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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ST. VINCENT MEDICAL CENTER,

Petitioner,

v.

LOS ANGELES COUNTY
SUPERIOR COURT,

Respondent;

ERMA GILL-BROWN,

Real Party in Interest.

B158714

(Los Angeles County
Super. Ct. No. BC252633)

ORIGINAL PROCEEDING, Barbara A. Meiers, Judge. Writ granted.

Lewis, D'Amato, Brisbois & Bisgaard and John J. Weber for Petitioner.

No appearance for Respondent.

Haney, Buchanan & Patterson, Steven H. Haney and Bruce T. McIntosh for Real
Party In Interest.

* * * * *

Petitioner, St. Vincent Medical Center (St. Vincent), seeks a writ of mandate directing the superior court to set aside its order granting real party Erma Gil-Brown's Code of Civil Procedure section 425.13¹ motion to amend her complaint to allege punitive damages. St. Vincent contends the court erred in permitting the amendment. We agree, and grant St. Vincent's petition for writ of mandate.

I. FACTUAL AND PROCEDURAL BACKGROUND

After undergoing a kidney transplant operation at St. Vincent, Brown sued her three treating physicians, Doctors Umakant Khetan, Rafael G. Mendez and Paul M. Asai, their company, Urological Consultants Medical Group, Inc., and St. Vincent² for professional negligence.

Brown alleged she suffered from hypertension and renal (kidney) failure and sought medical care from Khetan, Asai and Mendez. She was placed on a waiting list at St. Vincent, and on October 28, 1998, underwent transplant surgery. The donor kidney came from a 65-year-old donor who died from head injury. Prior to the surgery, Brown's blood was tested and she did not have hepatitis B. The donor kidney was also tested prior to the transplant surgery by "St. Vincent's medical staff, and specifically, . . . Asai, who reported the findings to . . . Khetan." The donor kidney tested by Asai "tested positive for hepatitis B core antibody."

Prior to the transplant surgery, St. Vincent and the other defendants "knew and did not disclose to [Brown] that the donor kidney had tested positive for hepatitis B, and did not seek or get [Brown's] informed consent to remove her kidney and replace it with the donor kidney that tested positive for hepatitis B." Brown "underwent the cadaveric kidney transplant, with the donor kidney containing hepatitis B without being first told that the

¹ All further statutory references are to the Code of Civil Procedure unless otherwise noted.

² St. Vincent is identified in the original and amended complaint as "a public medical facility licensed by and doing business in Los Angeles County and was the provider of the facility and protocol for the cadaveric kidney transplant received by [Brown]."

donor kidney had hepatitis B, or that there was a risk she could contract the disease from the donor kidney.” Brown would not have consented to the surgery had she been informed that the donor kidney had previously tested positive for hepatitis B.

Following the transplant surgery, Brown continued to seek medical care and treatment from St. Vincent and the other defendants. Although they treated her, they “failed to diagnose the hepatitis B, or inform her that the donor kidney had tested positive for hepatitis B.” Although she “had be[come] symptomatic for hepatitis B, [they] failed to inform her, or [diagnose] her as having hepatitis B. Instead, [they] misrepresented to [her] that her symptoms were a result of the transplant surgery itself, and that the symptoms were a natural result of her body accepting the donor kidney. [They] further assured [Brown] that her symptoms would [subside] with time as a result of the healing process.” When Brown expressed her concern about the possible cause of her symptoms, Khetan did not disclose that she had gotten hepatitis B from the donor kidney.

