Cal. Permanente Medical Group* (2002) 102 Cal.App.4th 39, 43.) If the demurrer is sustained by the trial court, our task on appeal is to determine whether the complaint states facts sufficient to constitute a cause of action. (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1126; *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) When the trial court sustains a demurrer without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment. If the plaintiff sustains his burden of establishing a reasonable possibility of curing the defect, it is an abuse of discretion to deny leave to amend. (*Ibid.*; *Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1126; *Friedman v. Southern Cal. Permanente Medical Group, supra,* 102 Cal.App.4th at p. 43.) Accordingly, in this aspect

of our opinion, we disregard the evidence presented in support and opposition to the anti-SLAPP motion, except to the extent it bears on the likelihood that plaintiff can cure any defect by amendment.

Unruh Act Claim

As our Supreme Court has recently explained: "In pertinent part, the [Unruh] Act provides that '[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.' ([Civ. Code,] § 51, subd. (b).)" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166 (*Angelucci*).) "As we have declared in past cases, the [Unruh] Act must be construed liberally in order to carry out its purpose." (*Id.* at p. 167.) "Its provisions were intended as an active measure that would create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious discrimination by such establishments." (*Ibid.*) In short, "the [Unruh] Act imposes a duty upon business establishments to refrain from arbitrary discrimination." (*Id.* at p. 169.)

In the trial court, defendants argued the pleading was defective because the factual allegations did not support a finding of discriminatory motivation based on the invidious categories alleged. More specifically, defendants contended that absent plaintiff's general allegations as to defendants' improper motivations, the specific conduct and statements attributed to Shin did not demonstrate that his alleged refusal to fill the prescription was based on defendant's race, disability, or sexual orientation. The trial court apparently agreed. As he did below, plaintiff argues the specific facts alleged were sufficient to exclude a non-arbitrary basis for Shin's conduct and supported the

reasonable inference that the alleged refusal to fill the prescription was motivated by at least one of the three invidious characteristics alleged. We agree.

There is no special requirement that Unruh Act claims be pled with specificity. To the contrary, our Supreme Court has made it clear that the Unruh Act is to be construed liberally in order to carry out its purpose of "protecting each person's inherent right to 'full and equal' access to 'all business establishments.' [Citations.]" (*Angelucci, supra,* 41 Cal.4th at p. 167.) As such, the Unruh Act "imposes a compulsory duty upon business establishments to serve all persons without arbitrary discrimination." (*Ibid.*)

Here, plaintiff's allegations established at least a prima facie case that he was legally entitled to have his prescription filled, having provided defendants with a valid prescription, along with his personal and insurance identifications. These facts—excluding, of course, defendants' evidence submitted in support of the anti-SLAPP motion—gave Shin no apparent, legitimate basis for his refusal. In addition to alleging facts sufficient to show defendants' conduct was arbitrary, plaintiff alleged he exhibited three characteristics statutorily recognized as being improper bases for discrimination—race, disability or medical condition, and sexual orientation.[6] We find those allegations, along with the further allegation that every other customer had his or her prescription filled without incident, sufficient to state a claim for invidious discrimination.

We disagree with defendants' assertion that plaintiff's allegations merely established his subjective belief that Shin's conduct was attributable to improper motives. The recent decision in *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729 is instructive. The *Payne* court found allegations sufficient to state a claim by an African-American physician that the defendant hospital violated the Unruh

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6 We note that plaintiff also alleged that defendants have an ongoing policy of discrimination and a longstanding history of discriminating against African-American customers, along with a reputation for discriminating against customers with medical disabilities and denying them access to necessary medications. Those unsupported, conclusory allegations play no role in our decision.

Act by failing to address racist conduct that impaired access of minority physicians and patients to that facility. (*Id.* at p. 746.) As in this case, there were no allegations in *Payne* that the defendant acknowledged or objectively betrayed any racial animus.

Moreover, as to discrimination based on medical condition or sexual orientation, plaintiff's declaration contained testimony that Shin became hostile when plaintiff acknowledged his AIDS diagnosis.

Confidentiality of Medical Information Act Claim

Plaintiff contends the trial court erred in sustaining the demurrer as to his second cause of action, which alleged a violation of the CMIA, based on Shin's unauthorized disclosure to Walgreens customers and other members of the public that plaintiff had AIDS. However, as the trial court found, plaintiff's allegations were legally defective and there is no likelihood that the defect could be cured by further amendment.

