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CASENOTES

COURT SUSTAINS DEMURRER IN "INTOXICATED MINOR CLAIM" FOR FAILURE TO SPECIFICALLY PLEAD FACTS ESTABLISHING HOW DFENDANTS FURNISHED ALCOHOL

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Filed 2/7/18 Wright v. Cooley CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JEAN KELSEY WRIGHT, Individually and as Successor in Interest, etc. et al., Plaintiffs and Appellants, v. JAMES KENNETH COOLEY et al., Defendants and Respondents.	F072269 (Super. Ct. No. 14CECG01925) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Greene, Broillet & Wheeler, Scott H. Carr, Robert D. Jarchi, Aaron L. Osten; Solouki & Savoy, Grant J. Savoy, Shoham J. Solouki; Esner, Chang & Boyer, Stuart B. Esner, Andrew N. Chang and Joseph S. Persoff for Plaintiffs and Appellants.

Emerson Church and Ryan D. Libke for Defendants and Respondents James Kenneth Cooley and Patricia Cooley.

Donahue Davies, James R. Donahue, Michael E. Myers and Stephen J. Mackey for Defendant and Respondent Nancy S. Shanafelt.

No appearance for Defendant and Respondent Chris Main.

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Plaintiffs appeal from the judgments entered after defendants' demurrers to the second amended complaint were sustained without leave to amend. Plaintiffs attempted to allege against defendants causes of action for selling or furnishing alcoholic beverages to a minor, or to an intoxicated minor, who then drove a motor vehicle negligently or recklessly, striking and killing plaintiffs' decedent. Plaintiffs sought to recover for the wrongful death of decedent. The trial court sustained the demurrers on the ground the pleading failed to allege facts sufficient to state a cause of action against defendants. We conclude plaintiffs were required to plead with particularity sufficient facts to demonstrate that their claims came within statutory exceptions to the statutory immunity applicable to those furnishing alcohol to persons who then consume the alcoholic beverages and cause injuries. Plaintiffs failed to do so and failed to identify any facts they could allege by amendment that would cure the defects. Accordingly, the trial court properly sustained defendants' demurrers and did not abuse its discretion by denying plaintiffs leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

The trial court sustained defendants' demurrers to plaintiffs' original and first amended complaints with leave to amend. Plaintiffs filed a second amended complaint. Defendants again demurred, contending plaintiffs failed to cure the defects in the previous pleadings, and the second amended complaint still failed to state facts sufficient to constitute a cause of action against them. The trial court agreed and sustained the demurrers without leave to amend. Plaintiffs appeal from the ensuing judgments.

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[1] In this opinion, as a matter of convenience, we refer to respondents as "defendants," although they are not the only defendants named in this case. Other defendants, who are not involved in this appeal, are referred to by their names.

Plaintiffs' second amended complaint contains the following allegations. Plaintiffs are the wife and minor children of decedent, Jaysen Wright. Defendant, Nancy Shanafelt,[2] and others not parties to this appeal, were "the legal owners, occupants, tenants, lessees, and/or residents" of specified property. Defendants, James Cooley, Patricia Cooley, Chris Main, and another who is not a party to this appeal, were "the legal owners, occupants, tenants, lessees, and/or residents" of another specified property. The properties together were referred to in the second amended complaint as the "subject premises." (Capitalization omitted.)

On February 16 to February 17, 2013, Shanafelt "knowingly furnished, provided, sold and/or caused to be sold alcoholic beverages . . . at their home (identified as the 'SUBJECT PREMISES')" to Morgan B. (Morgan), who was under 21 years of age. On the same dates, the Cooleys and Main "knowingly furnished, provided, sold and/or caused to be sold alcoholic beverages . . . at their home (identified as the 'SUBJECT PREMISES')" to Morgan, who was under 21 years of age. Defendants knew or should have known Morgan was under the age of 21. At the time they sold the alcoholic beverages to Morgan, she was obviously intoxicated. After purchasing alcoholic beverages from all of the defendants and consuming them on the subject premises, Morgan negligently or recklessly operated a motor vehicle, striking and killing decedent. Defendants' acts of "giving, furnishing, and/or selling alcoholic beverages" to Morgan, an underage person, were a substantial factor in causing decedent's death.

Plaintiffs' first cause of action for negligence was alleged against Morgan and her mother, the alleged owner of the motor vehicle. The first cause of action is not in issue in this appeal.

