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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ISRAEL P. CHAMBI,

Plaintiff and Appellant,

v.

MICHAEL DOGALI,

Defendant and Respondent.

G026678

(Super. Ct. No. 761284)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Raymond J. Ikola, Judge. Affirmed.

Rehm & Rogari and Joanna Rehm for Plaintiff and Appellant.

Lewis, D'Amato, Brisbois & Bisgaard, and Alan R. Zuckerman for Defendant and Respondent.

Neurosurgeon Israel P. Chambi sued his supervisor, Dr. Michael Dogali, and the UCI Medical Center for defamation and intentional infliction of emotional distress. The trial court granted a partial directed verdict, finding statements made by Dr. Dogali *during* the peer review process were absolutely privileged under Government Code section 821.6 and Civil Code section 47, subdivision (b). Dr. Chambi contends the immunity provided by Government Code section 821.6 covers only malicious prosecution actions, and the absolute privilege specified by Civil Code section 47, subdivision (b) did not apply here. For the reasons set forth below, we affirm.

* * *

Dr. Chambi joined the UCI faculty as a clinical instructor on June 1, 1989, and received surgical privileges at the medical center. His appointment was renewed annually and he was compensated on a straight salary basis. By 1991, he had been promoted to the rank of assistant clinical professor.

Dr. Dogali joined the UCI staff in late 1994, succeeding another physician as chair of the department of neurosurgery. Not long after his arrival at UCI, members of a “community group” approached Dr. Dogali with questions regarding Dr. Chambi’s judgment in hydrocephalus cases. These concerns were echoed by the chief resident, Dr. Peter Balousek. Dr. Balousek felt Dr. Chambi was “doing inappropriate surgery; that his complication rate was high; and that he and some of the other residents didn’t want to work with [him] and . . . he shouldn’t be on the teaching service.” After a meeting with the dean and the residents in the neurosurgery department, Dr. Dogali requested the hospital’s quality review committee to examine records detailing complication rates, multiple operations on the same patient, and adverse surgical outcomes for all neurosurgeons in the department for the past two years.

Concerned about the findings expressed in a statistical report prepared by the committee, Dr. Dogali, by letter dated January 4, 1995, placed Dr. Chambi on surgical supervision. Dr. Dogali also advised Dr. Philip DeSaia, president of the medical staff and

chairman of the UCI quality control committee, of the decision. Dr. Chambi was required to present his cases to one of three staff neurosurgeons — Drs. Dogali, Clarence Greene, and Kenneth Nudleman — at a weekly pre-surgical conference. At least one other surgeon had to approve the procedure before the operation could proceed. At the same time, Dr. Chambi was relieved of his teaching responsibilities and emergency room duties. A short time later, Dr. Dogali contacted the dean's office to determine his options with regard to Dr. Chambi. The response came in the form of a letter from a department administrator, dated January 12, 1995. Regarding the "best course of action for Dr. Chambi," the letter advised Dr. Dogali he could reduce Dr. Chambi's salary to \$44,892 and wait until his academic appointment expired on June 30; if his surgical privileges were withdrawn, he could be terminated; or if Dr. Chambi failed to follow instructions, he could be terminated for insubordination. The letter concluded with the somewhat cryptic statement: "I am sorry as I know this is not what you wish to hear."

The supervision program cut Dr. Chambi's surgical tally nearly in half. He performed 24 operations from January 1995 to mid-March, with a projected total of 120 for the year. Dr. Chambi had performed more than 400 operations in the preceding two-year period.

Around this same time, another issue was brewing. Dr. Chambi's compensation package changed in 1993. In addition to his base salary, he was to receive a percentage of his billings from private patients. In 1994, the Dean approved a \$40,000 bonus, payable when Dr. Chambi brought his clinical compensation plan contributions current. The dean later exempted Dr. Chambi from the university compensation program for the remainder of 1994.

On March 20, Dr. Chambi received notice to vacate his office by April 3, based on his failure to participate in the current version of the clinical compensation program. The new plan, effective January 1, 1995, required all professional fee income from faculty members to be deposited into a university account. Various billing fees and

taxes were deducted, and the dean retained discretion to disburse the remaining funds, usually back to the individual faculty member. There were no exceptions to this plan.

