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FILED
Superior Court of California
County of Los Angeles

AUG 06 2014

Sherri R. Carter, Executive Officer/Clerk
By M. Soto, Deputy
Moses Soto

8 Attorneys for Defendants,
9 ELAINE JONES, M.D., TORRANCE HEALTH ASSOCIATION, INC.,
10 TORRANCE MEMORIAL PHYSICIAN NETWORK

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

13 MATTHEW MOORE,
14 Plaintiff,

15 v.

16 ELAINE JONES, M.D., TORRANCE
17 HEALTH ASSOCIATION, INC.,
18 TORRANCE MEMORIAL PHYSICIAN
19 NETWORK, et al.,
20 Defendants.

Case No. BC550882
Assigned to the Hon. Steven J. Kleinfeld
Department: 53

**DEFENDANTS ELAINE JONES, M.D.,
TORRANCE HEALTH ASSOCIATION,
INC. AND TORRANCE MEMORIAL
PHYSICIAN NETWORK'S NOTICE OF
MOTION AND MOTION TO STRIKE
PORTIONS OF PLAINTIFF'S
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

[Filed concurrently with Demurrer and
[Proposed] Order]

Date: January 13, 2015
Time: 8:30 a.m.
Dept: 53

Action Filed: July 7, 2014
Trial Date: None

MOORE McLENNAN, LLP

08/07/2014

21 TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD
22 PLEASE TAKE NOTICE that on January 13, 2015, at 8:30 a.m., or as soon thereafter
23 as the matter may be heard, in Department 53 of the above-entitled court, located at
24 North Hill Street, Los Angeles, California, the Motion to Strike Portions of Plaintiff,
25 MATTHEW MOORE's Complaint by Defendants, ELAINE JONES, M.D., TORRANCE
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CIT/CASE: BC550882
LEA/DEF#:
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1 HEALTH ASSOCIATION, INC. and TORRANCE MEMORIAL PHYSICIAN
2 NETWORK, will be heard.

3 This Motion to Strike is based upon this written notice, Plaintiff's Complaint, the
4 attached Memorandum of Points and Authorities, the concurrently filed Demurrer to
5 Plaintiff's Complaint, the pleadings and other records on file herein, and on such other and
6 further argument as may be presented at the time of the hearing.

7
8 DATED: August 6, 2014

MOORE McLENNAN, LLP

9
10
11 BY: 

LAURA C. McLENNAN

DREW N. EVANS

Attorneys for Defendants,

ELAINE JONES, M.D., TORRANCE HEALTH
ASSOCIATION, INC. and TORRANCE
MEMORIAL PHYSICIAN NETWORK

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MOTION TO STRIKE

Defendants, ELAINE JONES, M.D., TORRANCE HEALTH ASSOCIATION, INC. and TORRANCE MEMORIAL PHYSICIAN NETWORK move to strike portions of the Plaintiff's Complaint on the following grounds:

1. Page 5, lines 16-17 of Plaintiff's Complaint starting with: "As a result thereof...", as it seeks punitive damages in violation of Code of Civil Procedure §425.13.

2. Page 6, lines 18-19 of Plaintiff's Complaint, as it seeks punitive damages in violation of Code of Civil Procedure §425.13.

3. The prayer punitive damages on page 6, line 27 of Plaintiff's Complaint, as it is in violation of Code of Civil Procedure §425.13.

4. All references to the terms and derivatives of "defamatory," "publish," "publication," "deceit," "malicious," "oppressive," "purposefully," "intent," "reckless" and "knowing" on the grounds that Plaintiff has failed to properly plead claims for Intentional Infliction of Emotional Distress and Libel, and these allegations are without basis or factual support and are uncertain.

WHEREFORE, Defendants pray:

1. That this motion to strike be granted;
2. The accompanying demurrer be sustained without leave to amend; and
3. For such other and further relief as to this court may seem just and proper.