The second cause of action was alleged against defendants, for negligence pursuant to Civil Code section 1714, subdivision (d). It alleged defendants were "parents,

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[2] Our references to "Shanafelt" in this opinion include Shanafelt in her individual capacity and as trustee of the Nancy S. Shanafelt Living Trust.

guardians and/or adults" within the statute, and they "furnished, provided, sold and/or caused to be sold alcoholic beverages" on the subject premises to Morgan; they knew or should have known she was under 21 years of age. As a proximate result, decedent suffered fatal injuries, which deprived plaintiffs of his love, society, comfort, and support and caused them to incur funeral expenses.

The third cause of action was alleged against defendants, for negligence pursuant to Business and Professions Code section 25602.1.[3] It alleged defendants were licensed or required to be licensed to engage in furnishing alcoholic beverages, and they "sold, caused to be sold and/or gave alcoholic beverages" to Morgan at the subject premises. At the time, Morgan was under 21 years of age and was obviously intoxicated, as indicated by her physical appearance, including alcoholic breath, slurred speech, unsteady walk, and lack of coordination. As a proximate result, Morgan negligently or recklessly operated a motor vehicle and decedent suffered fatal injuries, which caused plaintiffs' injuries.

The fourth cause of action was alleged by decedent's wife against defendants, for loss of consortium, based on the previous allegations of wrongdoing.

DISCUSSION

I. Standard of Review

The function of a demurrer is to test the sufficiency of the complaint by raising questions of law. (*Herman v. Los Angeles County Metropolitan Trans. Authority* (1999) 71 Cal.App.4th 819, 824.) On appeal from a dismissal after an order sustaining a demurrer without leave to amend, we employ two separate standards of review. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497 (*Hernandez*).) First, we review the sustaining of the demurrer de novo, exercising our independent judgment to determine whether the complaint sets forth sufficient facts to state a cause of action as a matter of law. (*Ibid*.) In doing so, " '[w]e treat the demurrer as admitting all material facts proper-

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[3] All further statutory references are to the Business and Professions Code unless otherwise indicated.

ly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) " 'We do not review the reasons for the trial court's ruling; if it is correct on any theory, even one not mentioned by the court, and even if the court made its ruling for the wrong reason, it will be affirmed.' " (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 637.)

Second, we review the trial court's denial of leave to amend for abuse of discretion. (*Hernandez*, *supra*, 49 Cal.App.4th at p. 1497.) "[W]e will only reverse for abuse of discretion if we determine there is a reasonable possibility the pleading can be cured by amendment." (*Id*. at p. 1498.) The burden is on the plaintiff to show in what manner the complaint can be amended and how the amendment will change the legal effect of the pleading. (*Medina v. Safe-Guard Products, Internat., Inc*. (2008) 164 Cal.App.4th 105, 112–113, fn. 8 (*Medina*).) "While such a showing can be made for the first time to the reviewing court [citation], it must be made." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

II. Pleading Requirements

A complaint must contain a "statement of the facts constituting the cause of action, in ordinary and concise language." (Code Civ. Proc., § 425.10, subd. (a)(1).) The complaint as a whole must contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) " '[A] plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action. . . . 'The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff.' " (*Ludgate Ins. Co. v. Lockheed Martin Corp*. (2000) 82 Cal.App.4th 592, 608.)

When, however, "a party relies for recovery upon a purely statutory liability it is indispensable that he plead facts demonstrating his right to recover under the statute. The complaint must plead every fact which is essential to the cause of action under the statute." (*Green v. Grimes-Stassforth Stationery Co*. (1940) 39 Cal.App.2d 52, 56.) Further, when recovery is sought under a statute, facts must be pleaded with particularity; "simply parroting the language of [the statute] in the complaint is insufficient to state a cause of action under the statute." (*Hawkins v. TACA Internat. Airlines, S.A.* (2014) 223 Cal.App.4th 466, 478 (*Hawkins*).) A "plaintiff may not sue multiple defendants on speculation that their conduct caused harm and 'thereafter try to learn through discovery whether their speculation was well-founded' " (*Id*. at p. 479.)