Although he was well aware his eligibility for a promised bonus was premised on his compliance with the terms of the compensation plan, Dr. Chambi never paid the sums he owed under the compensation plan. Per university guidelines, Dr. Dogali was required to reduce Dr. Chambi's salary and notify him to vacate his office at UCI. Because Dr. Chambi never made arrangements to vacate his office, the university moved his belongings, at its own expense, into storage on April 1. He received a list of the items removed from his office as well as their location. Dr. Chambi confronted Dr. Dogali about his patient charts. Dr. Dogali responded that they were "university property" and refused to return them. At Dr. Chambi's urging, the Dean ordered the charts released.

On March 27, Dr. Dogali sent Dr. Chambi a letter advising him his academic appointment would not be renewed on July 1, 1995. Appointments ran from July 1 to June 30. A decision not to renew was not the equivalent of a decision to terminate. The dean had the power to review a decision not to renew an appointment but did not exercise that power in this instance.

The Easter weekend arrived, but there was no salvation in sight. In fact, things would only get worse. On the evening of April 13, Guy Mason went to St. Jude's Hospital with a severe headache. The treating physician arranged for Mason to be transferred to UCI for tests and an evaluation by Dr. Chambi. Mason's wife, Helen, thought her husband was sent to UCI for testing only. Any surgery, if necessary, would be performed by Dr. Neil Martin at UCLA. Dr. Jennifer Mason, the patient's daughter, was a resident at UCI. When an angiogram revealed her father had an aneurysm, Dr. Mason arranged for his transfer to UCLA. Dr. Mason was no fan of Dr. Chambi's, and was well acquainted with his reputation amongst the residents.

Dr. Chambi resisted the transfer, and discussed the issue with the patient's family. In the end, they decided it was too risky to transfer Mason to UCLA and authorized

Dr. Chambi to proceed with the operation at UCI. Dr. Martin later testified the transfer to UCLA posed no risk to the patient before the initial surgery.

Dr. Chambi did not present the Mason case for approval before commencing surgery on April 14. During the procedure, Dr. Chambi saw two different aneurysms but clipped only one. Dr. Chambi later admitted he placed the clip in a different area than the one identified on a pre-operative angiogram.

Shortly after the operation, Dr. Chambi advised the Mason family the procedure was a success and the patient was on the road to recovery. He also told Mrs. Mason he had taken care of all the aneurysms and any problem requiring treatment.

Dr. Balousek expressed some concerns after the surgery was complete. He advised another neurosurgeon — either Dr. Weber or Dr. Greene — that the patient might have another aneurysm requiring surgical attention. When Dr. Dogali was informed of these events, he told Dr. Balousek to have Dr. Chambi do a second angiogram. Dr. Chambi refused. To make matters worse, the videotape of the operation could not be located. Dr. Dogali reviewed pre-operative x-rays, noting Dr. Chambi had not placed the clip where the aneurysms were indicated.

Dr. Chambi later admitted an angiogram was the only way to confirm the presence of a second aneurysm and he had refused Dr. Dogali's request to perform that test. Dr. Dogali called the Dean that evening and reported his concerns about the case, including the need to do a postoperative angiogram. Dr. Balousek also contacted the Dean and relayed Dr. Dogali's concerns.

Dr. Chambi stopped Balousek from ordering another angiogram. He informed Mrs. Mason he was the surgeon on the case and Balousek would have no further contact with the family.

Dr. Dogali eventually prevailed and a second angiogram was performed on Saturday, April 15. Reviewing the results, Dr. Dogali was convinced Dr. Chambi had not clipped the bleeding aneurysm. Dr. Chambi disagreed, insisting there was no need for any

further surgical intervention. Dr. Mason reviewed the results and sided with Dr. Dogali. She told Dr. Dogali her family wanted Dr. Martin to take over the case. Dr. Martin agreed to accept the patient at UCLA. At that time, Dr. Dogali learned Dr. Martin had been the family's first choice all along.