In general, the CMIA was "intended to protect the confidentiality of individually identifiable medical information obtained from a patient by a health care provider, while at the same time setting forth limited circumstances in which the release of such information to specified entities or individuals is permissible." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 859.) Specifically, Civil Code "[s]ection 56.10, subdivision (a), provides that: 'No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c)." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 426.) The statute defines "medical information" to mean "any individually identifiable information, *in electronic or physical form*, in possession of or derived from a provider of health care . . . regarding a patient's medical history, mental or physical condition, or treatment. . . ." (Civ. Code, § 56.05, subd. (g), emphasis added.)

As explained above, plaintiff alleged that Shin on behalf of the pharmacy had possession of plaintiff's "medical information" relating to his medical condition as an

AIDS sufferer, and that during the November 2, 2004 incident, he intentionally disclosed or published that information—without authorization—to "customers, patrons, employees and other members of the general public" for no legitimate purpose, but rather to "harass, humiliate, embarrass, and otherwise harm" plaintiff. Defendants demurred on the ground that plaintiff failed to identify the allegedly protected medical information and thereby failed to allege sufficient facts to show the information was protected under the CMIA. From the colloquy at the demurrer hearing and from plaintiff's declaration submitted in opposition to the anti-SLAPP motion, it was clear that the only medical information at issue was plaintiff's diagnosis as being infected with the AIDS virus, the source of which was plaintiff's statement to Shin. Moreover, as the trial court found, the claim is based on Shin's loud and hostile *inquiry* as to whether plaintiff had AIDS. That is, plaintiff did not allege that Shin "broadcast" plaintiff's medical condition to the pharmacy customers.

As such, there are two legal defects in plaintiff's allegations. First, there is no allegation that Shin actually made a public disclosure of plaintiff's medical condition. At most, plaintiff has alleged that Shin embarrassed him by making a public demand to know whether plaintiff had been diagnosed with AIDS or cancer. Second, there was no allegation that the "medical information" in defendants' possession was "in electronic or physical form," as required by Civil Code section 56.05, subdivision (g).

Nevertheless, at oral argument, plaintiff represented that he could cure these defects by further amendment. As noted above, it is an abuse of discretion to sustain a demurrer without leave to amend "if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (E.g., *Friedman v. Southern Cal. Permanente Medical Group, supra*, 102 Cal.App.4th at p. 43.) That question is "reviewable on appeal 'even in the absence of a request for leave to amend.'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971; Code Civ. Proc., § 472c, subd. (a).) We requested supplemental briefing to ensure plaintiff had the opportunity to demonstrate that further amendment would be effective.

In his August 6, 2007 response, plaintiff stated that upon remand he could allege he provided Shin with three medical records in physical form containing information that "conclusively established" that plaintiff suffered from AIDS and AIDS-related conditions—specifically, his hospital discharge form, prescriptions for other medications provided to him by the hospital upon his discharge, and the prescription labels on medication containers plaintiff showed the pharmacist. What plaintiff's carefully worded representation fails to do, however, is identify a document provided to Shin that actually contained his AIDS diagnosis. We have reviewed the hospital discharge form, which was submitted as an exhibit to plaintiff's declaration in opposition to the anti-SLAPP motion, and found no such entry. Neither did the Itraconazole prescription provided to Shin. There is no reason to believe any other prescription or prescription label would contain that diagnosis—and, despite having every opportunity to do so, plaintiff does not state that they do.

Accordingly, we find no reasonable possibility further amendment could allege that defendants disclosed "medical information" as defined by Civil Code section 56.05, subdivision (g).

Fraud Claim

Consistent with the trial court's ruling, we find plaintiff's fraud allegations so vague, general, and incoherent that they fail to state a claim for relief. "'Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.]'" (E.g., *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 85-86.) "'In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus '"the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect."' [Citation.] This particularity requirement necessitates pleading *facts* which 'show how,

when, where, to whom, and by what means the representations were tendered.'"' [Citation.]" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.)