III. Social Host Liability

Prior to 1971, although it was a misdemeanor to sell or furnish alcoholic beverages to an obviously intoxicated person (§ 25602), California case law held that a person who furnished alcoholic beverages to another person was not civilly liable for any damages resulting from the latter's intoxication. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705 (*Ennabe*).) Beginning in 1971, however, the California Supreme Court issued three decisions in which it held commercial sellers of alcoholic beverages and social hosts, who furnished alcoholic beverages to obviously intoxicated persons, civilly liable for injuries caused by those intoxicated persons. (*Id*. at pp. 705–706.) In 1978, the Legislature responded by adding subdivisions (b) and (c) to Civil Code section 1714. Subdivision (b), expressly abrogated the three cases and provided " 'that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.' " (*Ennabe*, at pp. 706–707.) Subdivision (c) of Civil Code section 1714 provided: " 'No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the con-

sumption of such beverages.' " (*Ennabe,* at p. 707.) At the same time, the Legislature amended section 25602 to include similar provisions. "This 'sweeping civil immunity' [citation] was intended 'to supersede evolving common law negligence principles which would otherwise permit a finding of liability under the[se] circumstances.' " (*Ennabe,* at p. 707.)

The 1978 legislation included "a 'single statutory exception to the broad immunity created by the 1978 amendments.' " (*Ennabe*, *supra*, 58 Cal.4th at p. 707.) Section 25602.1 provided that those licensed to sell alcohol could be held liable for selling, furnishing, or giving away alcoholic beverages to obviously intoxicated minors who later injured themselves or others. (*Ennabe*, at pp. 707–708.) Subsequently, the exception set out in section 25602.1 was expanded, and an exception to the immunity granted by Civil Code section 1714 was enacted by the addition of subdivision (d) to that statute.

In their second amended complaint, plaintiffs attempted in their second cause of action to allege against defendants a cause of action under Civil Code section 1714, subdivision (d). Their third cause of action attempted to allege a cause of action against defendants under section 25602.1. In the fourth cause of action, decedent's wife attempted to allege a loss of consortium claim, based on the same allegations of wrongdoing set out in the earlier causes of action.

IV. Second Cause of Action

Under Civil Code section 1714, subdivision (c), the general rule for social hosts is immunity: "[N]o social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages." Subdivision (d)(1) of that section provides the exception: "Nothing in subdivision (c) shall preclude a claim against a parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person whom he or she knows, or should have known, to be under 21 years of age, in which case . . . the furnish-

ing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death." To plead a cause of action falling within this statutory exception to the general rule of immunity, a plaintiff must allege the necessary facts "with particularity," and not simply parrot the language of the statute. (*Hawkins*, *supra*, 223 Cal.App.4th at p. 478.) The plaintiff must allege facts showing (1) the defendant is a parent, guardian, or another adult, (2) the defendant knowingly furnished alcoholic beverages, (3) at the defendant's residence, (4) to a person the defendant knew or should have known was under 21 years of age, and (5) the defendant's serving of alcoholic beverages to the minor was a proximate cause of injury or death to the underage person or a third person.

"Furnishing," when used in connection with the furnishing of alcoholic beverages to an intoxicated or underage person, has been narrowly interpreted. In *Coulter v. Superior Court* (1978) 21 Cal.3d 144, the plaintiff's first cause of action alleged the owner of an apartment complex and the apartment manager served alcoholic beverages to Williams in the recreation room at the complex, knowing she was becoming excessively intoxicated and intended to drive a motor vehicle. (*Id*. at p. 148.) The plaintiff was a passenger in the vehicle Williams subsequently drove, and was injured in a collision. The court found the first cause of action survived the defendants' demurrer. (*Id*. at p. 155.) The second cause of action, however, failed; it alleged only that the apartment owner " 'permitted' Williams to drink on their premises," and that the apartment manager somehow " 'aided, abetted, participated and encouraged' Williams to drink to excess." The second cause of action did not allege either the defendants or their agents "actually furnished liquor to Williams." The court indicated the term " 'furnish' " implied some affirmative action, not merely providing a place where alcoholic beverages were served. (*Ibid*.)

In *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141 (*Sagadin*), the court again held that "furnishing" alcohol required " 'some type of affirmative action on the part of the furnisher.' " (*Id.* at p. 1157.) There, the defendants permitted their underage son to host a party, but the father told his son that, if the son and his guests drank any of the beer in the

father's beer dispenser, it would have to be replaced. (*Id*. at p. 1149.) The parents were not present during the party. (*Ibid*.) The plaintiffs, three of the party guests who were also underage, were later injured in an automobile accident; the driver had served himself beer from the dispenser during the party. (*Id*. at pp. 1148–1149.)