Dr. Chambi argued against the transfer, advising the Masons the procedure had gone well and there were no more aneurysms. He also told Dr. Dogali that he was an "expert" in the field, as good as Dr. Martin. Dr. Chambi also resisted Dr. Mason's efforts to transfer her father to UCLA, insisting he had resolved the medical problem.

Nurse Robin Meleny-Assad spoke to the patient and confirmed his consent to the transfer. An administrator advised her to contact security and have someone remove Dr. Chambi if he approached the Mason family in an agitated fashion. She also called Dr. Dogali and reported she had arranged the transfer. After further discussion, Dr. Chambi finally signed the transfer order. Emergency surgery on Sunday revealed the presence of an untreated and bleeding aneurysm.

Unfortunately for Dr. Chambi, more bad news was on its way. On April 14, Dr. Greene told Dr. Dogali that Dr. Chambi had scheduled a procedure (an endoscopic third ventriculostomy) on a three-year-old Vietnamese child with hydrocephalus. Greene felt Dr. Chambi lacked the experience necessary for the procedure (he had only performed it on one other occasion) and believed he had failed to present the case at the regularly scheduled surgical conference.

Dr. Dogali dispatched Dr. Greene to "handle" the situation. Greene initially decided to put the procedure on hold until he could examine the child. Things changed when Greene discovered the patient had already been anesthetized. Balancing the risks, Greene decided to allow the procedure to continue. There was some initial improvement, but the operation ultimately proved a failure.

Three days later, Dr. Dogali sent a letter to the UCI medical executive committee, requesting the suspension of Dr. Chambi's surgical privileges. The request was

based on Dr. Chambi's handling of the Easter weekend cases. In each case, Dr. Dogali thought Dr. Chambi's conduct was inappropriate and reflected poor judgment. As chair of the department of neurosurgery, Dr. Dogali was obligated to report any inappropriate surgery or problems to the committee. Dr. Dogali denied writing the letter to hasten Dr. Chambi's departure from UCI. By that time, he had already notified Dr. Chambi his academic appointment would not be renewed, based on his failure to participate in the compensation plan. He showed the document to the dean and UCI legal counsel before he brought it to the April 17 committee meeting. He did not discuss its contents with anyone outside the committee or his department. Nor was he motivated by any personal ill will or prospect of personal gain. Similarly, Dr. DiSaia denied that Dr. Dogali had evidenced any ill will toward Dr. Chambi or that he was a "rogue" doctor "out to get" Dr. Chambi. According to Dr. DiSaia, Dr. Dogali simply "did his duty" when he reported his concerns to the executive committee.

The medical executive committee — not Dr. Dogali — suspended Dr. Chambi's privileges within weeks, finding he provided treatment below the relevant standard of care. An ad hoc committee was appointed to conduct an investigation into the accusations, but its efforts were limited by its failure to interview several key witnesses (Drs. Balousek, Mason, and Greene, and Nurse Meleney-Assad, for example). Dr. Martin wrote a letter to the committee, at Dr. Chambi's request, stating Dr. Chambi's treatment of Mason did not fall below the relevant standard of care. But his remarks were based on what Dr. Chambi told him and what he observed at UCLA, nothing more. Dr. Chambi did not relate any of his conversations with the Mason family before or after the surgery or any other information about the patient's transfer to UCLA. As Dr. Martin later explained, this made it "difficult for [him] to judge anything beyond what I was told." Martin did not recall speaking to any member of the committee nor was he ever called to UCI to discuss the case.

Dr. Chambi testified Dr. Dogali's jealousy drove him to destroy Dr. Chambi's reputation. In fact, Dr. Chambi thought Dr. Dogali was "out to get" him. According to Dr. Chambi, Dr. Dogali coveted two cases that went to Dr. Chambi, including Mr. Mason. Dr. Chambi conceded he had no information, other than his own personal beliefs, to support that claim. In fact, the undisputed evidence showed Dr. Dogali never approached the Mason family about taking the case.

