Case No. C079880
Nevada County Superior Court Case No. CU12-078288

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

Kathleen Leonard,
Appellant

v.

Retailer's Credit Association of Grass Valley, Inc.,
Respondent.

Appeal from the Superior Court for Placer County
The Honorable Linda J. Sloven, Judge

APPELLANTS' REPLY BRIEF

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I. Reply Argument On The Anti-SLAPP Motion

A. The Time to File a 425 Motion Is 60 Days from the Operative Facts Appearing in a Pleading

Respondent Retailer's Credit Association of Grass Valley, Inc.("RCA") does not deny that the "operative facts", i.e., the basis for RCA's assertion of its "right to petition or free speech", first arose in the original cross complaint filed by Appellant Kathleen Leonard ("Leonard") on February 22, 2012.

RCA admits that it did not file any CCP §425.16 ("425 Motion") concerning the operative facts in Leonard's cross complaint until 20 months later in June 2014. RCA has offered no explanation for why it did not file a 425 Motion by April 22, 2012 (60 days after cross complaint) or even before the court trial in June 2012. Nor does RCA explain why it never raised its "right to petition or free speech" as a defense during the 18 months that the first appeal was pending. RCA has never even claimed that Leonard's purported violation of RCA's constitutional "right to petition or free speech" harmed RCA in any manner.

RCA apparently chose not to file a *timely* 425 Motion hoping that it would prevail at the June 2012 court trial. RCA gambled again when it did not raise any "right to petition or free speech" issue during the first appeal. When these facts are coupled with RCA's filing of a 425 motion in June 2014, it becomes clear that RCA is using CCP §425.16 purely as a litigation tactic and not for protection of its "right to petition or free speech".

RCA's untimely 425 Motion has been extraordinarily prejudicial to Leonard. Even if Leonard is successful in this appeal, she has been forced into a protracted and costly appeal that has delayed moving forward on the merits of her claims for over two years.

B. Leonard's Verified First Amended Cross Complaint Provided Sufficient Evidence That She Would Prevail on the Merits

RCA asserts in its brief at p. 37-38 that, assuming Leonard got past the first prong of the analysis under CCP §425.16, she could not get past the second prong of the analysis because Leonard supposedly failed to introduce any admissible evidence in support of her causes of action, and thus, could not show that she would prevail on the merits.[1]

The truth is just the opposite. Leonard filed a verified cross complaint which has been repeatedly held to constitute an affidavit and to be admissible evidence. When uncontested by other evidence, a verified complaint will provide the factual basis for motions concerning such maters as venue, *Hollopeter v. Rogers* (1962) 199 Cal. App. 2d 814, 817, a preliminary injunction, *Coppinger v. Superior Court* (1982) 134 Cal. App. 3d 883, 887 (overruled on other grounds), or for the appointment of a receiver, *Nichols v. Nichols* (1933) 135 Cal. App. 488, 492. Here, Leonard's verified cross complaint provides sufficient evidence to support her allegations for the second prong analysis.

Consequently, it was RCA that had the burden to introduce admissible evidence with its 425 Motion that overcame Leonard's verified factual allegations. However, RCA failed to put any new evidence into the record. Accordingly, if this Court reaches the second prong of the test, it must find that RCA had the burden of proof, but did not submit anything that

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[1] RCA's 425 Motion argued that Leonard could not prevail on the merits under the second prong of the test for a 425 Motion because her causes of action are barred by CC §47(b). RCA did not argue in its original 425 Motion that there was insufficient evidence before the trial court on the substantive claims in the causes of action.

countered Leonard's evidence, and thus, Leonard would pass the second prong of a CCP §425.16 analysis.

C. RCA's Course of Wrongful Conduct Was Non-Communicative and Is Not Protected

Leonard's FACC alleged an extensive pattern of wrongful medical debt collection practices that had been ongoing for twelve years. The allegations are analyzed in Appellant's brief at pp. 26-29. Appellant then cited to *Action Apartment Association v. City of Santa Monica* (2007) 41 Cal. 4th 1232 ("*Action*") and *LiMandri v. Judkins* (1997) 52 Cal. App. 4th 326 ("*LiMandri*") for the rule that a wrongful course of conduct will *not* be protected by CC §47(b). Respondent RCA did not cite any *contra* authority to these decisions, thereby admitting the correctness of Appellant's argument.

As just discussed, the only evidence before the trial court about RCA's wrongful debt collection activities was Leonard's *verified complaint*. Taking Leonard's verified allegations as true for purposes of the 425 Motion, the trial court had to assume that Leonard had made a *prima facie* case.