In August 2000, Brown became very ill and went to a hospital emergency room for treatment. Thereafter, she received a call from the Los Angeles County Department of Health and was advised that she had tested positive for hepatitis B. She requested medical assistance from St. Vincent, and was assigned a liver specialist who confirmed that she had hepatitis B and that she had contracted the disease from the kidney transplant. She then confronted St. Vincent and the other defendants. “Instead of admitting to, and informing, [Brown] that she was introduced to the hepatitis B virus through the transplant, [they] falsely and maliciously told [Brown] that she must have [contracted] the disease through sexual intercourse with her husband.” Afterwards, Khetan, Brown’s transplant surgeon, refused to see Brown or answer her questions, and thereafter canceled appointments Brown made to see him. The misrepresentations to Brown “regarding the source of the hepatitis B, caused [her] and her husband to suffer serious marital strife until [her] husband subsequently tested negative for hepatitis B.”

In March 2002, Brown filed a motion pursuant to section 425.13 for leave to file a first amended complaint to add new causes of action³ and a claim for punitive damages. Added to the allegations set forth above was the claim that St. Vincent and the other defendants had altered her “medical records in an attempt to conceal that the donor kidney had tested positive for hepatitis B prior to the transplant surgery.” Brown asserted that she discovered the alteration after receiving copies of her medical records. According to Brown, “[a] comparison of the copies provided to [her] by [St. Vincent and the other defendants] in 1999 of the original records produced by subpoena reveals that the reference in the copy of the ‘History of Present Illness’ section of the ‘General History and Physical Examination,’ that the donor’s kidney was hepatitis B Core antibody positive, was redacted. However, the ‘Operative Report Findings’ section states the kidney was hepatitis B Core antibody positive.” The only evidence submitted in support of Brown’s section 425.13 motion was the declaration of Brown’s attorney and Brown’s declaration, attached to which were copies of her medical records.

In opposition to Brown’s motion, St. Vincent submitted the declaration of Adrienne Beauvoi, St. Vincent’s director of health information, department of medical records. Attached to her declaration was a copy of a two-page document entitled “General History and Physical Examination” relating to Brown, prepared by Dr. D. Julka, dictated October 30, 1998, and transcribed October 30, 1998. This is the document Brown claims was altered. Beauvoi stated, “On the first page, under ‘History of Present Illness’ in the second paragraph, the following appears: ‘HCV positive, _____ positive antibody, other antigens and antibodies are negative.’ The blank space between ‘HCV positive’ and ‘positive antibody’ has been there since the date that the document was transcribed. The document has not been modified or altered since the date of transcription. It is not unusual for dictated medical records to contain a blank such as in this case. In most cases, it

³ Brown sought leave to amend her complaint to set forth causes of action for battery, fraud and conspiracy to defraud, negligent misrepresentation, intentional infliction of emotional distress and negligent infliction of emotional distress.

indicates that the transcriber did not understand the dictation. The document has been in the medical records for [Brown] since the date it was transcribed, October 30, 1998.”

Also attached to Beauvoi’s declaration is a copy of a three-page document entitled “Operative Report” which was prepared by Khetan, dictated October 28, 1998, and transcribed November 6, 1998. According to Beauvoi, “[t]he document has been in the medical records for [Brown] since the date it was transcribed, November 6, 1998.”

The trial court granted Brown’s motion for leave to amend to add a claim for punitive damages, and St. Vincent⁴ filed this petition for writ of mandate.⁵

II. CONTENTIONS

St. Vincent contends the evidence presented by Brown in support of her section 425.13 motion did not support her claim for punitive damages against St. Vincent.

III. DISCUSSION

A. Section 425.13, subdivision (a)

Section 425.13, subdivision (a) provides: “In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits

⁴ At about the same time, Khetan, Asai, Mendez and their company, Urological Consultants Medical Group, Inc., filed a petition for writ of mandate. It was summarily denied.

⁵ Brown did not file opposition to St. Vincent’s petition for writ of mandate. Instead, she filed a motion to dismiss, contending that the petition is moot because she has now filed an amended complaint. We have reviewed the amended complaint. It reveals that Brown continues to assert a claim for punitive damages. In other words, the trial court’s order granting Brown’s section 425.13 motion remains in effect. This being so, we conclude this petition for writ of mandate is not moot. Accordingly, Brown’s motion to dismiss has been denied.

presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code.”

