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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA
JAN 05 2005
GARY H. BLAIR, EXEC. OFFICER
By *Lana Campos*
LANA CAMPOS Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA**

ATZE AKKERMAN and ELIZABETH AKKERMAN)
Plaintiffs,) Case No.: 1069713
vs.) **STATEMENT OF DECISION ON
SUBMITTED ISSUES**
JOSEPH JOHNSON, SANTA BARBARA COTTAGE HOSPITAL, et. al.)
Defendants)

A twenty-five day jury trial in the above-entitled action concluded with a special verdict that contained findings that both defendant Joseph Johnson, M.D., and Santa Barbara Cottage Hospital had been negligent, respectively, in obtaining informed consent and performing the informed consent review of plaintiff, Atze Akkerman, before he underwent electro-convulsive therapy (ECT), but that neither defendant's negligence was a substantial factor in causing plaintiffs' harm. A court trial was then conducted on plaintiff's remaining claims for violations of California Business and Professions Code Sections 17200 and 17500. The matter was submitted and then re-submitted at the trial court's request following Judge de Bellefeuille's lengthy illness in the fall of 2004. The court now renders its decision as follows.

///

1 The Court finds in favor of plaintiffs on both remaining claims. An injunction shall issue
2 forthwith prohibiting the further conduct of ECT at Santa Barbara Cottage Hospital until the
3 defendant submits proof of correction in its protocol for the informed consent process and
4 informed consent review consistent with the Court's decision herein. Plaintiffs' request for
5 restitution is denied, for failure to show that plaintiffs suffered any out of pocket loss as a result
6 of defendant's wrongdoing, and failure to establish that any other ECT patient treated during the
7 same time period suffered an out of pocket loss. Damages are not available for such claims.
8 Plaintiffs shall recover their costs as prevailing parties.

9 10 FACTS

11 Beginning in 1999, plaintiff Atze Akkerman underwent a series of electro-convulsive
12 treatments for severe depression at Santa Barbara Cottage Hospital under the supervision of his
13 treating physician, Dr. Joseph Johnson. The evidence revealed that at the time of Mr.
14 Akkerman's treatment, both Dr. Johnson and Cottage Hospital were utilizing an out-dated and
15 incomplete informed consent form not authorized under the governing provisions of Welfare and
16 Institutions Code, sections 5326.2 through 5326.75. Though the California State Department of
17 Mental Health promulgated and disseminated a new informed consent form in 1998, and sent it
18 to the hospital, Darcy Keep, the hospital employee in charge of tracking such information,
19 testified that the hospital never received it. It was not perhaps until as late as May 2004, long
20 after Mr. Akkerman filed this suit, that the hospital began to use the 1998 form, and only as a
21 result of this suit. The hospital was not diligent in pursuing updated information from the
22 Department of Mental Health and, to this day, does not have in place any meaningful and
23 trustworthy procedure for doing so.

24 The form used by Dr. Johnson did not contain within it the facts (included in the 1998
25 model form that he should have used) that ECT could cause irreversible, permanent memory
26 loss, or that unilateral shocks cause less memory loss than the bilateral shocks plaintiff would
27 receive, or that there is a division of opinion as to the efficacy of ECT or how it works.
28

1 The Welfare and Institutions Code also requires that a patient contemplating ECT must
2 undergo an informed consent review process with a board certified or board eligible psychiatrist
3 or neurologist *before* receiving ECT. The uncontroverted evidence at trial revealed that the
4 hospital's designated doctor for this process was neither board eligible or certified during his
5 entire tenure at the hospital. Dr. Carlos Sluzki admitted in his testimony that he had conducted
6 hundreds of these informed consent reviews, signing a document *under penalty of perjury* on
7 each and every occasion that he was certified or eligible, *which is false*. Dr. Sluzki purported to
8 conduct the informed consent review for Mr. Akkerman prior to his first ECT treatment, but had
9 no independent recollection of the event.

10
11 Indeed, there was considerable confusion and uncertainty about how and when Mr.
12 Akkerman received the informed consent review from Dr. Sluzki prior to the administration of
13 the therapy. It may have happened when Mr. Akkerman was being wheeled into the operating
14 theatre. It may have happened *after* the treatment was administered. It may not have happened
15 at all. One thing alone is clear: the chaos and disorganization surrounding this procedure does not
16 meet the minimal standards contemplated by the Welfare and Institutions Code to protect the
17 rights of mental health patients who must decide whether to have ECT.

