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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NICHAPHA KHACHITTHAMAWADEE et al., Plaintiffs and Appellants, v. TENET HEALTHCARE CORPORATION et al., Defendants and Respondents.	D088217 (Super. Ct. No. CVPS2304562)

APPEAL from an order of the Superior Court of Riverside County, Manuel Bustamante, Judge. Reversed and remanded with instructions.

Gusdorff Law, Janet Gusdorff; Louis J. Cohen; Kleiman Rajaram and Mark Kleiman, for Plaintiffs and Appellants.

Schuering & Doyle, Daniela P. Stoutenburg and Thomas M. Gray, for Defendants and Respondents Tenet Healthcare Corporation and Desert Regional Medical Center.

Cole Pedroza, Kenneth R. Pedroza, Nicole F. DeVanon; Hinshaw Marsh, Still & Kanter, Barry C. Marsh and Patrick C. Stokes, for Defendants and Respondents DHP Anesthesia Medical Group Inc. and Arun Thunga.

Dr. Richard Pan, an anesthesiologist, died of acute propofol intoxication. Plaintiffs Nichapha Khachitthamawadee and Alexa Nicha Pan, Pan's widow and daughter, sued Defendants Tenet Healthcare Corporation, DHP Anesthesia Medical Group, Inc., Desert Regional Medical Center, Inc., Team Health Inc., Team Health Anesthesia, and Dr. Arun Thunga, alleging causes of action for negligence-wrongful death, negligent infliction of emotional distress (NIED—which Plaintiffs withdrew in the trial court), and intentional infliction of emotional distress (IIED). The trial court sustained Defendants' demurrers to the second amended complaint without leave to amend.

Plaintiffs appeal, contending the trial court erred in sustaining the demurrers because they adequately alleged a duty owed to Pan and sufficient facts for the IIED claim to survive demurrer. We conclude the allegations in the complaint, and reasonable inferences therefrom, sufficiently alleged a duty to Pan; the trial court thus erred by sustaining Defendants' demurrers to Plaintiffs' negligence-wrongful death cause of action. We also conclude, however, Plaintiffs failed to allege sufficient facts to state a cause of action for IIED. We accordingly reverse the judgment and remand with instructions.

I.

Consistent with the principles governing our review of a ruling sustaining a demurrer, we recite facts from the allegations of Plaintiffs' second amended complaint. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

A.

DHP was Pan's employer. Thunga, Pan's supervisor, was DHP's Facility Medical Director of Anesthesia and the Chair of the Department of Anesthesia at Desert. DHP contracts with Desert to provide anesthesiologists to work in Desert's operating rooms. Tenet runs three hospitals, including Desert.

Team Health is a physician services organization that contracts with hospitals to take over their departments, including anesthesiology departments. Team Health Anesthesia is a subsidiary of Team Health that supplied and supervised anesthesiologists who worked at Desert, including Thunga. Team Health Anesthesia managed independent contractor anesthesiologists such as Pan and Thunga. Thunga performed management duties for Team Health Anesthesia, including supervising Pan. Both Team Health Anesthesia and Team Health investigated Pan's death.

B.

Propofol is a short-acting intravenous anesthetic agent commonly used to induce and maintain anesthesia. When abused, it creates feelings of elation and euphoria.

Among anesthesia professionals, propofol is a commonly abused substance, accounting for 41 percent of reported substance abuse cases. A 2007 survey of propofol abuse in anesthesia programs found a significant association between discrepancies in propofol accounting and abuse.

Numerous studies report the first sign of propofol abuse or addiction is often death, but circumstantial signs of abuse include discrepancies in propofol accounting. Studies have also demonstrated the effectiveness of controlling propofol in a manner consistent with a scheduled drug.

C.

On September 17, 2021, Thunga discovered Pan dead inside an "[o]n [c]all [r]oom" at 1:00 p.m. The coroner determined Pan died of acute propofol intoxication.

Plaintiffs believe Thunga discovered Pan in the morning but concealed his discovery to "stage" the scene to suggest Pan committed suicide. Thunga had Desert security cut the lock off Pan's locker. He then removed its contents and placed them, including vials of medication, inside Pan's backpack, creating the appearance Pan intended to end his life. In furtherance of this scheme, Thunga reported Pan had financial problems due to stock market losses and had requested additional shifts.