B. Standards under Section 425.13

A court may grant a section 425.13 motion if “the plaintiff has established that there is a substantial probability that the plaintiff will prevail on a claim pursuant to Section 3294 of the Civil Code.” (§ 425.13, subd. (a).) To show a substantial probability, the plaintiff must substantiate the proposed punitive damages claim with admissible evidence similar to the showing made on a summary judgment. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) A section 425.13 motion “operates like a demurrer or motion for summary judgment ‘in reverse’ . . . ; the motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim that is ‘substantiated,’ that is, supported by competent, admissible evidence.” (*Id.* at p. 719.) “Consistent with the legislative intent to protect health care defendants from the drastic effects of unwarranted punitive damages claims, the entire package of materials submitted in support of the section 425.13(a) motion should be carefully reviewed to ensure that a genuine contestable claim is indeed proposed.” (*Id.* at p. 720.) Because the issue concerns the sufficiency of the evidence to support a punitive damage award, a reviewing court is governed by a de novo standard of review. (*Id.* at pp. 721-722.)

C. Analysis

Applying an independent review standard and viewing the evidence in the light most favorable to Brown, we conclude Brown did not satisfy the requirements of section 425.13, subdivision (a) to show a reasonable trier of fact could find St. Vincent liable for punitive damages under Civil Code section 3294.

Civil Code section 3294 requires a plaintiff to establish by clear and convincing evidence “that the defendant has been guilty of oppression, fraud, or malice” (Civ. Code, § 3294, subd. (a).) An employer is not liable for the acts of an employee unless the “employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the

wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice.” (Civ. Code, § 3294, subd. (b).) Where, as here, the employer is a corporation, “the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.” (*Ibid.*)

To show fraud sufficient to support a claim for punitive damages, a plaintiff must present evidence showing “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” (Civ. Code, § 3294, subd. (c)(3).)

The only evidence presented by Brown in support of her contention that she is entitled to assert a punitive damages claim against St. Vincent is set forth in the declaration attached to her section 425.13 motion. The declaration is revealing. It shows that she differentiates between “Defendants” and “St. Vincent.” “Defendants” are “Defendants Dr. Khetan, Dr. Asai and Dr. Mendez who work for Urological Consultants Medical Group, Inc.” “St. Vincent” is “St. Vincent Medical Center.” Accordingly, in Brown’s declaration, “Defendants” does not include St. Vincent.

Brown avers that Khetan, Asai, Mendez and Urological Consultants Medical Group, Inc., not St. Vincent, provided her with medical care and treatment. She was placed on a waiting list at St. Vincent. In October 1998, she was informed that a kidney was available and that she was a candidate. She does not state who informed her that the kidney was available or who informed her that she was a candidate. Prior to surgery, she tested negative for hepatitis B. Dr. Asai tested the donor kidney, and it tested positive for hepatitis B core antibody. The test results on the donor kidney were disclosed to Khetan, Mendez and “other St. Vincent medical providers and staff,” but not disclosed to Brown. Brown does not disclose the names of the “other St. Vincent medical providers and staff.” Prior to surgery, Khetan, Asai, Mendez and Urological Consultants Medical Group, Inc., not St. Vincent, failed to obtain Brown’s informed consent to remove her kidney and replace it with a donor