18 The hospital argues that it cannot be held responsible for its failure to provide the right
19 consent form, for the language of the statute speaks of the treating physician's duty to do so.
20 This argument is disingenuous, for the physician and the hospital act in concert to provide the
21 service to the patient. The hospital provides the forum and equipment. Its own policy manual
22 includes instruction on stocking consent forms and providing them to the doctors with privileges
23 at the hospital. Here the hospital undertook a duty and cannot pass the buck.

24 California's unfair competition law is a broad statute that prohibits any unlawful, unfair, or
25 fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. The
26 courts of California have narrowly construed advertising to include one-on-one representations.
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1 The Court finds that the written representations in the informed consent review form signed
2 by Dr. Sluzki constitute an advertisement within the meaning of B & P Code Section 17500.
3 The Court further finds that the defendant Cottage Hospital knew the representations of Dr.
4 Sluzki were false, and yet allowed him to engage in the deceptions at hand. The Court does not
5 agree with the Hospital that this was "merely a technicality", as Dr. Sluzki is an accomplished
6 physician who happened to receive his medical training abroad in Argentina, a country that does
7 not share reciprocity of benefits with American doctors. The fact remains that under California
8 law, Dr. Sluzki was not qualified to determine Mr. Akkerman's capacity to intelligently and
9 comprehensively consent to ECT. It is not up to Cottage Hospital to determine that the law does
10 not apply to its employees.

11 The Court also finds that Dr. Johnson's use of an incomplete and erroneous consent form
12 likewise fell within the purview of 17200's sweeping consumer protections. His failure to
13 follow the dictates of the Welfare and Institutions Code constituted an unfair business practice.
14 It is not necessary for plaintiff to prove that he was harmed by the practice. To show that he was
15 deceived is sufficient for an adverse finding.

16
17 The defendant also disputes one of plaintiffs' major contentions- that ECT is a dangerous
18 modality that merits the close scrutiny of the law. Defense witnesses described it as "safe and
19 effective". Dr. Erickson, Dr. Sluzki's successor at the Hospital, denied knowing that there was
20 any considerable controversy in the medical community about ECT's value in treating mental
21 illness. Yet Dr. Johnson himself admitted in his testimony that no one understands how ECT
22 works to combat mental illness. It remains a mystery to the medical profession.

23 ECT has been utilized for many years, and some things are understood about it- the
24 potential side effects, which are enumerated in the Welfare and Institutions Code. Section
25 5326.2 mandates that the information required for a true informed consent shall include, in a
26 clear and explicit manner, a discussion with the patient of memory loss (including its
27 irreversibility) and that there exists a division of opinion as to the efficacy of the proposed
28

1 treatment, why and how it works and its commonly known risks and side effects. The
2 Akkermans did not receive this vital information from either Dr. Johnson or Dr. Sluzki.

3
4 In the second phase of the trial the plaintiffs introduced a survey conducted under the
5 auspices of Moore v. California State Board of Accountancy (1992) 2 Cal 4th 999, which the
6 court admitted over defense objection. The survey's purpose was to determine what it is that
7 people understand about the information provided by way of written consent forms (informed
8 consent) as well as verbal information given by the physician in conjunction with the written
9 information he or she provides relative to proposed psychiatric health treatments. The results
10 were instructive and not surprising. 49% of those polled wished, first and foremost, to be
11 advised of the potential risks and possible side effects of a treatment. 42% were concerned about
12 the specifics of the treatment and its effectiveness. A whopping 78% said they accept as
13 accurate the representations of their psychiatrist concerning the effectiveness of treatment
14 options; 76 % accepted the doctor's representations of the safety of the procedure. 70% of the
15 respondents said that their decision to receive the treatment would be affected by the second
16 opinion of the chief psychiatrist of the hospital regarding whether to have ECT. These results
17 underscore the high regard patients extend to doctors and the compelling need for full disclosure
18 of all known risks by the doctor to the patient, *regardless of the doctor's personal opinion on the*
19 *subject.*

20 The survey went on to ask respondents to interpret key phrases taken from the actual
21 consent form utilized by Dr. Johnson in his initial informed consent process with Mr. Akkerman.
22 In regards to the critical issue of memory loss the following statement from the form was
23 analyzed:

24 *"This treatment could have the following side effects and risks: memory loss lasting from an*
25 *hour or so after each treatment to spotty losses lasting for several months or years following a*
26 *series of treatments"*

1 56% of respondents agreed that the statement definitely or very likely included the possibility of
2 memory loss, but 62% believed it to be temporary rather than permanent. Only 22% read it as
3 suggesting permanent memory loss. The consent form used by Dr. Johnson was decidedly
4 misleading in this critical regard.

