Under Section 425.13 Can Be Harsh And Unforgiving

By Benjamin T. Ikuta | Apr. 26, 2022

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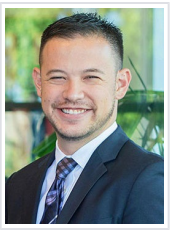
Failing to follow proper filing for punitive damages under Section 425.13 can be harsh and unforgiving

The result was a family who now cannot assert claims for punitive damages against a health care provider who engaged in horrific wrongful conduct and intentional misrepresentations, resulting in the death of a wife and mother.



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On Friday, April 22, 2022, the Court of Appeal, Fourth District, Division 1 issued its opinion in Divino Plastic Surgery v. Superior Court (Espinoza), Case No. D079661. The holding is a stark reminder to plaintiffs that they must follow the procedural hurdles and timing requirements of Code of Civil Procedure section 425.13 to plead punitive damages against health care providers. That is true regardless of how egregious or horrific the wrongdoing, or if the facts can support intentional torts outside the scope of MICRA.

Thirty-six-year-old Megan Espinoza was a wife and mother of two young minor children. She was a Kindergarten teacher for the Cajon Valley Union School District in the San Diego area. Following the birth of her second son a few years earlier, Megan decided she wanted breast augmentation surgery. She consulted with plastic surgeon Carlos Chacon, M.D., and his surgery center Divino Plastic Surgery.

Megan and her husband were told prior to the surgery that a licensed anesthesiologist would be present during the surgery to administer the anesthesia and monitor Megan. This was particularly important to Megan given that she had a known prior sensitivity to epinephrine and was taking prescriptions for sedatives used as sleeping aids. Indeed, a consent form prior to the surgery referenced that a licensed anesthesiologist was to administer the anesthesia.

There was no licensed anesthesiologist. Rather, a Registered Nurse administered the anesthesia even though she was not licensed to do so. Prior to the surgery on December 19, 2018, Megan was given oral Percocet (a narcotic) and Valium (a central nervous system depressant). During the course of the surgery, the RN administered high amounts of Fentanyl (a narcotic), Demerol (a narcotic), Midazolam (sedative), and Ketamine (sedative). Instead of relying on a written order, the RN selected these drugs on her own without oversight.

A different unlicensed medical assistant administered the local anesthesia without Dr. Chacon present and without knowing the differences in lidocaine concentrations or appropriate quantities to administer. During the procedure, numerous staff members took selfies with their cameras.

Sadly, but not surprisingly, Megan's oxygenation rate dropped to extremely hypoxemic levels and she went into full cardiopulmonary arrest. The staff started CPR and also started administering Epinephrine and Narcan. Approximately half an hour after the arrest, the patient regained her pulse

but continued to have problems breathing, requiring continuous bag and mask ventilation with her oxygenation continuously dropping into hypoxic levels. Megan remained comatose, with her body only responding to painful stimuli. Even though Megan needed to be intubated to effectively breathe, an intubation was not performed because there was no one who had performed one previously and felt comfortable doing it. There were other failures to follow basic resuscitation procedures under the Advanced Cardiovascular Life Support protocols.

What's worse, Dr. Chacon did not call 911. Rather, he called two anesthesiologist friends for advice. He did not disclose to either of them pertinent facts, including the patient's extremely precarious position and hypoxemic status. One anesthesiologist offered to come in and assist, but Dr. Chacon declined. The other told Dr. Chacon that he needed to immediately call 911 so that the paramedics could intubate Megan and provide her with adequate oxygenation. Dr. Chacon's response? "I'm working on it."

Dr. Chacon still did not call 911 even as the patient started to show seizure-like activity. Paramedics were finally called more than three hours after CPR. Dr. Chacon lied to the 911 dispatcher that Megan was conscious and omitted that CPR had been performed. During the criminal investigation of Dr. Chacon, the EMTs stated that they were in "disbelief" regarding the delay in calling 911.

Megan was taken to Scripps hospital, where she never woke up or regained the ability to breathe on her own. She died on January 28, 2019 from irreversible brain damage due to lack of oxygen.

On October 21, 2019, Megan's family sued Dr. Chacon, the RN, and the medical assistant for malpractice, fraud, and medical battery. While the complaint alleged that Dr. Chacon acted with malice and oppression with a conscious disregard of the safety of Megan, the complaint did not mention punitive damages.

Dr. Chacon was also criminally charged for involuntary manslaughter based on Megan's death. Yet, the medical board did not take any action until December of 2021, three years after the surgery. Following Megan's death, Dr. Chacon was permitted to perform surgery on numerous other patients without the requirement of even telling his patients that he had been criminally charged with Megan's death.

In the civil action, on February 19, 2021, the trial court at a case management conference set trial for January 28, 2022. At that CMC, the family's attorney did not voice any concern about the timelines under section 425.13.

Under Code of Civil Procedure section 425.13, special procedure requirements apply whenever a plaintiff seeks punitive damages "[i]n any action for damages arising out of the professional negligence of a health care provider." In short, a plaintiff cannot assert punitive damages against a health care provider until the plaintiff first files a motion showing that "that there is a substantial

probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code." Such a motion must be supported by admissible evidence and declarations.