DATED: August 6, 2014

MOORE McLENNAN, LLP

BY: 

LAURA C. McLENNAN
DREW N. EVANS
Attorneys for Defendants,
ELAINE JONES, M.D., TORRANCE HEALTH ASSOCIATION, INC. and TORRANCE MEMORIAL PHYSICIAN NETWORK

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Matthew Moore ("Plaintiff") filed his Complaint on July 7, 2014 against Elaine Jones, M.D. ("Dr. Jones"), Torrance Health Association, Inc. ("THAI") and Torrance Memorial Physician Network ("TMPN")(collectively "Defendants"). The Complaint alleges two causes of action for Intentional Infliction of Emotional Distress ("IIED") and Libel, respectively. However, the Complaint is extremely vague and ambiguous, consists of uncertain allegations, relies heavily on unsubstantiated legal conclusions, and thus does not sufficiently state a cause of action. Furthermore, it seeks punitive damages in violation of Code of Civil Procedure §425.13. As such, Defendants request that the identified portions of Plaintiff's Complaint be stricken.

II. PLAINTIFF MAY NOT CLAIM PUNITIVE DAMAGES AGAINST A HEALTHCARE PROVIDER WITHOUT LEAVE OF COURT

A. This Case is Governed by Code of Civil Procedure §425.13

In this case, Defendants are all undeniably health care providers as defined in Code of Civil Procedure §425.13(b). And despite the creative pleading by Plaintiff, this action constitutes professional negligence at most, and not any intentional tort. While acting in her capacity as Plaintiff's treating physician, Dr. Jones recorded in his medical chart that he was homosexual, the basis for Plaintiff's claim. As this matter arises directly from the provision of professional services by Defendants, Code of Civil Procedure §425.13 is applicable.

The California Supreme Court has held that the central focus in determining whether Code of Civil Procedure §425.13 applied is whether the causes of action, including any intentional torts, "arise out of" medical negligence. In Central Pathology Service Medical Clinic v. Superior Court (1992) 3 Cal.4th 181, the court held that:

Whenever an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a healthcare provider acting in his capacity as such, then the action is one "arising out of the professional negligence of a healthcare provider," and the party must comply with section 425.13(a). Id. at 191-192.

1 In Central Pathology, defendant doctor conducted a pap smear on Constance Hall and
2 sent the smear to Central Pathology for processing and analysis. Central Pathology indicated
3 that the smear was negative for cancer, but Hall was later diagnosed with cancer. Hall sued
4 the doctor and Central Pathology for fraud, intentional infliction of emotional distress,
5 negligence, and loss of consortium. Central Pathology petitioned for a writ of mandate to
6 disallow Plaintiffs pleading punitive damages against healthcare providers, as it was
7 prohibited by Code of Civil Procedure §425.13. The Supreme Court remanded the case to
8 the Court of Appeals with directions to issue a peremptory writ of mandate.

9 The court then held that the plaintiff's cause of action for fraud was directly related to
10 the manner in which the defendants provided professional services: "The claim emanates
11 from the manner in which defendants performed and communicated the results of medical
12 tests, a matter that is an ordinary and usual part of medical professional services. It is
13 therefore governed by section 425.13(a)." Id. at 192-193.

14 Just like in Central Pathology, the causes of action for IIED and Libel in this case
15 emanate from the manner in which Defendants provided medical services, namely the
16 creation and maintenance of information in Plaintiff's medical records. This is clearly a
17 function that is "an ordinary and usual part of medical professional services."

18 The Court of Appeal in Davis v. Superior Court (1994) 27 Cal.App.4th 623
19 interpreted Central Pathology and held:

20 The focus is on the physician's (or healthcare provider's)
21 conduct. Our inquiry begins with whether the doctor accused of
22 the improper behavior was engaged in the practice of medicine at
23 the time he or she was consulted by the patient. . . . The conduct
24 of which Davis is accused, if true, is unethical, illegal and
25 immoral. It is, however, no more outrageous than the conduct of
26 the Central Pathology defendant physician. Real party was,
27 therefore, required to comply with the requirements of section
28 425.13(a). Id. at 629.