In a meeting after Pan's death, a Team Health and Team Health Anesthesia manager admitted knowing Pan "'had been diverting propofol.'" Despite this, no steps were taken to limit Pan's access to abused medications, place him in a drug diversion and rehabilitation program, or report him to the California Medical Board.

In November 2021, Thunga informed clinicians: "'FYI: 20 ml propofols are going to be dispensed individually,'" from the automated medication dispensing system instead of allowing clinicians to "grab fistfuls of vials whenever it suited them."

In September 2022, Thunga wrote the doctors and nurses to inform them the pharmacy director would now treat propofol as a controlled drug. This meant any wastage—i.e., dispensed drug not used by a patient—needed to be documented and any discrepancies cleared before the end of each shift.

A Desert anesthesiologist testified the hospital she previously worked at had a strict protocol for destroying propofol wastage that required

documenting the amount of propofol used and the amount wasted or thrown away. Any wastage was returned to the pharmacy to test for dilution.

Plaintiffs allege Defendants added propofol to the wastage protocol after Pan's death. Defendants had the legal and administrative authority and technical ability to rectify the dangerous situation they created by making propofol freely available to a population of clinicians known to be at risk for abusing this drug. But instead of correcting the problem, Defendants made it worse by leading clinicians to believe the problem would not only be tolerated but actively covered up.

II.

A.

A demurrer tests whether, as a matter of law, the facts alleged in the complaint state a cause of action. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166.) "[W]e give the complaint a reasonable interpretation, [reading it as a whole and its parts in their] context," assuming the truth of properly pled or implied factual allegations, and considering judicially noticed matters. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We "do not assume the truth of contentions, deductions, or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

We review de novo a ruling sustaining a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We are not concerned with the difficulties the plaintiff may have in proving the claims (*id.* at p. 1115) or the trial court's reasons for sustaining the demurrer, as it is the ruling, not the rationale, that is reviewable (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631). A

trial court errs by sustaining a demurrer when the complaint states a cause of action under any viable legal theory.

B.

Plaintiffs contend the trial court erred in sustaining the demurrers to their negligence claims because it framed the scope of Defendants' legal duty to Pan too narrowly. We agree.

1.

Negligence liability arises only when the defendant had a duty of care toward the plaintiff or to a class of persons to which the plaintiff belongs. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.) A duty may arise through statute, contract, the relationship of the parties, the character of the activity in which the defendant engaged, or the interdependent nature of human society. (*Ibid.*) In certain circumstances, California recognizes a common law duty based on the theory of negligent undertaking. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612; Rest.2d Torts, § 324A.)

Where the facts are undisputed, the existence of a duty of care presents a question of law. (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 45.) But when the record supports competing inferences or the factual record is not yet fully developed, the question whether a duty exists must await a hearing on the merits. (*Artiglio,* 18 Cal.4th at p. 615.)

2.

Defendants and the trial court characterized Defendants' duty to Pan as merely a duty to prevent Pan from committing self-harm. But that is not the duty Plaintiffs pled. The complaint alleges Defendants "had a duty of care to monitor, prevent[,] and remediate drug diversion by its providers and to comply with their drug diversion policies to protect providers and

patients." It further alleges Defendants "had a duty to exercise reasonable care in how they controlled and accounted for [p]ropofol." Taking these allegations as true, as we must on demurrer, Plaintiffs identify four independent theories under which Defendants owed a duty of care: the special circumstances doctrine; the Labor Code; the California Code of Regulations; and the negligent undertaking doctrine.

Plaintiffs need only establish a duty under one of these theories to defeat Defendants' demurrers. As we explain, the complaint adequately alleges a duty of care under the California Code of Regulations and the negligent undertaking doctrine.

a.

Plaintiffs allege Desert had a statutory duty under regulations that apply to any general acute care hospital—defined as "a hospital, licensed by the Department, having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff which provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services" (Cal. Code Regs., tit. 22, § 70005(a))—to (1) establish "safe and effective systems for procurement, storage, distribution, dispensing[,] and use of drugs" (Cal. Code Regs., tit. 22, § 70263(c)(1)) and (2) develop "regulations concerning anesthetic safety." (Cal. Code Regs., tit. 22, § 70235(a)(2).)

