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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IVY CONTRERAS, a Minor, etc., et al., Plaintiffs and Appellants, v. CHILDRENS HOSPITAL OF LOS ANGELES, Defendant and Respondent.	B156810 (Los Angeles County Super. Ct. No. BC243789)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed.

Law Offices of Michels & Watkins, Philip Michels, Steven B. Stevens for Plaintiffs and Appellants.

Cassel Malm Fagundes, Joseph H. Fagundes, Mikki M. Riella; Moore, Winter, Skebba & McLennan, Laura C. McLennan for Defendant and Respondent.

A child was severely injured during routine dental treatment after being improperly intubated by the anesthesiologist. The child and her parents sued the Childrens Hospital of Los Angeles for malpractice. The trial court granted summary judgment to the hospital. We affirm because the child's mother signed a pre-treatment admission document acknowledging that the doctors are not employees or agents of the hospital. As a result, appellants had actual notice of the independent contractor relation between the hospital and the doctors, and they cannot successfully argue that the doctors were ostensible agents of the hospital.

FACTS

On August 21, 2000, appellant Maria Mayorquin brought her daughter Ivy Contreras to a dental clinic for treatment.[1] The dental clinic was recommended to Mayorquin by nurses at respondent Childrens Hospital of Los Angeles (the Hospital). The people at the dental clinic wear name tags that say "Childrens Hospital"; however, the doctors actually work for a private medical group with no corporate relationship to the Hospital. Mayorquin assumed that the staff --including the anesthesiologist-- worked for the Hospital. No one advised her that she could select an anesthesiologist for Ivy.

As Ivy's mother and guardian, Mayorquin signed a document entitled "Conditions of Admission" (the Admission Document) before Ivy received treatment. Paragraph 3 of the Admission Document reads as follows: "LEGAL RELATION BETWEEN HOSPITAL AND DOCTOR. All physicians and surgeons rendering services to the patient, including the pathologist, radiologist, anesthesiologist and the like, are independent contractors and they are not employees, agents or servants of the hospital. The patient is under the care and supervision of his attending physician and it is the responsibility of the hospital and of the nursing staff of said hospital to implement the instructions of this doctor. . . ."

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[1] The parties state that Ivy suffers from a congenital illness, though there is no evidence in our record addressing her condition.

During Ivy's treatment, disaster struck. As stated in appellants' answers to interrogatories, there was a "[f]ailure to properly intubate" on the part of the anesthesiologist. As a result, Ivy suffered severe injury.

Ivy and her parents filed suit for malpractice against the Hospital; the University Childrens Medical Group; dentist Randall Neiderkohrn; and anesthesiologist Mashallah Goodarzi.[2] The complaint alleges that each of the defendants is the agent, alter ego, servant, joint venturer or employee of the other defendants, and that they rendered negligent treatment. The negligent treatment caused severe injury to Ivy, including brain damage.

The Hospital pursued a motion for summary judgment, arguing that the care it rendered to Ivy met the standards practiced in the community at all times, that it did nothing to contribute to Ivy's injuries, and that there is no agency relationship between the Hospital and Ivy's physicians. Further, the Hospital argued that appellants never raised the theory of ostensible agency in their pleading or in their answers to interrogatories.

The Hospital's motion was supported by the declaration of a board certified pediatrician/anesthesiologist, who opined that the Hospital met the standards of care for the community and that responsibility for administering anesthesia fell to the attending anesthesiologist, not to nursing staff members or medical residents. The Hospital's vice president and general counsel declared that the Hospital "does not employ any physicians or surgeons to practice medicine." He denied that doctors Neiderkohrn or Goodarzi are Hospital employees: they work for a private medical group with no corporate relationship to the Hospital.

In opposition, appellants argued that the Hospital is vicariously liable for the doctors' negligence because they were acting as the Hospital's actual or ostensible

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[2] The Hospital is the only defendant who is a party to this appeal.

agents. Appellants also argued that the Admission Document is an unauthenticated, unconscionable, adhesive contract.