At the close of testimony, the trial court directed a partial verdict for Dr. Dogali on his defamation and intentional infliction of emotional distress claims. The court found any statements or remarks Dr. Dogali made during the UCI peer review process were absolutely privileged under Government Code section 821.6 and Civil Code section 47, subdivision (b). The court also concluded the privileges did *not* apply to two letters Dr. Dogali wrote *after* Dr. Chambi's privileges were reinstated by the executive committee.

The jurors deliberated for two hours and returned a defense verdict on the remaining portion of the case. Dr. Chambi appeals only from the order granting the partial directed verdict.

I

Dr. Chambi first challenges the order granting the directed verdict on a purely legal point, claiming the immunity provided by Government Code section 821.6 is limited to malicious prosecution actions. We see it differently.

Preliminarily, Dr. Dogali argues Dr. Chambi never raised this argument below. But our review of the record reveals that Dr. Chambi's counsel, during argument on the motion for a directed verdict, argued section 821.6 "arises in the malicious prosecution area, and this is not a malicious prosecution case." Alternatively, he argued there was evidence to show Dr. Dogali's statements were made "outside the scope" of his employment and the issue should go to the jury. Accordingly, we find the argument has not been waived. (*Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767; *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.)

We turn next to the merits, but reach the same conclusion as the trial court. In arguing Government Code section 821.6 is limited to malicious prosecution, Dr. Chambi relies heavily on *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, but tries to extract too much from it. We thought this issue was settled some time ago, in *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278 (*Jenkins*). In *Jenkins*, we explained this argument is based on “too broad an interpretation of *Sullivan* which limited its holding and discussion to the lack of immunity for false imprisonment. . . . [¶] Other courts have also recognized section 821.6 is not limited to only malicious prosecution actions. In *Citizens Capital Corp. v. Spohn* (1982) 133 Cal.App.3d 887 [*Citizens Capital*], the court determined section 821.6 provided immunity to government officials who published charges of improper collection methods against plaintiff. In *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491 [*Kayfetz*], the state was sued for publishing a disciplinary action against plaintiff. The court acknowledged the ‘publication was authorized as part of the statutory scheme and was clearly “within the scope of [defendant’s] employment,” within the meaning of section 821.6.’ [Citation.] ‘[S]ection 821.6 is not limited to suits for damages for malicious prosecution, although that is a principal use of the statute. [Citations.]’” (*Id.* at p. 283.)

Dr. Chambi argues *Citizens Capital* and *Kayfetz* were wrongly decided. But all the cases dealing with the subject have arrived at the same conclusion — the immunity provided by section 821.6 is *not limited* to the tort of malicious prosecution. (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205; 1211; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407; *Cappuccio, Inc. v. Harmon* (1989) 208 Cal.App.3d 1496.) Dr. Chambi does not cite, nor has our independent research revealed, any recent authority to support his position.

In short, Dr. Chambi concedes the weight of authority is against him but fails to offer any persuasive reason to disregard that weight. We can find no grounds for reversal on this point.

II

In a related argument, Dr. Chambi complains he was entitled to have the jury decide whether Dr. Dogali's acts were within the "scope of his employment." He claims he presented sufficient evidence that Dr. Dogali was acting for personal gain to take the case to the jury on this issue. The trial court reached a different conclusion, and so do we.

We begin with the appropriate standard of review: "On appeal from a judgment on a directed verdict, appellate courts view the evidence in the light *most favorable to appellant*. All conflicts must be resolved and inferences drawn in appellant's favor; and the judgment will be reversed if there was substantial evidence . . . tending to prove all elements of appellant's case." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1997) ¶8:138, p. 8-74 (rev. # 1, 2001).) Accordingly, we must reverse if we find substantial evidence supports Dr. Chambi's theory that Dr. Dogali's statements were made solely for his personal gain.

