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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TUAN ANH DO,

Plaintiff and Appellant, **A128467**

v. **(Alameda County Super. Ct. No. RG09469814**

PHUONG DUC DANG et al.,

Defendants and Respondents.

_____/

Tuan Anh Do (Do) appeals contending the trial court erred when it sustained demurrers to his complaint alleging medical malpractice. We will dismiss parts of the appeal because they are taken from nonappealable orders and affirm the remainder.

I. FACTUAL AND PROCEDURAL BACKGROUND

In late 2007 and early 2008, Do was experiencing pelvic pain. He went to his primary care physician, Dr. Phuong Duc Dang (Dr. P. Dang) who referred Do to a urologist. The urologist diagnosed Do with hernias and recommended corrective surgery. Dr. P. Dang then referred Do to a surgeon, Dr. Chuck Van Dang (Dr. C. Dang) who scheduled the surgery.

The surgery took place on August 29, 2008 at San Leandro Hospital (Hospital). About an hour before the surgery, a nurse gave Do a one-page preprinted information sheet that briefly described hernias and hernia operations. Do signed the information

sheet and attested that he had "received this information and my questions have been answered." Then shortly before the surgery itself, Do was provided an informed consent form that he signed.

After the surgery, Do experienced pain and was left with scars that were "not as *minimal* as [his surgeon] had [led him] to expect." (Original italics.) Accordingly, in August 2009, Do filed a complaint seeking damages for the injuries he sustained.

The complaint at issue here is a second amended complaint. It alleges five causes of action: (1) against Dr. P. Dang, his primary physician, for fraud, (2) against Dr. C. Dang, his surgeon, for fraud, oppression and malice, (3) against Dr. C. Dang for "false surgery," (4) against the Hospital for "deceitful paperwork," and (5) against all three defendants for battery.

All three defendants demurred to the complaint. The trial court sustained the demurrers to the causes of action alleged against Dr. P. Dang and Dr. C. Dang, but granted Do leave to amend to allege a cause of action for professional negligence against both of them. Subsequently, Do in fact filed a third amended complaint alleging professional negligence against Dr. P. Dang and Dr. C. Dang. The trial court sustained the Hospital's demurrer without leave to amend reasoning the Hospital was entitled to prevail on the causes of action that had been alleged as a matter of law.

Do then filed the present appeal challenging all three of the court's demurrer rulings.

II. DISCUSSION

A. Appealability

Dr. P. Dang and Dr. C. Dang both argue that to the extent Do challenges the orders sustaining their demurrers *with* leave to amend, the appeal must be dismissed. They are correct.

As a general rule, an appeal may only be taken from a final judgment (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697), and an order sustaining a demurrer with leave to amend is not a final judgment that may be appealed. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457.) Plainly, the appeal

as to Dr. P. Dang and Dr. C. Dang must be dismissed because it has been taken from nonappealable orders.

B. Hospital's Appeal

Do contends the trial court erred when it sustained the Hospital's demurrer without leave to amend.

The standard of review we apply is settled. A demurrer "tests the legal sufficiency of the complaint . . . ." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) On appeal from a dismissal following such an order, we assume the truth of all facts properly pleaded in the complaint, as well as those that may be implied or inferred from the express allegations. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) "We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law. [Citation.]" (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) When analyzing such a ruling, we look "only to the face of the pleadings and to matters judicially noticeable and not to the evidence or other extrinsic matter." (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 239, fn. 2, italics omitted.) We are "not bound by the trial court's construction of the complaint . . . ." (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958.) Rather, we independently evaluate the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We must determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) However, while our review is de novo, it is limited to those issues that are adequately raised and supported in Do's brief. (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 630.)

With this background we turn to the arguments that have been advanced.

The trial court sustained the Hospital's demurrer to Do's fourth cause of action alleging "deceitful paperwork." Do now contends the trial court erred, but the only legal authority he cites is Code of Civil Procedure section 128.7, subdivision (b)(4), a statute

that is not relevant to the issue he has presented.[1] An appellant has the burden of demonstrating error by citing appropriate and pertinent legal authority. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) If he fails to do so, an appellate court may treat the issue as forfeited. *(Ibid.*) Do has failed to satisfy his burden in this case.

Turning to the fifth cause of action alleging battery, we conclude the trial court ruled correctly. Do seems to argue that the Hospital is liable for a battery because the information sheet he was provided prior to surgery (a document Do characterizes as the "Ten Deceits"), failed to disclose the risks of surgery adequately and therefore vitiated the consent form he signed. However, this argument conflates battery and lack of informed consent. A cause of action based on lack of informed consent sounds in negligence and arises when a doctor performs a procedure without first adequately disclosing the risks and alternatives. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324.) By contrast, battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent. (*Ibid.*) Here, Do signed a consent form and thus his cause of action, if any, normally would be characterized as a lack of informed consent, not a battery. But this theory of liability would not aid Do in any event. Do has not cited, and we are not aware of any authority that would impose liability on a *hospital* for a *doctor's* failure to obtain adequate informed consent. (See 1 McDonald, California Medical Malpractice Law and Practice (2003) § 2:11, p. 150, fn. 2 ["Neither a BAJI instruction nor any written decision exists to impose a duty on a hospital or other health

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[1] As is relevant, Code of Civil Procedure section 128.7, subdivision (b) states: "By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading . . . an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

"[¶] . . . .

"(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

care institution to receive a patient's informed consent, except in rather unique circumstances."])

Do contends he can state a valid cause of action for battery under the reasoning of *Rains v. Superior Court* (1984) 150 Cal.App.3d 933, and a CACI instruction that is patterned on that case.[2] However, *Rains* holds that a *doctor* can be liable for medical battery if the doctor obtained the patient's consent through intentional misrepresentation. (*Id.* at pp. 938-941.) The case is not applicable here where we are asked to determine whether Do can validly impose liability on a Hospital not a doctor.[3]

In sum, we conclude the trial court correctly sustained the Hospital's demurrer.

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.

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[2] As is relevant here, CACI No. 1303 states:

"[Plaintiff] claims that [his] consent [was obtained by fraud/mistake/duress] . . . .

"If [plaintiff] proves that [his] consent was [obtained by fraud], then you must find that [he] did not consent."

[3] Because the issue is not before us, we state no opinion on the issue of whether Dr. P. Dang or Dr. C. Dang might have some legal liability under the reasoning of *Rains.*