THE TRIAL COURT'S RULING

The trial court granted the Hospital's motion for summary judgment. It determined that there are no triable issues of material fact in that: the Hospital acted within the standard of care; the Hospital did not cause Ivy's injuries; and there is no actual or ostensible agency relationship between the Hospital and any of Ivy's attending physicians. Judgment was entered in favor of the Hospital on January 24, 2002. Appellants filed a timely appeal from the judgment.

DISCUSSION

The judgment is appealable. (Code Civ. Proc., § 437c., subd. (*l*).) Review is de novo. (*Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040, 1044.)

1. Effect of the Admission Document

The Admission Document advises clients that the physicians at the dental clinic are independent contractors, not employees, agent or servants of the Hospital. Appellants raise a number of objections to the Admission Document.

a. Authenticity

Appellants argue that the Admission Document is inadmissible because it is not authenticated. (Evid. Code, § 403, subd. (a)(3).) Properly authenticated hospital and medical records are admissible as business records. (*People v. Diaz* (1992) 3 Cal.4th 495, 535; *People v. Moore* (1970) 5 Cal.App.3d 486, 492-493; *In re Troy D.* (1989) 215 Cal.App.3d 889, 902.) The nurse, doctor or other person making the record need not be called as a witness to establish a business record's admissibility. (*People v. Blagg* (1968) 267 Cal.App.2d 598, 609.) The trial court has wide discretion to determine the admissibility of medical records. (*In re Troy D., supra,* 215 Cal.App.3d at p. 902.)

The medical records in this case are accompanied by a declaration from the custodian of records. The Hospital contends that the genuineness of the signature on the Admission Document may be resolved by comparing Mayorquin's signature on her

declaration in support of the motion for summary judgment against Mayorquin's signature on the Admission Document. A trier of fact may decide the genuineness of handwriting.[3] A declaration signed under penalty of perjury is a reliable handwriting exemplar. And, indeed, the signatures on the two writings appear to be the same.

Tellingly, Mayorquin does not declare that she never signed the Admission Document. Nor, for that matter, do appellants deny that the Admission Document contained in our record bears Mayorquin's signature. Given the similarity of the signatures, the circumstances under which the document was produced as a business record, and the notable lack of any argument denying the authenticity of the Admission Document, we see no impediment to using it.

b. Ambiguity

Appellants contend that the Admission Document is confusing, ambiguous and unintelligible. Specifically, they maintain that that the phrase "[a]ll physicians and surgeons rendering services to the patient . . ." does not cover dentists. According to appellants, a dentist is not a physician.[4]

A contract is interpreted in a way that will make it lawful, operative, definite, reasonable, and capable of being carried into effect. (Civ. Code, § 1643.) Ambiguities in standard form contracts are construed against the drafter. (Civ. Code, § 1654; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739.) The words of a contract are generally interpreted in their ordinary and popular sense. (Civ. Code, § 1644; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 931.)

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[3] Evidence Code section 1417 states, "The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court."

[4] Appellants implicitly concede that the anesthesiologist, Dr. Goodarzi, is a physician. At any rate, the contractual clause being challenged expressly lists anesthesiologists as doctors who are not Hospital employees.

In its broadest sense, the term "physician" includes anyone exerting a remedial or salutary influence. (*United States v. 22 Devices, etc.* (S.D.Cal. 1951) 98 F.Supp. 914, 917.) Any practitioner of the healing arts may be considered a "physician," depending on the context in which the term is used. (57 Ops.Atty.Gen. 79, 80 (1974).)[5] The dictionary defines a physician as "a person skilled in the art of healing: one duly authorized to treat disease . . . ." (Webster's 3d Internat. Dict. (1981) p. 1707.) State law recognizes that a dentist falls within the realm of "physicians."[6] Thus, a dentist --who exerts a remedial influence and works in the healing arts-- does indeed qualify as a physician.

The context in which the Admission Document was signed is relevant. Mayorquin signed the document on May 21, 2000, the day Ivy received treatment. In this context, it is clear that the "legal relation between doctor and hospital" clause in the Admission Document refers to the doctors rendering medical services that day, including doctors Neiderkohrn and Goodarzi. Under the circumstances, paragraph 3 of the Admission Document is not confusing, ambiguous or unintelligible.

c. Violation of Civil Code section 1668

Appellants assert that the Hospital is using the Admission Document to exculpate itself from liability that would ordinarily be imposed. A contract cannot exempt any person from responsibility for his fraud or willful injury to another. (Civ. Code, § 1668.)

