

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

MELODY WHITTEMORE et al.,

Plaintiffs and Appellants,

v.

OWENS HEALTHCARE - RETAIL PHARMACY,
INC. etc. et al.,

Defendants and Respondents.

C060873

(Super. Ct. No.
163129)

APPEAL from a judgment of the Superior Court of Shasta County, Bradley L. Boeckman, Judge. Affirmed.

Marc C. Barulich for Plaintiffs and Appellants.

Maire & Beasley, Wayne H. Maire and Aaron W. Moore; Kenny, Snowden & Norine, Jonz c. Norine; Lauria, Tokunaga, Gates & Linn, Raymond R. Gates and Brian A. Rosenthal, for Defendants and Respondents.

* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of Part II of the Discussion.

This action involves the Drug Dealer Liability Act (the Act). (Health & Saf. Code, §§ 11700 et seq.)¹ It authorizes a user of an illegal controlled substance (and specified others) to recover damages resulting from its use from those who knowingly market the substance. It extends to substances for which a prescription is required. (§§ 11703, subd. 1, 11352.) The question tendered is whether a pharmacy is liable under the Act for the conduct of an employee who furnished stolen prescription drugs to the plaintiff.

For more than a year, plaintiff Melody Whittemore bought black market prescription pain medications, including OxyContin, from defendant Steven Correa, an employee of defendants, and she became addicted. The pain medications were Schedule II controlled substances that may be dispensed legally only by prescription. (Health & Saf. Code, §§ 11055, 11352.)

Thereafter, Melody² and her husband Kenneth L. Whittemore sued Correa and his employers, defendants Owens Healthcare-Retail Pharmacy and Omnicare, Inc. (the pharmacies), from whom they allege Correa obtained the illegal controlled substances, on the ground that the pharmacies failed a legal duty to plaintiffs to discover and report that the substances had been stolen from them.

¹ A reference to an undesignated section is to the Health and Safety Code unless otherwise apparent from the context.

² When referring to plaintiffs individually, we shall use their respective first names; no disrespect is intended.

The trial court sustained the pharmacies' demurrer without leave to amend, ruling that the doctrine of unclean hands barred plaintiffs from maintaining causes of action "[b]ased on plaintiff's own illegal conduct in buying and taking medications for which she had no prescription and which she was aware were stolen"

Plaintiffs appeal from the ensuing judgment of dismissal. They assert that they should be permitted leave to amend their complaint to allege that the Act creates a statutory exception to the doctrine of unclean hands.

We agree that the doctrine of unclean hands does not preclude recovery in circumstances covered by the Act because the very purpose of the Act is to permit recovery of damages in specified circumstances by the user and others damaged by the use of the drugs. (§§ 11706, 11705.) However, the Act extends liability only to a person "who knowingly participates in the marketing of illegal controlled substances within this state" (§ 11704.)

We shall affirm the judgment for the reason that the pharmacies did not knowingly market the controlled substances to Melody.

FACTS

In reviewing a judgment of dismissal entered after the sustaining of a demurrer, we accept as true the factual allegations of the complaint. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 238.) The operative (first amended) complaint alleges the following.

Melody was treated by a doctor in or about September 2005 for a severe infection. After she left her doctor's care, Melody "did not know how she was going to be able to obtain the necessary pain medication." She was approached by a woman who "informed her that the pain medication could be obtained for her for \$1.00 per pill"; Steven Correa soon began providing Melody with pain medication. Melody purchased various pain medications from Correa, including Norco, OxyContin and Hydrocodone, and she asserts that all of these medications "came from Defendant/OWENS and/or Defendant/OMNICARE[,]" by whom Correa was employed.³

Between September 2005 and March 2007, Melody paid Correa over \$330,000 in cash for pain pills. She became physically and emotionally addicted to them. Her husband discovered her distress, and she was hospitalized. Sometime thereafter, Melody cooperated with drug enforcement officers to expose and arrest Correa.