Dr. Chambi concedes that Dr. Dogali, as chair of the department of neurosurgery and a member of the medical executive committee, was charged with the responsibility for "continuing evaluation, review and reporting of clinical work for the purpose of insuring quality of patient care" and the alleged defamatory statements "appear to be within the scope of [Dr. Dogali's] employment to evaluate and report on physicians concerning the quality of patient care." However, he contends he offered evidence sufficient for a jury to conclude that Dr. Dogali's "inflammatory" statements "were made *solely* because [Dr.] Dogali wanted to . . . rid himself of Dr. Chambi before his appointment was up on June 30 because he didn't like the way [Dr.] Chambi challenged his authority on signing the new compensation plan." (Italics added.) He says the entire incident was nothing more than a "a power dispute" between the two men.

The problem with this contention is that the evidence in the record does not support it. The undisputed testimony revealed Dr. Dogali's remarks were made in a peer review meeting. As the dean of the medical school confirmed, the discussions at that

meeting were confidential, to facilitate the participation of physicians in the process. Such confidentiality was required “to allow one doctor to express his true feelings about another doctor” without the threat of a lawsuit.

As the trial judge noted, “[T]here is no conflicting evidence which would take Dr. Dogali’s conduct outside of the scope of his employment. [¶] . . . [¶] In this case, the evidence is clear, in the court’s mind, that everything Dr. Dogali did was done in his capacity as Chairman of the Department of Neurosurgery. Counsel has suggested that he was acting out of personal gain because he could not achieve the signature of Dr. Chambi on the new contract for the formation of the [new compensation plan], but that’s not personal gain. He was trying to advance a job he felt he had to do as Chairman of the Department of Neurosurgery. [¶] Whether he was right or wrong, that was within the course and scope of his employment. And accordingly, on the face of the statute, even if Dr. Dogali was acting maliciously and without probable cause in bringing that letter to the Executive Committee, he is absolutely immune from any liability for that act.”

Once we put aside speculation and personal beliefs, there is nothing to support the notion that Dr. Dogali’s statements regarding Dr. Chambi’s surgical skills were made as part of any malevolent scheme or for personal gain. The key piece of evidence on this point — exhibit 27, the letter explaining Dr. Dogali’s options regarding Dr. Chambi — is not the smoking gun Dr. Chambi thinks it is. That Dr. Dogali asked for a list of his legal options, after Dr. Chambi failed to comply with the requirements of the university mandated compensation program, was poor proof that he was acting outside the course and scope of his employment as chairman of the department of neurosurgery. If anything, it tends to show the opposite was true. (See Rest. 2d (Agency), § 228 [“Conduct of a servant is within the scope of employment if . . . [¶] . . . [¶] (c) it is actuated, *at least in part*, by a purpose to serve the master.” (Italics added.)].) The order granting the directed verdict was proper.

III

In any event — and as if the preceding discussion were not enough — the Civil Code section 47, subdivision (b) privilege also immunized Dr. Dogali from any liability for the statements he made during the peer review process.¹ It is well settled a hospital hearing regarding staff privileges is a quasi-judicial proceeding, and statements made at such hearings are absolutely privileged. (*Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 866-867.)

Alternatively, Civil Code section 43.8 provided Dr. Dogali a complete defense to this action. That statute affords civil immunity to any person who communicates information “intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing or veterinary arts.” We note the statute was amended in 1990 as part of a “comprehensive reform of this state’s system of discipline against medical practitioners.” (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568.) As amended, the immunity conferred by the statute is “absolute rather than conditional.” (*Id.* at p. 1569.) Thus, there is no support for the notion that the immunity does not apply to individuals who “‘knowingly [provide] false or malicious information.’” (*Ibid.*)

Dr. Chambi’s position, if adopted, would seriously undermine the peer review process. The public policy underlying Business and Professions Code section 809 is to ensure that health care professionals, *not lay jurors*, make key determinations concerning competency to practice medicine. (See *California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1484 [“The disincentive to full and frank participation in committee activities is much greater from the threat of disclosure in damage actions of any type than in mandate proceedings where the worst that can happen is the reversal of the hospital’s staff

¹ The statute provides, in pertinent part: “A privileged publication or broadcast is one made: . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law”

privileges decision.”].) In short, the time has come for Dr. Chambi to take his medicine, and accept the trial court’s remedy for his actions.

The judgment is affirmed. Respondent shall recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.