Desert does not dispute these regulations govern its conduct. Instead, it argues the regulations exist solely to protect patients and create no duty running to an anesthesiologist or his family. Even if the regulations applied, Desert contends the negligence claim is time-barred by the one-year limitations period in Code of Civil Procedure section 340.5, which governs

actions against health care providers for professional negligence. Both arguments fail.

First, section 70263 refutes Desert's argument that this regulation applies only to patients. Section 70263(c)(1) requires "safe and effective systems for procurement, storage, distribution, dispensing[,] and use of drugs and chemicals." This language is directed at the handling of controlled substances throughout the hospital, not at the treatment rendered to any particular patient. A drug-control system that fails is dangerous precisely because it exposes everyone with access to the drug supply, staff and patients alike, to the risk of diversion and its consequences. Nothing in the regulation's language confines its protective purpose to patients, and Desert cites no authority so limiting it. We are thus unpersuaded by this argument.

Second, Code of Civil Procedure section 340.5 applies only to claims for negligence "in rendering the professional services that hospitals and others provide by virtue of being health care professionals: that is, the provision of medical care to patients." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88.) But Plaintiffs' claims arise from Desert's failure to safeguard controlled substances. Section 340.5 therefore does not apply.

The remaining Defendants argue the regulations do not bind them because they are not acute care hospitals. Plaintiffs maintain DHP contractually assumed Desert's regulatory obligations. The complaint alleges Desert contracted with DHP, Team Health, and Team Health Anesthesia, and the underlying contract between Desert and DHP confirms that services under the contract were to be rendered by providers employed by or under contract with DHP.

Plaintiffs' argument has merit. Plaintiffs allege Tenet, Desert, DHP, Thunga, Team Health, and Team Health Anesthesia each had a duty of care

to monitor, prevent, and remediate drug diversion by their providers and comply with their drug diversion policies to protect providers and patients. They further allege all Defendants were agents or employees of the other Defendants. Plaintiffs also claim that, under (1) contracts between Desert, DHP, Team Health, and Team Health Anesthesia and (2) written policies, Defendants agreed to resolve any discrepancies regarding the supply count or distribution and administration of propofol.

The contract bears this out. DHP agreed to meet Desert's performance metrics in several categories, including keeping the automated medication dispensing system's "unreconciled Medication rate" below five percent annually. The contract designated the Director—Thunga—as responsible for providing these services. And it confirmed DHP and all physicians it employed were independent contractors.

Taken together, these allegations establish that DHP—and, by extension, Thunga—contractually assumed responsibility for monitoring discrepancies between the medication the dispensing system recorded and the medication accounted for as used or wasted. The complaint alleges Desert knew anesthesiologists abused propofol, discrepancies in propofol accounting existed, and providers were diverting the drug. It is therefore reasonable to infer that Thunga, who sat on Desert's drug diversion prevention committee, knew anesthesiologists were diverting propofol for abuse. When there was less propofol than the automated dispensing system said there was, Desert's pharmacy department would be alerted and would notify Thunga. But rather than address the problem, Thunga instructed staff to "'close out' the discrepancies without regard to how many drugs were missing." Only after Pan's death did Thunga direct clinicians to treat

propofol as a controlled substance, requiring waste be documented and discrepancies cleared.

The contract between DHP and Desert independently establishes this delegation on ordinary principles of assumption of duty. A party's contractual undertaking can give rise to a duty of care running to persons outside the contract, even absent privity. (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.) Whether such a duty exists turns on a balancing of factors, including the extent to which the transaction was intended to affect the third person, the foreseeability of harm, the closeness of the connection between the defendant's conduct and the injury, the moral blame attached to that conduct, and the policy of preventing future harm. (*Ibid.*)

Here, Desert's contract with DHP was intended to affect providers, like Pan, because the contract's performance metrics were designed to control propofol access. Harm from unchecked diversion was foreseeable given Desert's alleged knowledge that (1) anesthesiologists were abusing propofol and (2) accounting discrepancies already existed. The connection between Thunga's conduct—instructing staff to close out discrepancies "without regard to how many drugs were missing"—and Pan's death from acute propofol intoxication is direct. On these facts, the contract's performance metrics and its designation of the Director's responsibilities show (1) Desert delegated to DHP and Thunga the duty to monitor and clear drug discrepancies and (2) DHP and Thunga assumed the accompanying duty of care. Defendants offer no authority that Desert's regulatory duties were nondelegable.