29 The Davis Court further explained:

30 What Central Pathology and this case have in common is that
31 each of the physicians was charged with unprofessional,
32 unethical and possibly illegal conduct. The real party appears to
33 suggest that we distinguish this case by focusing on the
34 motivation underlying the physician's conduct. . . . such an
35 approach is unworkable. Id. at 628.

1 Similarly, in Cooper v. Superior Court (1997) 56 Cal.App.4th 744, plaintiff alleged
2 sexual battery and false imprisonment by a gynecologist during an exam. The Court of
3 Appeal held that Code of Civil Procedure §425.13 applied to the various causes of action
4 pleaded, including sexual assault and IIED, and stated that “[t]he applicability of section
5 425.13 does not depend upon technical pleading distinctions between intentional versus
6 negligent tort theories. Identifying a cause of action as ‘intentional tort’ as opposed to
7 ‘negligence’ does not itself remove the claim from the requirements of section 425.13.” See
8 Id. and Johnson v. Superior Court (2002) 101 Cal.App.4th 869.

9 Therefore, as the case law makes clear, the “name” of the cause of action is irrelevant.
10 The dispositive factor is whether the claimed injuries arose out of the acts of a healthcare
11 provider in providing medical services. As explained more fully in moving defendant’s
12 concurrently filed Demurrer, Plaintiff has alleged nothing more. This case deals with a
13 treating physician’s recording information in Plaintiff’s medical records to which Plaintiff
14 objected. Plaintiff does not allege sufficient facts to support his causes of action for IIED
15 and Libel, let alone conduct that could conceivably result in punitive damages.

16 As all of the above-cited cases make clear, the question as to when conduct “arises out
17 of” medical care only concerns whether the actions were related to the professional services
18 provided. In this case, Defendants are each health care providers under Code of Civil
19 Procedure §425.13(b). As such, the protections of Section 425.13(a) apply to Defendants in
20 the instant Complaint.

21 **B. A Court Order is Required Before Plaintiff Can Seek Punitive Damages**

22 Code of Civil Procedure §425.13, provides, in pertinent part:

23 In any action for damages arising out of the professional
24 negligence of a healthcare provider, no claim for punitive
25 damages shall be included in a complaint or other pleading
26 unless the court enters an order allowing an amended pleading
27 that includes a claim for punitive damages to be filed.

28 Code of Civil Procedure §425.13 also provides that a plaintiff must establish by
motion a “substantial probability” that he or she will prevail in a claim for punitive damages
pursuant to Civil Code §3294.

1 As evident from the Complaint, and as more fully discussed in the concurrently filed
 2 Demurrer, Plaintiff has not alleged any facts that support a finding of malice or oppression as
 3 required by Civil Code §3294 in order to obtain punitive damages. Plaintiff has merely
 4 asserted unsubstantiated legal conclusions, which are insufficient.

5 Moreover, Plaintiff has not filed a motion in accordance with Code of Civil Procedure
 6 §425.13 to seek leave to add punitive damages. Thus, Plaintiff has improperly included a
 7 prayer for punitive damages in his Complaint, in violation of Code of Civil Procedure
 8 §425.13, which must be stricken.

9
 10 **III. IRRELEVANT AND IMPROPER MATTER SHOULD BE STRICKEN FROM**
 11 **THE COMPLAINT.**

12 Code of Civil Procedure §435(b)(1) provides in part that: "any party, within the time
 13 allowed to respond to a pleading may serve and file a notice of motion to strike the whole or
 14 any part thereof, . . ." Further, Code of Civil Procedure §436 provides that:

15 The court may, upon a motion made pursuant to section 435, or
 16 at any time in its discretion, and upon terms it deems proper:

17 (a) Strike out any irrelevant, false, or improper matter inserted in
 any pleading.