RCA tried, but failed, to distinguish itself from the analysis in *Action* and *LiMandri* decisions by citing to *Olszewski v. Scripps Health* (2003) 30 Cal. 4th 798. However, the decision in *Olszewski* was based upon a factual finding that the *only* tortious allegation by the plaintiff was the filing of liens that *were authorized by law* and this, by itself, did not constitute a wrongful course of conduct. *Id.* at 831. In sharp contrast, Leonard's FACC alleges a variety of tortious actions over a twelve year period that were never based upon any lawful conduct and this does constitute a wrongful course of conduct that is not protected by CC §47(b).

RCA continued with its disingenuous ignoring of the factual allegations

in the FACC by arguing that the *LiMandri v. Judkins* (1997) 52 Cal. App. 4th 326 is not applicable because "Leonard has not alleged that RCA engaged in an overall course of conduct". Respondents Brief at p. 41. As just shown, Leonard has alleged that RCA engaged in a twelve year course of tortious misuse of private medical files and the use of these files to extort payment that was wrongful. Thus, *LiMandri* supports Leonard, not RCA.

Finally, RCA asserts that the decision in *G.R. v. Intelligator* (2010) 185 Cal. App. 4th 606 ("*G.R.*") is more applicable. However, *G.R.* is clearly distinguished because *it does not concern a course of conduct*; rather, it involves *a single instance of filing a credit report with the court* which is, by definition, not a wrongful course of conduct. Leonard has alleged a twelve year course of conduct by RCA with perhaps hundreds of wrongful filings, and in addition, Leonard has alleged other tortious conduct that went far beyond mere filings with the court. Furthermore, Leonard alleged that RCA did this as a course of conduct that ignored HIPAA and CMIA, both of which are very specific laws intended to prevent exactly the type of conduct that RCA engaged in.

D. RCA's Conduct Vitiates HIPAA and CMIA

Appellant agrees with RCA that HIPAA does not create a private right of action and stated this in her Opening Brief at 39-40. Further, as a consequence of the law of the case here (see Appellant's Opening Brief at 34n5), Leonard did not have a cause of action under CMIA.

However, the issue is not whether Leonard had a cause of action under HIPAA, but whether the assertion of the CC §47(b) privilege would vitiate HIPAA in California courts. See Appellant's Opening Brief at 34-37. If medical debt collectors like RCA can simply ignore HIPAA by asserting the

litigation privilege, then the entire scheme of federal regulation of protected health information is a nullity for all medical debt collection cases.

RCA failed to make any argument that justifies the assertion of the litigation privilege over HIPAA. The consequences of nullifying such a crucial federal regulatory scheme would be enormous and of serious detriment to the citizens of California. RCA, like any medical debt collector, has a minimal burden of obtaining authorization from the patient or a suitable protective order. RCA does not want to follow even this nominal rule. Just as Leonard has alleged happened in her case, if the litigation privilege can be used to shield against systematic violation of HIPAA, then medical debt collectors will simply extort payment by threatening to make medical records public.

Finally, RCA argues that the holding in *Olszewski v. Scripps Health* (2003) 30 Cal. 4th 798, 831-832, lends support for RCA. However, there is a critical factual and legal distinction between this case and *Olszewski*. Indeed, in *Olszewski* the Court of Appeal distinguished its holding from that in *LaMandri* (which held the privilege inapplicable) because in *LaMirandri* there was a broader course of tortious conduct where the filing of a lien was just one part of a course of tortious conduct, while in *Olszewski* there was just the lawful filing of liens without other tortious conduct. Indeed, the *Olszewski* decision distinguished *LaMandri*, by observing that the filing of a lien *as authorized by California law* is shielded by the privilege, but that the litigation privilege *cannot be used to protect wrongful conduct*. The conduct alleged by Leonard was *not authorized* by state law, and in fact, was in direct violation of HIPAA, and in Appellant's view, in violation of CMIA.[2]

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[2] See Appellant's Opening Brief at p. 34n5.

II. Reply Argument On The Motion For Attorney's Fees

A. Leonard Was The Prevailing Party

RCA argues that Leonard did not "prevail" on her original cross complaint. This is nonsense. Leonard's cross complaint sought, *inter alia*, injunctive relief against RCA for the attachment of her medical records to the complaint. The trial court ruled in favor of RCA on the complaint and denied Leonard any relief on her cross complaint. The Appellate division reversed the entire trial court decision and remanded for a new trial. It also granted the injunctive relief prayed for in Leonard's cross complaint and ordered her medical records sealed. Clearly, this was "prevailing" under the law.

B. Leonard Is Entitled To Fees Under CC §1717(b)(2)

RCA did not dismiss until after Leonard prevailed on her original cross complaint and had obtained substantial relief. Although it is correct that Leonard did not prevail on her FACC before RCA dismissed, she is not seeking any attorney's fees for the litigation under her FACC, just the attorney's fees for successful appeal under her original cross complaint.