After plaintiffs learned that the pharmacy defendants are required by law to monitor medications in their possession and to report missing medication to the Drug Enforcement Agency, they brought this action against Correa and Owens Healthcare-Retail Pharmacy, Inc., Omnicare, Inc., seeking damages based on

³ Although the complaint implies (but does not specifically allege) that Correa stole the medications from defendants in order to sell them to Melody, plaintiffs' opposition to defendants' demurrer confirms it is plaintiffs' theory that "Correa, was allowed to steal controlled substances from [defendants] and sell them" and that was the understanding of the trial court in ruling on the demurrer.

various theories including negligence. They alleged the pharmacy defendants failed to properly monitor and account for controlled medications in their possession, and failed to report to the federal drug enforcement agency that certain medications had been lost, missing or stolen, and, in so doing, "were instrumental in providing [Melody] with assorted pain medication," and acted in "reckless disregard for Plaintiff's welfare."

Plaintiffs also alleged Kenneth Whittemore suffered severe emotional distress by virtue of his having seen the effects the drugs had on his wife, and sought damages on legal theories of unfair business practices, loss of consortium, intentional infliction of emotional distress, and battery because Melody's addiction rendered her unable to consent to ingesting the pain medication. Among the damages plaintiffs sought to recover were the sums Melody spent on the pain medications, medical expenses related to her addiction, and punitive damages.

The pharmacy defendants demurred,⁴ arguing (as relevant to this appeal) that Melody's admitted illegal purchase and use of federally-controlled medications without a prescription may not, as a matter of law, give rise to claims against them.⁵

⁴ Initially, only Owens Healthcare-Retail Pharmacy demurred; Omnicare, Inc. answered. Later, the court (with the parties' consent) deemed the demurrer to have been filed by both pharmacy defendants.

⁵ No response by Correa to the complaint appears in the record.

Defendants also argued they have no liability for Correa's conduct based on a theory of respondeat superior, because Correa was not acting within the scope and course of his employment when he stole pain medications from them and sold them to Melody.

Plaintiffs responded that the injury was caused by the defendants' failure to supervise Correa and to monitor the inventory of controlled medications; that defendants may properly be held responsible for their employees' crimes and tortuous conduct if it was (as here) foreseeable.

The court sustained the demurrer without leave to amend on the ground urged by defendants. "Based on plaintiff's own illegal conduct in buying and taking medications for which she had no prescription and which she was aware were stolen, her causes of action are barred." The court also ruled that Kenneth's claims for negligent infliction of emotional distress and loss of consortium, although arguably his alone, do not survive because they depend on Melody's claims.

DISCUSSION

I

Standards of Review

Our task in reviewing the sustaining of a demurrer is to determine whether the complaint states facts sufficient to constitute a cause of action. We assume the truth of the properly pleaded material facts and the reasonable inferences that may be drawn therefrom, and give the complaint a reasonable

interpretation, reading it as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

When the demurrer to the complaint has been sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion in sustaining the demurrer and we reverse the decision. On appeal "[t]he burden of proving a reasonable possibility exists that a complaint's defects can be cured by amendment rests 'squarely on the plaintiff.'" (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091, relying on *Blank v. Kirwan*, *supra*, 39 Cal.3d at pp. 318-319.)

The trial court sustained the demurrer on the ground the doctrine of unclean hands bars the plaintiff, and derivatively her husband, from recovering from the pharmacies. On appeal the plaintiffs seek to amend their complaint to bring the case within the provisions of the Act on the view it authorizes recovery on grounds otherwise barred by the doctrine of unclean hands. With that much we agree.

However, the plaintiff makes no claim that the complaint can be amended to show that the pharmacies "knowingly marketed" the prescription drugs to her. For that reason we shall affirm the judgment of dismissal.

II

The Court Did Not Err in Applying the Doctrine of Unclean Hands

Plaintiffs contend the trial court erred in ruling that Melody's "own illegal conduct in buying and taking medications

for which she had no prescription and which she was aware were stolen" bars the complaint. The trial court did not err.