5
6 The Court finds further that the hospital has not cured the defects in its system sufficient to
7 avoid the imposition of the injunctive relief requested by plaintiffs. Darcy Keep states in her
8 declaration that the hospital is now using the correct consent form, and has in place a system for
9 communicating with the mental health rights advocate and the Department of Mental Health to
10 make sure that the hospital is in compliance with the law. Curiously, the consent form currently
11 in use by the hospital was not appended to her declaration. Further, the system she describes is
12 exactly the same one that failed in 1998. She claims to be the gatekeeper of information for the
13 hospital, but cannot explain why, for the last six years her employer has not kept abreast of
14 critical changes in the mandates of the law governing the use of ECT.

15 Furthermore, the Court is not convinced that Dr. Erickson has put in place an informed
16 consent review procedure that thoroughly complies with the dictates of the Welfare and
17 Institutions Code, particularly in light of his lack of experience in administering ECT and his
18 lack of knowledge of the law's requirements. He admitted in his testimony that he had never
19 read the Code until called upon to participate in this case as a witness. The Court lacks
20 confidence in the hospital's ability to self-police. There appears to be a strong likelihood that the
21 harmful practices at the heart of this suit will continue unless the Court issues the injunction as
22 requested.

23 THEREFORE the Court declares that Santa Barbara Cottage Hospital violated Business
24 and Professions Code Sections 17200 and 17500 from 1998 to May 2004. An injunction is an
25 appropriate remedy, for the harm complained of has not ceased and there is a significant risk that
26 it shall continue without on-going court supervision and intervention.
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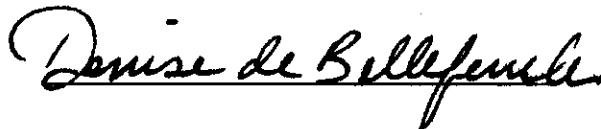
1 Santa Barbara Cottage Hospital is enjoined from engaging in the dissemination of inaccurate,
2 unlawful and/or deceptive information to its mental health patients who are considering ECT.
3 The hospital shall not permit an unauthorized person to perform the required informed consent
4 review, and must be in compliance with Welfare and Institutions Code Sections 5326.2 and
5 5326.75 in properly verifying that patients have received all of the information under the law
6 constituting true informed consent prior to receiving ECT.

7
8 Santa Barbara Cottage Hospital shall immediately cease providing ECT to patients, and
9 advise its attending physicians that the hospital has lost the right to perform such treatment.

10 Should the hospital wish to re-institute the practice of providing ECT, it must provide to
11 this Court the following items:

- 12 1. A copy of the current consent form proposed for use by treating physicians who wish to
13 utilize the hospital to perform ECT.
- 14 2. A written plan for on-going communications with the Department of Mental Health and
15 the patients' rights' advocates office in regards to on-going changes in the law
16
- 17 3. A written protocol on informed consent reviews for ECT to be utilized by the board certified
18 or eligible psychiatrist or neurologist who conducts said reviews. This protocol must include the
19 same information on risk factors as the model consent form and also contain a checklist
20 regarding the factors to be included in the doctor's determination of a patient's capacity to give
21 consent.

22
23 January 2, 2005

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25 Judge of the Superior Court
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<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA</p> <p>STREET ADDRESS: 1100 Anacapa Street MAILING ADDRESS: CITY AND ZIP CODE: Santa Barbara, California 93101 BRANCH NAME: Santa Barbara-Anacapa Division</p>	<p>FILED</p> <p>SUPERIOR COURT of CALIFORNIA COUNTY OF SANTA BARBARA</p> <p>JAN 05 2005</p> <p>GARY M. BLAIR, EXEC. OFFICER</p> <p>By <i>Liana Campos</i> LIANA CAMPOS Deputy Clerk</p>
<p>Caption:</p> <p>Atze Akkerman vs Joseph Johnson</p>	
<p>CLERK'S CERTIFICATE OF MAILING</p>	<p>CASE NUMBER: 1069713</p>

I certify that I am not a party of this action and that a true copy of the foregoing was mailed first class, postage prepaid in a sealed envelope addressed as shown, and that the mailing of the foregoing and execution of this certificate occurred at Santa Barbara, California, on (date) 01/05/2005.

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Clerk's Certificate of Mailing

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