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5 "'The term licensed physician would include, in its broader sense, any licensed person engaged in the healing arts. (Webster's New Twentieth Century Unabridged Dictionary, Second Edition, Cleveland and New York 1960, p. 1353). It would specifically include physicians and surgeons licensed by the Board of Medical Examiners, podiatrists licensed by the Board of Medical Examiners, physicians and surgeons licensed by the Board of Osteopathic Examiners, and dentists licensed by the Board of Dental Examiners.'" (79 Ops. Atty. Gen., *supra,* at p. 81.)

6 Labor Code section 3209.3 states, "(a) 'Physician' includes physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law."

A contract may, however, release one from liability for ordinary negligence unless the public interest is involved or a statute expressly forbids it. (*Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74.)

We fail to see how the Admission Document operates as an exemption from all liability. It clarifies that the physicians rendering services to the patient are independent contractors, not employees.[7] Paragraph 3 of the Admission Document does not fall within the ambit of Civil Code section 1668 because it contains no exculpatory language. Further, the complaint does not allege "willful injury," only ordinary negligence.

Appellants rely on a Supreme Court case for the proposition that hospitals cannot impose exculpatory clauses as a condition of admission. In *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, the plaintiff, while in pain and under sedation, sought treatment at the UCLA medical center. He was compelled to sign a document that purported to release the medical center "'from any and all liability for the negligent or wrongful acts or omissions of its employees . . . .'" (60 Cal.2d at p. 94.) The court found that the exculpatory clause was part of a contract of adhesion and against public interest. (*Id*. at pp. 101-102.)

The *Tunkl* case is inapposite. In *Tunkl*, the medical center denied responsibility for the acts of its employees. Here, the Hospital is denying that the physicians are its employees, agents, or servants. The Hospital's Admission Document does not require the patient to relinquish the right to sue in order to receive treatment; it is not a release of liability. The Admission Document clarifies that the patient is under the care of the attending physicians, who render services to the patient as independent contractors.

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[7] State law has long provided that corporations cannot practice medicine. (Bus. & Prof. Code, § 2400.) To avoid running afoul of this prohibition, hospitals are generally limited to using doctors who are independent contractors, not employees. (Health & Saf. Code, § 32129; *Conrad v. Medical Bd. of California* (1996) 48 Cal.App.4th 1038, 1042-1044, 1049.)

d. *Unconscionability*

Appellants contend that the Admission Document is procedurally unconscionable. A contract is procedurally unconscionable if (1) it is oppressive, meaning that it "arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice'" or (2) it causes surprise, meaning that a term is "hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486; *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 723.) Unconscionability is a question of law. (Civ. Code, § 1670.5, subd. (a).)

Though the Admission Document is a standardized preprinted form, the elements of oppression and surprise are absent. Mayorquin was not in a "take it or leave it" situation. (Compare *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 818-819: a concert promoter "was required by the realities of his business" to sign a form contract "with *any* concert artist with whom he wished to do business . . . .") Mayorquin could choose to reject the Admission Document by taking her business to another dentist. The only reason Mayorquin gives for choosing this particular clinic is convenience -- the easy availability of Ivy's medical records. This does not mean that Mayorquin had to accept the Admission Document or go without dental treatment for Ivy. The Hospital has not cornered the dental services market, to the exclusion of other meaningful choices for routine procedures. The clause entitled "Legal Relation Between Hospital and Doctor" is not hidden in a prolix document. It is the third paragraph in a two-page agreement.

In short, paragraph 3 of the Admission Document falls short of being a contractual term that is so unfair and unreasonable as to "shock the conscience." (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1055; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 689; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)

2. Theory of Ostensible Agency

Appellants seek to recover on a theory that the dentist and the anesthesiologist are the ostensible agents of the Hospital, making the Hospital vicariously liable for the

negligent acts of its agents. Appellants' complaint alleges that each of the defendants is the agent of the other defendants.

a. Adequacy of the Pleading

The Hospital contends that appellants' theory cannot succeed because ostensible agency is a form of equitable estoppel that must be pleaded with specificity. (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761.) Even assuming that appellants' pleading lacks the requisite specificity, we are not delayed by this contention: the complaint can always be amended to plead a theory of recovery with greater specificity.

b. Viability of Ostensible Agency Theory

An ostensible agency arises when a principal intentionally or negligently causes a third person to believe another is his agent, though the person is not really his employee. (Civ. Code, §§ 2300, 2317.) Although the existence of an agency relationship is usually a question of fact, it "becomes a question of law when the facts can be viewed in only one way." (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 658.)