The court concluded the son furnished alcohol to the guests by contributing to the fund to buy additional kegs of beer, instructing others to pick up the additional kegs, and personally attaching the keg, which facilitated access to the beer. (*Sagadin*, *supra*, 175 Cal.App.3d at p. 1158.) Although the parents had assisted in preparing food and decorating for the party, and had provided the location for the party with knowledge alcohol would be served to underage individuals, those facts were insufficient to impose liability on them. (*Ibid*.) However, the jury could reasonably have inferred from the father's statement about replacing the beer that he thereby authorized use of the beer at the party. That authorization constituted the necessary affirmative act of furnishing the alcohol. Furnishing did not require pouring the drink; "it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker." (*Ibid*.) There was no evidence the mother took any affirmative action to furnish alcohol to the plaintiffs, however, so the judgment against her was reversed. (*Id*. at pp. 1158, 1178.)

In *Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, a bicyclist and his wife sued the five underage occupants of a vehicle that struck the bicyclist and injured him. The trial court sustained demurrers or granted judgment on the pleadings in favor of the four passengers, and the appellate court affirmed. (*Id*. at p. 760.) The plaintiffs alleged the four passengers purchased alcohol and took it to the home of a friend, Shoemaker, to consume it. (*Id.* at p. 761.) Shoemaker then furnished the alcoholic beverages to the driver. The four passengers allegedly conspired with Shoemaker, or aided and abetted him in furnishing the alcoholic beverages to the driver at Shoemaker's residence. (*Ibid*.) The court stated: "Although the claim against Shoemaker appears to fall within the [Civil Code] section 1714, subdivision (d) exception, plaintiffs cannot bootstrap respondents

into that exception by alleging that respondents conspired with or aided and abetted Shoemaker by providing alcoholic beverages that were furnished to" the driver. (*Id*. at p. 764.) The Civil Code section 1714, subdivision (d), exception applied to "a very narrow class of claims" against an adult who knowingly furnished alcohol at his or her residence to a person the adult knew or should have known was under age 21. The passengers were not alleged to have furnished alcohol to the driver at their residences, so the claims against them were barred as a matter of law. (*Rybicki,* at p. 764.)

In *Ruiz v. Safeway, Inc*. (2012) 209 Cal.App.4th 1455, the court determined that a store did not furnish alcohol, or cause it to be furnished, to the driver of the vehicle that killed the plaintiffs' decedent. The store had sold alcohol to an underage person who was a passenger in that vehicle and who shared the alcohol with the driver before the collision. (*Id*. at pp. 1460–1461 [construing the terms furnish and cause to be furnished as they were used in § 25602.1].) The store did not supply the alcohol to the driver, it sold it to the passenger; further, nothing about the sale to the passenger constituted an affirmative act that necessarily would have resulted in the passenger furnishing or giving the alcohol to the driver. (*Id*. at pp. 1460–1461.)

Plaintiffs' first amended complaint contained only one cause of action against defendants based on allegedly selling or furnishing alcohol to Morgan; it referenced both section 25602.1 and Civil Code section 1714, subdivision (d). When the trial court sustained the demurrer to the first amended complaint, it noted that the two statutes imposed different requirements, and concluded plaintiffs' two causes of action for furnishing alcohol had been "impermissibly and confusingly 'lumped together' into a single cause of action." Additionally, defendants were "all 'lumped' together, so that the defendants cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her."

Plaintiffs' second amended complaint separated their claims into two causes of action, one under each statute. It made no changes to the "lumping together" of defendants

and the allegations against them. It continued to make its claims in conclusions, without allegation of supporting facts.

Plaintiffs' second cause of action does not allege the circumstances under which alcohol was allegedly provided to Morgan. It does not factually allege any affirmative act by which any of the defendants furnished alcoholic beverages to Morgan prior to the accident in which decedent was killed. For example, it does not allege any defendant personally served alcoholic beverages to Morgan. It does not even allege any defendant was present on the "subject premises" at the time Morgan was allegedly furnished alcohol there. It does not allege any facts demonstrating any defendant authorized any other defendant, or any third person, to serve alcoholic beverages to Morgan. It does not allege any defendant purchased or had possession or control of the alcoholic beverages and served them, or in some specified way authorized or permitted someone else to serve them, to Morgan at that defendant's residence. The second cause of action simply alleges the bare conclusion that all of the defendants "knowingly furnished, provided, sold and/or caused to be sold alcoholic beverages" to underage individuals, including Morgan.