Accordingly, Desert and the remaining Defendants owed a duty of care under the regulations.

b.

Even if the remaining Defendants could ultimately show the regulations did not create a duty to monitor, prevent, and remediate drug diversion, that would not end the inquiry because the negligent undertaking doctrine also supplies a duty here.

A defendant who undertakes to render services to someone other than the plaintiff may also owe a legal duty of care to a third party. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.) Section 324A of the Restatement Second of Torts sets out this theory of liability. (*Ibid.*) To state such a negligence claim, a plaintiff must show (1) an actor undertook to render services to another; (2) the defendant should have recognized those services as necessary for the protection of third persons; (3) the defendant failed to exercise reasonable care in performing the undertaking; (4) that failure caused physical harm to the third person; and (5) either (a) the defendant's carelessness increased the risk of harm, (b) the undertaking was to perform a duty the other party owed to the third person, or (c) the third person or other party relied on the undertaking. (*Artiglio,* 18 Cal.4th at p. 614.)

A defendant contractually agreeing to provide services meant to protect others, then performing those services negligently, is a classic negligent undertaking fact pattern. In *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, the defendant contracted to provide a convenience store with armed, uniformed security guards at night. (*Id.* at p. 287.) No guard was on duty when several customers assaulted the store clerk one evening. (*Id.* at pp. 286–287.) The trial court granted summary judgment for the security company, but the court of appeal reversed, explaining that "the harm that befell [the plaintiff] was precisely the kind of

harm that [the defendant] was there to prevent." (*Id.* at p. 291.) The court held it was "a reasonable inference that the presence of an armed guard in close proximity to [the clerk] would have prevented the assault," leaving it to the trier of fact to draw, or not draw, that inference. (*Id.* at p. 292.)

Here, just as the security company in *Mukthar* undertook to protect store employees from the specific harm of an assault, the remaining Defendants undertook to protect anesthesia providers like Pan from the specific harm of unchecked propofol diversion—a harm they knew was already occurring under their watch. The face of the complaint satisfies each element of the negligent undertaking test.

The first element, that the remaining Defendants undertook to render services to another, is sufficiently alleged. Plaintiffs aver Desert implemented a propofol control program and assigned Thunga the responsibility for administering and enforcing it. Yet the remaining Defendants failed to follow the policy. The precise scope of Defendants' undertaking is a factual question that cannot be resolved on demurrer.

The second element, that the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons, is likewise adequately alleged. Plaintiffs allege Defendants knew anesthesia providers commonly abused propofol, propofol discrepancies existed, and Pan himself was diverting the drug. Thus, Defendants should have recognized that monitoring propofol use and discrepancies was necessary to protect clinicians like Pan from the very harm that ultimately caused his death.

The third and fourth elements, that Defendants failed to exercise reasonable care in the performance of the undertaking, thereby causing physical harm to Pan, are sufficiently alleged.

As to the fifth element, Defendants argue their alleged carelessness did not increase the risk of harm to Pan and he did not rely on their undertaking to monitor propofol discrepancies. But the fifth element does not require a showing of increased risk or reliance where the undertaking was to perform a duty the defendant owed to a third person. (*Artiglio,* 18 Cal.4th at p. 614.) That is the case here. By agreeing to monitor and remediate propofol diversion, the remaining Defendants undertook to perform the very duty Desert owed Pan under the regulations discussed above.

Because Plaintiffs adequately alleged a duty of care, the trial court's order sustaining the demurrers to Plaintiffs' negligence claim must be reversed.

C.