The defense of unclean hands arises from the maxim ""He who comes into Equity must come with clean hands."" (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059.) The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy: he must come into court with "clean hands," and keep them clean, or he will be denied relief, regardless of the merits of his claim. The defense is available in legal as well as equitable actions, and whether it applies is generally a question of fact, although it can apply at the pleading stage when the plaintiff's own pleadings contain admissions that establish the basis of an unclean hands defense. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 681; *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978, and cases cited therein.)

"The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the court's, rather than the opposing party's, interests. [Citations.] The doctrine promotes justice by making a plaintiff answer for his own misconduct in the action. It prevents 'a wrongdoer from enjoying the fruits of his

transgression.' [Citations.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at pp. 978-979.)

The misconduct that renders a plaintiff's hands "unclean" need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine, but it must relate directly to the cause at issue. (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at pp. 978-979.) Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. (*Ibid.*)

With these principles in mind, we conclude the trial court did not err in determining that, absent an exception to the rule, the doctrine of unclean hands bars plaintiffs' claims for damages in this case.

The trial court here properly examined analogous case law from two other jurisdictions, one of which is directly relevant to this case. (see *Blain v. Doctor's Co., supra*, 222 Cal.App.3d at p. 1060.) The trial court applied theories analogous to our state's "unclean hands" doctrine to hold that a plaintiff who voluntarily purchases or ingests illegal drugs is precluded by his own conduct from maintaining a civil action for damages arising from his having done so.⁶ In *Kaminer v. Eckerd Corp.*

⁶ We need not consider here, as the court did in *Orzel v Scott Drug Co.* (1995) 449 Mich. 550 [537 N.W.2d 208], that the fact

(Fla.Dist.Ct.App. 2007) 966 So.2d 452, a college student died after ingesting OxyContin obtained from a fraternity brother, who got the drug from his roommate, a pharmacy technician who had stolen 126 pills from his employer. (*Id.* at p. 453.) The decedent's estate argued the defendant pharmacy was responsible because it "fail[ed] to follow federal regulations or its own procedures for safeguarding controlled substances"

(*Ibid.*) The pharmacy sought summary judgment, arguing that the deceased's own criminal conduct in ingesting the drug precluded his estate's recovery. (*Ibid.*) The Florida Court of Appeal agreed to presume the deceased's knowledge of the illicit nature of the drug, and held that his criminal conduct in ingesting it absolved the defendant pharmacy from liability. (*Id.* at pp. 454-455.) In so doing, the Court applied Florida's common law rule precluding wrongdoers from profiting or receiving compensation as a result of their illegal acts. (*Ibid.*, also citing *Orzel v Scott Drug Co.*, *supra*, 449 Mich. 550 [537 N.W.2d 208].)

The nature of Melody's misconduct here is analogous to the misconduct at issue in *Kaminer*. She knowingly engaged in the unlawful activity of purchasing and ingesting medication for which she had no legal prescription. Illegal acquisition, possession, and use of controlled substances carry heavy

that a pharmacist's improper dispensing of controlled substances to the plaintiff was "equally" blameworthy did not create an exception to the wrongful-conduct rule in an action for negligence. (*Id.* at pp. 564-565, 573-576 [at pp. 215, 219].)

criminal sanctions, and Melody's conduct is particularly egregious because she broke the law in this manner not once, but repeatedly, and over 18 months. (See *Kendall-Jackson Winery, Ltd. v. Superior Court*, *supra*, 76 Cal.App.4th at pp. 978-979.)

Melody's conduct relates directly to the transaction concerning which the complaint is made. (See *Kendall-Jackson Winery, Ltd. v. Superior Court*, *supra*, 76 Cal.App.4th at pp. 979, 984.) Melody's criminal purchase of illegal controlled substances from Steven Correa is the factual predicate upon which she claims that she and her husband suffered from her resulting addiction, lost the money she paid for the drugs, and had to pay for substance abuse treatment and related medical services after she became addicted.