There are two elements to the doctrine of ostensible agency in cases where a patient is seeking to impose liability on a hospital. First, there must be conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital. This element is satisfied when the hospital holds itself out to the public as the provider of care, unless it gave the patient contrary notice. (*Meija v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453-1454.)[8] In this instance, the Admission Document gave notice that the patient "is under the care and supervision of his attending physician," not under the Hospital's care.

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8 Appellants rely heavily on the opinion in *Mejia, supra*, 99 Cal.App.4th 1448. We accept the analysis in *Mejia* for the purpose of our discussion of ostensible agency, the issue appellants have raised. Our acceptance of the opinion in *Mejia* for this purpose does not mean we endorse or generally accept the opinion in *Mejia*.

Second, the plaintiff must rely on the apparent agency relationship. The patient is deemed to know that a physician is not an agent of a hospital if the hospital gives the patient actual notice, or if the patient is treated in the hospital by his personal physician. (*Meija v. Community Hospital of San Bernardino, supra,* 99 Cal.App.4th at pp. 1453-1454.) The issue of ostensible agency is left to the trier of fact "[u]nless the evidence conclusively indicates that the patient should have know that the treating physician was not the hospital's agent . . . ." (*Id*. at p. 1458.)

In this case, the evidence conclusively indicates that Mayorquin received actual notice that the treating doctors are not the Hospital's agents. Mayorquin signed the Admission Document, which expressly states that the doctors "are independent contractors and they are not employees, agents or servants of the hospital." As discussed above, this clause is unambiguous. While appellants argue strenuously that the Hospital "selected" and "assigned" doctors Niederkohrn and Goodarzi to Ivy, there is no evidence at all in the record that the Hospital plays any role in selecting and assigning doctors. It is just as likely that the Hospital has contracted with a medical group, which in its turn, hires its own doctors and assigns patients to the doctors.

The cases cited by appellants are distinguishable. In none of the cited cases did the plaintiff sign a document expressly acknowledging receipt of actual notice that the attending physicians are independent contractors, not agents. There are other factual distinctions as well. In *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 166-167, the negligent anesthesiologist was the acting administrator of the defendant hospital and a member of its board of directors, giving rise to a question whether, as a staff member, he was the hospital's ostensible agent. In *Seneris v. Haas* (1955) 45 Cal.2d 811, the negligent doctor was one of six anesthesiologists on the staff of the defendant hospital. The evidence in *Seneris* failed to show that the plaintiff had notice that the anesthesiologist was not an employee, nor was the plaintiff obliged to inquire whether each person at the hospital was an independent contractor. (*Id*. at p. 832.) Likewise, the plaintiff with a broken back in *Stanhope v. L.A. Coll. of Chiropractic* (1942) 54 Cal.App.2d 141, 146, had no notice of the nature of the relationship between the

defendant and an X-ray laboratory, nor was he required to ask if the doctors were independent contractors as he was being carried from room to room in excruciating pain.

Given that there is an express, pre-treatment agreement on the subject of the Hospital's relation to the doctors, it cannot be argued that there is an implied contract embracing the same subject, but compelling different results. (See *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1387.) Appellants cannot have relied on any apparent agency after signing their consent to an express clause denying the existence of an agency relationship. Nor can it be argued that Mayorquin did not read or understand the Admission Document: in the absence of fraud and imposition, a party is bound by contract provisions and is estopped from complaining that the terms are unfamiliar or contrary to his intentions or understanding. (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 303; *Williams v. California Physicians' Service* (1999) 72 Cal.App.4th 722, 739.) Appellants' theory of ostensible agency is defeated by their consent to the statement in the Admission Document that the treating doctors are not employees or agents of the Hospital.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

NOTT, J.

ASHMANN-GERST, J.