Plaintiffs' allegations regarding the other elements necessary to bring their claims within Civil Code section 1714, subdivision (d), also take the form of conclusions, most of which are alleged substantially in the language of the statute. Without distinguishing among the defendants, plaintiffs allege that all the defendants "were parents, guardians and/or adults within the statutory meaning" of that section. Plaintiffs do not unambiguously allege that each defendant furnished alcohol to Morgan at his or her own residence. Rather, they lump together two addresses under the term "subject premises," then allege all the defendants furnished alcohol to Morgan on "the subject premises."

The second cause of action does not allege with particularity facts showing that defendants knew or should have known Morgan was underage. For example, there is no allegation that any defendant was on the premises when Morgan was present, that any defendant observed her appearance or checked her identification, or that any defendant was

personally acquainted with her and knew her to be underage. There is no allegation of any relationship between Morgan and any of the defendants from which it can be inferred any of them knew, or had reason to know, her age. The second cause of action simply alleges the conclusion that defendants, "and each of them, knew or should have known that said minors, including but not limited to [Morgan], was/were minor(s) under twenty-one (21) years of age."

Plaintiffs assert the rule requiring that a plaintiff plead a claim based on statute with particularity does not apply to their cause of action, because the statute in issue does not create liability. They state: "None of Plaintiffs' claims arises out of statutory liability, however. Plaintiffs' claims are all common law negligence claims. The relevance of the two statutes at issue are [*sic*] solely for immunity purposes. The relevant language of the statutes merely allows for the *possibility* of liability. Even if Plaintiffs establish the application of the exception to the statutes, Plaintiffs will further have to establish that Defendants were negligent."

But plaintiffs' second cause of action depends for its existence on a statute. Unless plaintiffs satisfy the requirements of subdivision (d) of Civil Code section 1714, they cannot state a viable cause of action. Without meeting those requirements, the immunity of subdivision (c) of Civil Code section 1714 applies, and defendants may not be held liable. Thus, in order to state a cause of action, plaintiffs must allege all the facts necessary to bring their claims within the ambit of Civil Code section 1714, subdivision (d). Even if plaintiffs' claim is not considered to be a statutory claim that must be alleged with particularity, plaintiffs must at least allege facts, rather than conclusions phrased in the language of the statute, to advise the defendants of the wrongdoing with which they are charged.

Plaintiffs failed to allege facts that would bring any of the defendants within the scope of the statutory exception to the social host immunity. We conclude the trial court correctly determined plaintiffs' second cause of action failed to state facts sufficient to

constitute a cause of action under the statute, and it did not err in sustaining defendants' demurrers to that cause of action.

V. Third Cause of Action

In the third cause of action of the second amended complaint, plaintiffs attempted to allege a cause of action under section 25602.1. The preceding section, section 25602, makes it a misdemeanor to sell, furnish, or give away any alcoholic beverage to an obviously intoxicated person. (§ 25602, subd. (a).) Subdivision (b) of that section creates an immunity from civil liability: "No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage." (§ 25602, subd. (b).) Section 25602.1 sets out an exception to that immunity:

> "Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed, pursuant to Section 23300, or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage, and any other person who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person." (§ 25602.1.)

Plaintiffs' third cause of action, like their second, is based on a statute that narrowly defines the circumstances under which liability may be imposed, as an exception to the broad statutory immunity. Like the second cause of action, we conclude it is a statutory cause of action; plaintiffs must allege their claims factually and with particularity in order to bring them within the statutory exception, and avoid the immunity granted by section 25602.

There are two bases for liability under section 25602.1: (1) the defendant was licensed or required to be licensed to sell alcohol, and sold, furnished, or gave alcohol to

an obviously intoxicated minor, which was the proximate cause of the personal injury or death of a person; or (2) the defendant was "any other person" (someone not licensed or required to be licensed) and he or she sold alcohol, or caused it to be sold, to an obviously intoxicated minor. Plaintiffs' third cause of action alleged a claim based on the first category: that defendants, "and each of them," were "licensed, or required to be licensed, pursuant to Business and Professions Code § 23300, to engage in the furnishing of alcoholic beverages." Each defendant allegedly "sold, caused to be sold and/or gave alcoholic beverages" to underage individuals, including Morgan, who were obviously intoxicated, as indicated by their physical appearance. The third cause of action did not expressly allege defendants were liable under the second category of section 25602.1, the "any other person" category.