18 (b) Strike out all or any part of any pleading not drawn or filed
 19 in conformity with the laws of this state, a court rule, or an order
 of the court.

20 In Ricard v. Grobstein, Goldman, Stevenson, Siegel, Lebine and Mangel, 6
 21 Cal.App.4th 157, 162 (1992) the court noted that "a trial court has authority to strike sham
 22 pleadings, or those not filed in conformity with its prior ruling. (See Code of Civil Procedure
 23 §436;)"

24 Plaintiff is pleading intentional torts when the pled facts simply do not support causes
 25 of action for IIED and Libel. Since Plaintiff has failed to sufficiently plead the
 26 aforementioned causes of action as noted above and in the concurrently filed Demurrer,
 27 Defendants also request that the trigger words associated with those claims and damages
 28 requests are stricken. Therefore, references to the terms and derivatives of "defamatory,"

1 "publish," "publication," "deceit," "malicious," "oppressive," "purposefully," "intent,"
2 "reckless" and "knowing" should be stricken from Plaintiff's Complaint.

3 Additionally, Plaintiff has improperly included a prayer for punitive damages in
4 violation of Code of Civil Procedure §425.13, as detailed above. Accordingly, Plaintiff's
5 prayer for punitive damages as well as the references to punitive damages in paragraphs 13
6 and 15 of Plaintiff's Complaint should be stricken.

7
8 **IV. CONCLUSION**

9 Based on the foregoing reasons and authorities cited, Defendants respectfully request
10 that their Motion to Strike portions of Plaintiff's Complaint be granted in its entirety.

11
12 DATED: August 6, 2014

MOORE McLENNAN, LLP

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14
15 BY: 

LAURA C. McLENNAN

DREW N. EVANS

Attorneys for Defendants,

ELAINE JONES, M.D., TORRANCE HEALTH
ASSOCIATION, INC. and TORRANCE
MEMORIAL PHYSICIAN NETWORK

MOORE McLENNAN, LLP

08/07/2014

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 701 North Brand Boulevard, Suite 200, Glendale, California 91203-4232.

On AUGUST 6, 2014, I served the foregoing document(s) described as **DEFENDANTS ELAINE JONES, M.D., TORRANCE HEALTH ASSOCIATION, INC. AND TORRANCE MEMORIAL PHYSICIAN NETWORK'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;

(BY MAIL) By placing a true copy thereof enclosed in a sealed envelope addressed as above, with postage thereon fully prepaid in the United States mail, at Glendale, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal service on the same day with postage thereon fully prepaid at Glendale, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. C.C.P. 1013a(3).

(BY ELECTRONIC MAIL (E-MAIL)) from my electronic notification address to the electronic notification of the addressee as indicated on service list.

(BY OVERNIGHT COURIER) I placed the above-referenced document(s) in an envelope for collection and delivery on this date in accordance with standard FedEx overnight delivery procedures.

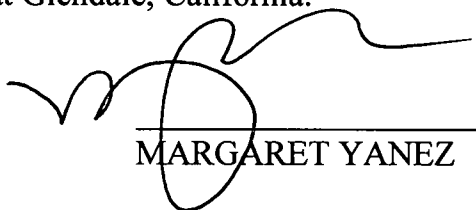
(BY FAX) I transmitted a copy of the foregoing document(s) this date via facsimile to the fax numbers shown herein. The facsimile machine I used was in compliance with CRC Rule 2.306 and the transmission was reported as complete and without error. A copy of the transmission report was properly issued by the transmitting facsimile machine.

(BY PERSONAL SERVICE) I delivered such envelope(s) by hand to the offices of the addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made

Executed on AUGUST 6, 2014, at Glendale, California.


MARGARET YANEZ

Our File No.: 35061

MOORE MCLENNAN, LLP

08/07/2014

SERVICE LIST

MOORE v. JONES – BC 550 882

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08/07/2014