The basis for plaintiff's fraud cause of action is that defendants falsely represented to the public that all Walgreens stores are "open to all members of the public," when in fact defendants "routinely engage in a pattern and practice of discriminating against minorities and the disabled." In alleged reliance on that public representation, plaintiff entered the Walgreens pharmacy on November 2, 2004, in the belief that he would have his prescription filled. When it was not, plaintiff suffered unidentified physical and other harm due to the delay in obtaining the "necessary medications."

The legal defects in such a claim are obvious. First of all, there is no allegation that Shin represented that the pharmacy was "open to the public." Nor is there any allegation that Walgreens made a specific statement to induce members of minority groups and persons suffering from disabilities to enter its stores for the purpose of denying them the services to which they were legally entitled. To the extent there was any statement, it was merely the representation by Walgreens that the store was "open" for business with the implication that it complied with anti-discrimination law. As to the four specific misrepresentations that Shin allegedly made to plaintiff, none can support the fraud claim because, as pleaded, they were not intended to induce plaintiff's detrimental reliance and did not do so. Each statement was an excuse or justification for Shin's refusal to fill the prescription. As such, plaintiff neither believed the statements were true nor acted to his detriment in any such belief.

In sum, plaintiff has improperly affixed the label of fraud to a set of allegations that might only support a very different claim—conspiracy to violate his civil rights. As these defects go to the essence of plaintiff's pleading, we find no error in the trial court's ruling. (See *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1819 [demurrer to a fraud cause of action properly sustained without leave to amend where the appellate court could not perceive a "reasonable possibility that the defects in the complaint can be cured by amendment," and the plaintiff did not "suggest any such

possibility"]; *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 75 [flaws in allegations in a fraud cause of action justified sustaining demurrer without leave to amend].)

Intentional Infliction of Emotional Distress Claim

Plaintiff argues the trial court erred in sustaining the demurrer to the cause of action alleging intentional infliction of emotional distress. We agree. "The tort of intentional infliction of emotional distress is comprised of three elements: (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 suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593; *Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 130.) "The fact that conduct might be termed outrageous is not itself sufficient. 'The tort calls for intentional, or at least reckless conduct—conduct intended to inflict injury or engaged in with the realization that injury will result.' (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 210.)" (*Ess v. Eskaton Properties, Inc.*, *supra*, 97 Cal.App.4th at p. 130.)

Contrary to defendants' assertion on appeal, the first amended complaint did not merely allege Shin inquired whether plaintiff had AIDS or cancer and then withheld the prescription. Rather, plaintiff made the following factual allegations: Shin's "loud and hostile questioning of Plaintiff whether he had 'AIDS' or cancer" was so extreme as to shock community sensibilities, and caused plaintiff "great physical and mental pain and suffering," including "physical illness, loss of sleep, anxiety, depression, headaches and other physical symptoms," along with the "exacerbation of his AIDS related conditions." Plaintiff also alleged that he informed Shin as to the critical need for having the

prescription immediately filled. Under those circumstances, it was no mere conclusion to allege "defendants' refusal to provide necessary and essential medications to an individual with a life threatening illness is shocking, and reprehensible and inexcusable."

Negligence Claim

In their demurrer, defendants argued that plaintiff's allegations were deficient because, among other things, plaintiff failed to allege the duty or standard of care upon which the negligence claim was based. As defendants correctly pointed out, there were no specific facts alleged and to the extent other allegations were incorporated by reference into the negligence claim, all of those allegations were premised on intentional conduct. Plaintiff's opposition, which was perfunctory at best, failed to identify the duty or standard of care that defendants allegedly breached. Plaintiff's appellate argument is no better, as he merely states that defendants can be held liable for unspecified "negligent acts" by their employees. In short, neither below nor on appeal has plaintiff alleged a legal duty in support of his negligence claim. Nor has plaintiff cited any authority that provides even remote support of his contention. Under these circumstances, we are entitled to summarily reject the contention and deem it forfeited. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 956; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.)

DISPOSITION

We reverse the judgment dismissing the action and awarding attorney fees under Code of Civil Procedure section 425.16. We also reverse the judgment sustaining the demurrer as to the Unruh Act claim and the claim for intentional infliction of emotional distress. However, we affirm the judgment dismissing the claims for violation of the

California Medical Information Act, fraud, and negligence. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.