The motion to seek punitive damages must be filed "within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier." Therefore, given that the Court first set trial for January 28, 2022, the statute dictated that Megan's family have their motion on file by April 28, 2021.

While section 425.13 has very similar language to the draconian MICRA statutes, section 425.13 was actually passed in 1987, twelve years after MICRA. The legislative intent behind Code of Civil Procedure section 425.13 was "to protect health care providers from frequently pleaded and frivolous punitive damage claims." (College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 723.)

On August 3, 2021, Megan's family filed their motion to seek punitive damages against Dr. Chacon, the RN, and the medical assistant. Over Defendants' timeliness objection, the trial court granted the motion on the basis that the intentional torts were based on conduct outside of mere professional negligence and were thus outside the scope of section 425.13.

The Court of Appeal reversed, finding that the motion was untimely as a matter of law, regardless of how egregious or wanton the conduct. As such, the family was barred from seeking punitive damages against Defendants. In doing so, given the disturbing facts underlying the case, the appellate recognized that "[t]he conduct of which Chacon is accused, if true, is unethical, illegal and immoral and would warrant imposition of punitive damages" had the motion been filed timely.

First, the Court of Appeal rejected the family's argument that Defendants were not acting as "health care providers" under section 425.13 given that they were not licensed to provide anesthesia or otherwise provide anesthesia services. Section 425.13 has an identical definition of "health care provider" as the MICRA statutes. Accordingly, the Court of Appeal cited the very recent decision of Lopez v. Ledesma (2022) 12 Cal.5th 848, where the California Supreme Court found that MICRA's $250,000 cap applied when the negligence of unsupervised Physician Assistants acting outside the scope of their allowable practice caused the death of a 4-year-old child. In short, "Chacon and Divino did not lose their status as health care providers entitled to the protections of section 425.13 merely because the Espinozas allege the manner in which Chacon and Divino's employees performed the acts that caused Megan's death fell outside the scope of the applicable licenses."

However, while the definition of "health care provider" is identical to the MICRA statutes, the scope of the wrongful conduct is not. The Court of Appeal held that section 425.13 is far broader and more far-reaching in relation to the conduct involved. All of the MICRA statutes state: "In any action for injury against a health care provider based on professional negligence…" By contrast, section 425.13 states: "In any action for damages arising out of the professional negligence of a health care provider…" the Court of Appeal held that "arising out of" is far broader than "based on" and would

cover wrongdoing even if such conduct would not fall under MICRA.

In short, the court explained that "cases on what constitutes a professional negligence claim under MICRA are not controlling, because section 425.13 is not part of MICRA, uses different language, and serves a different purpose." Accordingly, while fraud-based misconduct would not be subject to MICRA's provisions, it still would fall under the ambit of section 425.13. The family's claim for battery in performing a surgery without an anesthesiologist present and thus was a materially different procedure than what Megan consented to would also fall under section 425.13.

The Court of Appeal essentially held that any injury to a patient that arose out of the physician-patient relationship in any conceivable way would be subject to section 425.13. The result was a family who now cannot assert claims for punitive damages against a health care provider who engaged in horrific wrongful conduct and intentional misrepresentations, resulting in the death of a wife and mother. This is particularly harmful because often, a prayer for punitive damages is required to even convince a physician to provide consent for his insurance company to resolve a case. Due to settlement reporting requirements to the California Medical Board, any settlement of a medical malpractice action by an insurer requires the explicit consent of the physician. Ironically, for bad doctors who commit egregious misconduct, this provision lessens the likelihood of settlement before trial. These doctors, fearful that their wrongdoing will be reported to the medical board with a potential revocation of their license, will often refuse to settle and "roll the dice" at trial. Given the $250,000 MICRA cap on general damages, oftentimes the only way for a harmed patient to avoid trial and obtain insurance money against such physicians is to seek punitive damages that the physician would be personally liable for.

There are many lessons from this case. Section 425.13 is very harsh and unforgiving. There are many cases where the extent of the fraud or wrongful conduct (such as altering and destroying records) cannot be determined until substantial discovery. Ensure that the timelines set forth under section 425.13 are carefully calendared. Since the 9-month provision counts backwards, if the last day falls on a weekend or holiday, calendar backwards to the Friday before. (See Steele v. Bartlett (1941) 18 Cal.2d 573, 573.) It is often prudent to timely file the motion even if discovery is not complete, set out a hearing date as far as possible, and supplement the initial papers as needed.

If it is truly not possible to timely file the motion, make sure you create a strong record and carefully follow the guidance of Goodstein v. Superior Court (1996) 42 Cal.App.4th 1635, 1645. In CMC statements or at Initial Trial Setting Conferences, voice any concerns of the inability to timely file the client's motion in a timely fashion. Show diligence in pursuing discovery and show that facts supporting the motion could not have been discovered earlier. Ensure that the motion is filed as soon as reasonably practicable after discovering the facts that support the motion. Without a strong showing of near impossibility, a court cannot grant a late-filed section 425.13 motion. (See Freedman v. Superior Court (2008) 166 Cal.App.4th 198, 204.)

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