RCA appears to have abandoned the argument that there was no mutuality under the medical services contract which RCA used to obtain an award of attorney's fees after the original trial. Leonard's original cross complaint clearly arose out of the breach of the medical services agreement by RCA, acting as the collection agent for SNMH, and under the mutuality rule for such contractual attorney's fees provisions, is entitled to an award.

Leonard's victory on the original cross complaint was a final ruling. RCA could have petitioned for review, but it did not even try, and thus, RCA must be deemed to have accepted the adverse decision of the Appellate

Division. RCA did not contest this argument in Leonard's Opening Brief.

C. Leonard Is Also Entitled To Attorney's Fees Under CCP §1021.5

RCA argues that Leonard did not bring a suit on behalf of the public, that it was just a private action on her behalf. That, however, is not only irrelevant, it goes against the very purpose of the statute. As observed by the Court of Appeal in *County of Colusa v. California Wildlife Conservation Board* (2006) 145 Cal. App. 4th 637, 647:

> The doctrine rests upon the recognition that *privately initiated lawsuits* are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. (Emphasis Added.)

RCA has not cited to, and Appellant is unaware of, any decision that says that a suit must be brought "on behalf of the general public" as RCA claims in its brief at p. 55. Indeed, it is the bringing of a private action to enforce an important public policy that is the critical test. That is exactly what Leonard did in this case. She stood up against a medical debt collector on behalf of SNMH (aka Dignity Health) to enforce the public policy behind HIPAA and CMIA that private health information must be protected from misuse and wrongful public disclosure. Leonard prevailed. RCA is now mocking her achievement because it fought against this important public policy and lost.

D. Leonard's Petition To The U.S. Supreme Court Affirms Her Accomplishment And Her Benefit to the Public

RCA next argues that Leonard's Petition for Certiorari shows that there was no public benefit. However, just the opposite is true.

First, RCA improperly and misleadingly discusses the petition out of context. The Appellate Division placed under seal *certain pages* of Leonard's medical records that it found to contain protected health information. Other pages that it found were in a "safe harbor" (a term borrowed by the Appellate Division) were allowed to stay in the public domain. Leonard petitioned with the Court of Appeal and the U.S. Supreme Court to place these other pages under seal because they also contained PHI, in particular, the patient's medical information number which is the key to accessing all of a patient's medical information.

The summary denial of a petition does not establish law of the case, and therefore, Leonard's petitions are simply of no effect on the merits. *Kowis v. Howard*, 3 Cal. 4th 888, 899 (1992) ("*Kowis*") where the California Supreme Court held: "a summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason. We disapprove of contrary dicta in any case." See also, *Varian Med. Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 200-201 (2005), affirming the rule of *Kowis*. Leonard was clearly the prevailing party on the first appeal and the fact that she petitioned to bring to the attention of the appellate courts the additional problem of the Appellate Division creating a "safe harbor" rule when none exists does not negate the public benefit she did generate.

True, the Appellate Division decision was not published, but it did enforce a very important public benefit by bringing HIPAA to the attention of

the Superior Court. It has further led to this appeal that will decide very important issues with a significant effect on the general public if the decision is published. Indeed, RCA has not cited to any case that says that the appeal must result in a published opinion in order for attorney's fees to be awarded under CCP §1021.5.

Finally, Leonard is quite sure that RCA, SNMH and Dignity have all been working very hard since the Appellate Division's decision to protect all patient PHI from wrongful disclosure in future debt collection cases throughout this state in accordance with HIPAA.

III. Conclusion

Appellant's Opening Brief accurately states the applicable law and correctly set forth the facts. Her arguments are compelling and demonstrate the errors in the trial court's ruling on Respondent's 425 Motion and on Appellant's motion for attorney's fees.

The issues before the Court are of great importance to all citizens of California. Leonard, without any outside assistance, has fought a courageous legal battle for four years as of the date of this brief. She has already made a difference that is positively affecting others accused of not paying a medical bill. The decision in this case will, hopefully, provide the guidance needed in every case in this state where a party wants to place another party's medical records into evidence.

Respectfully Submitted,

Dated: August 15, 2016

/s/ Patrick H. Dwyer
Patrick H. Dwyer,
Attorney for Appellant

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through III) is approximately 2,605, which is in accordance with the California Rules of Court.

/s/ Patrick H. Dwyer
Patrick H. Dwyer,
Attorney for Appellant

Date: August 15, 2016

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Appellant's Reply Brief in the matter of Leonard v. RCA, Case No. CU12-78288, appeal No C079880 was served via United States first class mail to:

1. The Superior Court for the County of Nevada
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I declare under penalty of perjury under the laws of California that the foregoing certification is true and correct.

_/s/ Patrick H. Dwyer____
Patrick H. Dwyer,

Date: August 15, 2016

Location: Penn Valley, CA 95946