kidney that tested positive for hepatitis B. Following the surgery, Brown continued to seek medical care and treatment from Khetan, Asai, Mendez and Urological Consultants Medical Group, Inc. These same defendants failed to diagnose her with hepatitis B. Nor did they inform her that she had hepatitis B. In fact, they represented to her that the symptoms were related to the surgery, that the symptoms were the natural result of the surgery, and that the symptoms would diminish over time. When she expressed concerns about her symptoms, Khetan denied that she had contracted hepatitis B from the donor kidney. She learned she had contracted hepatitis B following an emergency room visit on August 13, 2000, and thereafter contacted St. Vincent. She was referred to a liver specialist who confirmed the hepatitis B diagnosis and who told her she had contracted hepatitis B as a result of the kidney transplant. Brown then confronted Khetan, Asai, Mendez and Urological Consultants Medical Group, Inc. with the liver specialist's findings and was told that she must have contracted the disease through sexual intercourse with her husband. When Brown's husband tested negative for hepatitis B, Brown again confronted Khetan, Asai, Mendez and Urological Consultants Medical Group, Inc. Khetan refused to see her and refused to answer her questions and canceled her appointments.

As to her alteration of medical records claim, Brown declares that Khetan, Asai, Mendez and Urological Consultants Medical Group, Inc. altered her medical records to conceal that the donor kidney had tested positive for hepatitis B prior to the surgery, concealed the fact that they knew the donor kidney had tested positive, failed to inform Brown of that fact, and failed to obtain her informed consent prior to surgery.

Although unclear, it appears Brown's only claim against St. Vincent is that St. Vincent intentionally altered a medical record *after* the transplant occurred in order to conceal from Brown that the donor kidney had tested positive for hepatitis B.

Even when viewing the record in the light most favorable to Brown, there is no evidence that St. Vincent is guilty of altering a medical record in order to conceal from Brown that the donor kidney had tested positive for hepatitis B. The only evidence presented by Brown in support of her section 425.13 motion is set forth in her declaration.

With respect to her claim of alteration of the medical records, Brown claims that there is a redaction on page one of a two-page document entitled “General History and Physical Examination” dictated by Dr. D. Julka on October 30, 1998, and transcribed on that date. The entry reads: “Her donor is a B+ 53-year-old male who died of intracranial hemorrhage. HCV positive, _____ positive antibody, other antigens and antibodies are negative.” The space between “HCV positive,” and “positive antibody” is in the medical records as maintained at St. Vincent.

As noted above, Adrienne Beauvoi, a St. Vincent employee, declared in support of St. Vincent’s opposition, “There is simply a blank. There has not been a redaction.” Tellingly, the “Operative Report” prepared by Khetan, dictated October 28, 1998, and transcribed November 6, 1998, states on the first page, under “Findings:” “The kidney came from a 65-year-old donor with about 40 hours of cold time, normal renal function, and good urine output. The [patient’s] kidney had *hepatitis B core antibody positive* and the biopsy done last night by Dr. Asai was reported to be satisfactory.” (Italics added.) Thus, the record, as a whole, does not support Brown’s conclusion that the records were altered after the transplantation to hide the fact that the donor kidney was positive for hepatitis B.

Moreover, Brown presented no evidence suggesting that an officer, director, or managing agent of St. Vincent engaged in any malice, fraud, or oppression as those terms are used in Civil Code section 3294.

We therefore conclude that Brown failed to meet her burden of showing that there is a substantial probability that she will prevail on her claim for punitive damages, and that the trial court erred in granting Brown’s section 425.13 motion. Accordingly, on remand the trial court will be required to strike all references to punitive damages alleged against St. Vincent.⁶

⁶ We recognize that Brown has been granted leave to file a “revised” complaint. Under the circumstances of this case, the trial court is directed to strike all punitive damages allegations directed against St. Vincent contained within Brown’s “revised” complaint. As to the new causes of actions set forth against St. Vincent, St. Vincent remains free to file a demurrer or other pleading in an effort to clarify exactly what is being alleged against it.

IV. DISPOSITION

Let a peremptory writ of mandate issue directing the respondent trial court to vacate its order granting real party's motion for leave to amend her complaint to set forth a claim for punitive damages, and to enter a new and different order denying the motion. The costs of this petition are awarded to petitioner.

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_____, P.J.
BOREN

We concur:

_____, J.
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_____, J.
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