Among other elements, a claim for IIED requires extreme and outrageous conduct by the defendant done with the intent to cause, or in reckless disregard of the probability of causing, emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) Although an IIED claim typically requires egregious conduct *directed at* the plaintiff, an exception applies where the defendant, aware of the plaintiff's presence, acts with reckless disregard of the likelihood that the conduct will cause the plaintiff severe emotional distress. (*Id.* at pp. 1001–1002.)

Conduct is "outrageous" only when it exceeds "all bounds of that usually tolerated in a civilized community." (*Potter,* 6 Cal.4th at p. 1001 [cleaned up].) To survive demurrer, a plaintiff must allege with "'great[] specificity'" the acts claimed to be so extreme. (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.) Whether conduct is outrageous is ordinarily a question of fact, but a court may dispose of an IIED claim on demurrer where the alleged facts do not

amount to outrageous conduct as a matter of law. (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356.)

Plaintiffs allege Thunga staged the discovery of Pan's body several hours after his death, left them in the cafeteria without telling them Pan had died, staged the scene to suggest suicide, emptied Pan's locker to reinforce this impression, and gave the coroner information supporting a suicide finding. Plaintiffs allege (1) they were traumatized when the coroner determined Pan had committed suicide based upon the information Thunga supplied and (2) DHP ratified Thunga's conduct by failing to discipline him. Plaintiffs further allege Thunga staged the scene for his own benefit to cover up his "repeated failure to account for known [p]ropofol discrepancies."

These allegations do not state a claim for IIED under either the "directed at" or "reckless disregard" variation of IIED.

The "directed at" variation of IIED "requires conduct which is *especially calculated to cause* and does cause the claimant mental distress of a very serious nature." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1273.) In *Coon*, the plaintiff sought recovery for emotional distress suffered due to witnessing the assault of a dear friend. (*Id.* at p. 1272.) The appellate court rejected the claim because the assault was not directed at the plaintiff personally and therefore was not calculated to cause the plaintiff severe distress. (*Id.* at p. 1273; *Smith v. Pust* (1993) 19 Cal.App.4th 263, 266–268, 274 [no recovery for plaintiff after therapist had sexual relations with plaintiff's wife because therapist's actions were not directed at plaintiff].) The same is true here. Thunga's alleged conduct was not directed at Plaintiffs personally, and nothing in the complaint suggests he sought out Plaintiffs with the intent to cause them emotional distress. On the contrary, the allegations suggest Thunga acted to protect himself.

Nor does the complaint show conduct falling under the "reckless disregard" exception, which requires the plaintiff be present and witness the outrageous conduct. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 906.) Plaintiffs did not witness any of the conduct they allege was outrageous. Being left waiting in the cafeteria for news about Pan does not itself exceed the bounds of decency tolerated in a civilized community and is insufficient as a matter of law to state an IIED claim. (*Potter,* 6 Cal.4th at p. 1001; *Barker,* 240 Cal.App.4th at p. 356.) Because the complaint fails to allege Thunga directed his conduct at Plaintiffs or acted recklessly in their presence, we do not address the remaining elements of this claim.

Plaintiffs contend the trial court erred by dismissing this claim with prejudice rather than granting leave to amend. But a court abuses its discretion by sustaining a demurrer without leave to amend only where "there is a reasonable possibility that the defect can be cured by amendment." (*City of Dinuba,* 41 Cal.4th at p. 865.) The plaintiff bears the burden of showing how amendment would cure the defect and may do so on appeal. (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) Leave to amend is generally appropriate where the plaintiff demonstrates both the proposed amendment and how the amendment changes the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) No abuse of discretion appears here. Plaintiffs have had two opportunities to develop the factual basis for this claim and have not identified any proposed amendment that would change its legal effect.

Finally, Plaintiffs also pleaded a cause of action for NIED but withdrew it in the trial court. Should we conclude their IIED claim is insufficiently pled, Plaintiffs ask for the opportunity to reintroduce the NIED claim. Because the NIED claim is not before us, we express no opinion on that

request. If Plaintiffs seek leave to amend on remand, the trial court should decide in the first instance how to resolve the issue.

III.

We reverse the judgment of dismissal in favor of Defendants. We remand with instructions to overrule the demurrers on the first cause of action for negligence. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

CASTILLO, J.

WE CONCUR:

BUCHANAN, Acting P. J.

KELETY, J.