Plaintiffs argue (without citation to authority) that the defendant pharmacies' alleged failure to report all losses or thefts of controlled substances should preclude operation of the doctrine of unclean hands because the rules regarding dispensing and accounting for prescription painkillers "were created to protect the very class of people of which [plaintiffs] belong."⁷ We are unconvinced that the Legislature by enacting statutes

⁷ Business and Professions Code section 4104, subdivision (a) provides: "Every pharmacy shall have in place procedures for taking action to protect the public when a licensed individual employed by or with the pharmacy is discovered or known to be chemically, mentally, or physically impaired to the extent it affects his or her ability to practice the profession or occupation authorized by his or her license, or is discovered or known to have engaged in the theft, diversion, or self-use of dangerous drugs."

regarding the dispensing of controlled medications intended to confer special protection on persons like Melody, who repeatedly and fraudulently engaged in the illicit use of drugs, and plaintiffs have not identified any contrary authority.

Plaintiffs' citation to case authority for the general proposition that a licensed pharmacist is responsible for the acts of his agents or employees done in the course of his business in the operation of the license does not aid them here. (E.g., *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 713; *Arenstein v. California State Board of Pharmacy* (1968) 265 Cal.App.2d 179, 192.) These cases contribute nothing to an examination of how (or whether) the doctrine of unclean hands should operate in a civil action brought by the person who ultimately obtains and uses drugs stolen from a pharmacy.

In sum, the doctrine of unclean hands was properly applied by the trial court to the claims of negligence and -- absent the application of an exception to its operation -- it creates a legal bar to plaintiffs' claims for damages against the pharmacy defendants.

III

The Drug Dealer Liability Act

Plaintiffs assert for the first time on appeal that, even if the doctrine of unclean hands would otherwise bar their complaint, they should be permitted to amend it to assert that an exception to that doctrine, applicable to the facts presented here, is provided by the Act. We disagree.

While the Act is inconsistent with the doctrine of unclean hands insofar as a case comes within its provisions, the Act does not apply unless the defendants "knowingly participate[d] in the marketing of illegal controlled substances within this state" and that rules out the plaintiffs' theories of recovery against the pharmacies. (§ 11704, subd. (a).)

The purpose of the Act is to enable persons injured as a consequence of the use of of an "illegal controlled substance" to recover damages from persons who participated in their marketing and to shift the cost of damages "to those who illegally profit from that market." (§§ 11701, 11702.)

The Act applies both to users and to specified others. It applies to "[s]pecified illegal controlled substance[s]" which include any substance which violates section 11352. (§ 11703, subd. 1.) The drugs at issue in this case, Norco, OxyContin, and Hydrocodone, are schedule II drugs under section 11055, subdivisions (b)(1)(J) and (N), the marketing of which is made illegal by section 11352 "unless upon the written prescription of a [licensed] physician"

A. The Individual User

"A person may recover damages under [the Act] for injury resulting from an individual's use of an illegal controlled substance." (§ 11704.)⁸ "A person entitled to bring an action . . . may seek damages only from a person who manufactured,

⁸ The division includes section 11706.

transported, imported into this state, sold, possessed with intent to sell, furnished, administered, or gave away the specified illegal controlled substance actually used by the individual user of an illegal controlled substance." (§ 11706, subd. (b).)

Although section 11706 does not contain a scienter requirement for liability, that is supplied by section 11704, subdivision (a). "A person who *knowingly* participates in the marketing of illegal controlled substances within this state is liable for civil damages provided in this division." (Italics added.)⁹

This would include Steven Correa, who sold the drugs to Melody without a prescription. It would not include the defendant pharmacies since they did not "knowingly" participate in the marketing of the drugs to Melody.

B. The Husband

Melody's husband also sued for his loss of consortium and the costs of her treatment. The Act, section 11705, includes the spouse as one of the persons, other than the user, who may recover damages, but only from the person who furnished the illegal controlled substance to the individual user (subd. (b)(1)) or from the person who "knowingly participated in the marketing" of the substance to the user (subd. (b)(2)). The

⁹ For this reason the Act does not impose liability for negligent conduct.

latter phrase applies only to a person who is convicted of a drug marketing offense. (§ 11705, subd. (c).)

The pharmacies neither furnished the illegal substances to Melody nor were they convicted of a criminal offense.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

BLEASE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.