The statutory exception in section 25602.1 to the " 'sweeping civil immunity' " set out in section 25602, subdivision (b), is a narrow one that must be construed strictly to effect the Legislature's intent. (*Elizarraras v. L.A. Private Security Services, Inc*. (2003) 108 Cal.App.4th 237, 243; *Hernandez v. Modesto Portuguese Pentecost Assn*. (1995) 40 Cal.App.4th 1274, 1281 (*Modesto Portuguese*).) "*Selling*" alcohol for purposes of section 25602.1 is defined to include "any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another." (§ 23025.) The "phrase 'causes [alcohol] to be sold' [as used in section 25602.1] requires an affirmative act directly related to the sale of alcohol, which necessarily brings about the resultant action to which the statute is directed, i.e., the sale of alcohol to an obviously intoxicated minor." (*Modesto Portuguese*, at p. 1282.) The statute requires malfeasance, not mere acquiescence or inaction. (*Ibid*.) "For example, one who, having control over the alcohol, directs or explicitly authorizes another to sell it to a minor who is clearly drunk falls within the statutory language. On the other hand, merely providing a room where alcoholic beverages will be sold by others is not sufficient." (*Ibid.*) Thus, when the owner of property rents it to another, who obtains a license to sell alcohol and thereafter sells alco-

hol to an underage person on the premises, the owner has not caused the alcohol to be sold to the underage person, when the owner purchased no alcohol, served no alcohol, exercised no degree of control or authority over the sale of the alcohol, was not even present at the event where the alcohol was sold, and was not in a position to detect signs of intoxication in the alcohol consumer. (*Id*. at p. 1283.) Selling alcohol or causing it to be sold may include charging an entrance fee to a party which enables the guest to drink alcoholic beverages provided at the party. (*Ennabe*, *supra*, 58 Cal.4th at p. 722.)

"[T]he apparent intent of section 25602.1 is to subject to potential liability only those persons or organizations who, either personally or through an agent, are in the position to detect signs of intoxication in a minor seeking to purchase alcohol from the person or organization, and can refuse to sell alcohol to that minor in order to protect the minor and reduce the potential that the minor will cause personal injury to himself or others as a result of his intoxication." (*Modesto Portuguese*, *supra*, 40 Cal.App.4th at pp. 1282–1283.) Thus, a plaintiff may allege a cause of action within section 25602.1, by alleging the defendant personally sold, furnished, or gave alcoholic beverages to an underage individual, while the defendant was in a position to detect whether that individual was obviously intoxicated. Alternatively, a plaintiff may allege facts showing that the defendant authorized another to sell, furnish, or give alcoholic beverages to an underage individual when either the defendant or the authorized person, or both, was in a position to observe whether the individual was obviously intoxicated.

Like the second cause of action, plaintiffs' third cause of action is alleged in conclusions. It alleges all the defendants "sold, caused to be sold and/or gave alcoholic beverages at or on the subject premises to individuals, including but not limited to defendant Morgan . . . , who were/was under twenty-one (21) years of age." (Capitalization omitted.) The underage persons, including Morgan, "were obviously intoxicated as indicated by, among other symptoms, their physical appearance, including but not limited to impaired judgment, alcoholic breath, slurred speech, unsteady walk and lack of coordina-

tion." Defendants breached their duty of care by "selling, furnishing, giving and/or providing alcoholic beverages to minors . . . including Morgan . . . , who was an obviously intoxicated minor and who defendants . . . knew or should have known was under the age of twenty-one." (Capitalization omitted.) The third cause of action does not allege factually and with particularity that any of the defendants was present on the premises, personally sold or furnished alcoholic beverages to Morgan, or was in a position to observe whether Morgan was obviously intoxicated, at the time she was allegedly sold or furnished alcoholic beverages. It also does not allege factually that any of the defendants engaged in any conduct by which he or she authorized any other person to sell or furnish alcohol to Morgan while either that defendant or the authorized person was then present and able to observe Morgan's alleged symptoms of intoxication. Plaintiffs have not alleged that any defendant acted as the agent or employee of, or was otherwise authorized to act on behalf of, any other defendant. Additionally, like the second cause of action, the third cause of action contains no factual allegations supporting the conclusion that defendants knew or should have known Morgan was under the age of 21.

In short, plaintiffs did not allege facts, rather than bare legal conclusions, bringing their claims within the statutory exception to immunity from liability which is set out in section 25602.1. We conclude the trial court properly sustained the demurrer to the third cause of action of the second amended complaint.

VI. Fourth Cause of Action

In their briefs, plaintiffs make no argument in support of the fourth cause of action for loss of consortium. "A cause of action for loss of consortium is, by its nature, dependent on the existence of a cause of action for tortious injury to a spouse. . . . [I]t stands or falls based on whether the spouse of the party alleging loss of consortium has suffered an actionable tortious injury." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746.) Because plaintiffs have not alleged facts showing decedent suffered an actionable injury tortiously caused by defendants, the loss of consortium claim advanced by his wife cannot stand.

VII. Leave to Amend

Plaintiffs assert the trial court abused its discretion by denying leave to amend their complaint. Plaintiffs bear the burden of showing in what manner the complaint can be amended and how the amendment will change the legal effect of the pleading. (*Medina, supra*, 164 Cal.App.4th at pp. 112–113, fn. 8.) Plaintiffs have not identified any facts they could truthfully add to their pleading to cure the deficiencies that caused the demurrers to be sustained.

In the trial court, despite the previous sustaining of defendants' demurrers to the original and first amended complaints, plaintiffs consistently argued that the second amended complaint alleged sufficient facts to state their causes of action against defendants. At the end of their oppositions, however, they tacked on a request for leave to amend if the pleading was found insufficient. They did not identify any facts they wished to add to cure the defects if they were granted leave to amend.

At the hearing of the demurrers to the second amended complaint, plaintiffs' counsel stated he had no problem amending to add "some further facts with respect to the social circle that these individuals were in. With respect to the fact that parties were being held at these houses repeatedly and that minors were the ones that were there receiving the alcohol." He also asserted he had possession of two "extremely detailed" police reports that laid out "facts of the nature of the parties and . . . identified various witnesses." Plaintiffs' counsel stated he could allege further facts from the police report, including facts about whether defendant Main qualified as an adult and whether he knew Morgan was obviously intoxicated or a minor. Plaintiffs' counsel did not suggest any facts he could add to show that any of the defendants was personally present and served or sold alcohol to Morgan directly, or authorized someone to do so, and the authorized person was present and did serve or sell alcohol to Morgan.

At the hearing, counsel for the Cooleys represented that his clients did not live in the house plaintiffs alleged the Cooleys owned or occupied, and that he had made an of-

fer of proof to plaintiffs' counsel regarding that fact. The Cooleys' counsel also represented that he had the police report, but he had seen no facts that his clients were present at the time in question; he added that Mr. Cooley was on the East Coast at the time. Plaintiffs did not deny or respond to those statements, but merely argued again that the pleading was sufficient. In their appellate brief, the Cooleys again assert they live elsewhere and Mr. Cooley was on the East Coast at the time of the alleged events. They also assert they are not even mentioned in the police reports plaintiffs seem to rely on for additional facts.

In their opening brief, plaintiffs profess ignorance of which elements of their cause of action were found deficient, and assert that, "[o]nce Plaintiffs stated they could plead additional facts, the trial court should have granted leave to amend." In support, plaintiffs cite two cases: *King v. CompPartners, Inc*. (2016) 243 Cal.App.4th 685, 598, review granted April 13, 2016, S232197 and *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235–236.) In both cases, however, the plaintiffs identified particular facts they wished to add to their pleadings, and the proposed facts specifically addressed the areas of the pleadings the court had found to be deficient.[4]

Plaintiffs having been granted leave to amend twice and having still failed to state a cause of action, leave to amend was within the trial court's discretion. The trial court was not required to grant leave to amend when plaintiffs merely requested leave to amend or represented that an amendment could be made, without suggesting what additional facts could be truthfully alleged to cure the deficiency. The burden is on the plaintiff to show both how the complaint can be amended and how the amendment will cure the deficiency. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994.) Plaintiffs did not meet that burden, either in the trial court or in their briefs on appeal.

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[4] We note the California Supreme Court granted review of the decision in *King v. CompPartners* the day before plaintiffs' opening brief in this case was filed, and it remains under review. As such, it currently has no binding or precedential effect. (Cal. Rules of Court, rule 8.1115(e)(1).)

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

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HILL, P.J.

WE CONCUR:

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POOCHIGIAN, J.

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DETJEN, J.