Filed 12/13/07 Decker v. Long Beach Mem. Med. Center CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

AMBER DECKER, Plaintiff and Appellant, v. LONG BEACH MEMORIAL MEDICAL CENTER, Defendant and Respondent.	B189265 (Los Angeles County Super. Ct. No. NC036453)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph E. Diloreto, Judge. Reversed.

Law Offices of George T. Kelly, George T. Kelly and Jeany A. Duff for Plaintiff and Appellant.

Dummit, Briegleb, Boyce & Buchholz, Craig S. Dummit and Adam R. James for Defendant and Respondent.

Plaintiff Amber Decker appeals from summary judgment for Long Beach Memorial Medical Center (the hospital), one of several defendants in a medical negligence case plaintiff brought on account of injuries suffered following surgery at the hospital.[1] Because plaintiff established a triable issue of ostensible agency between the hospital and certain of the physicians whose conduct was at issue, we reverse the summary judgment.

FACTS

Plaintiff's complaint named as defendants the hospital and three physicians who had treated her there. Each of them was alleged to have been an agent of the hospital. The complaint alleged that on December 26, 2003, plaintiff underwent knee surgery by Dr. Young-Nguyen, assisted by anesthesiologist Dr. Chen. At the end of the procedure, Dr. Chen used a wooden tongue depressor to aid in removing an anesthesia tube from plaintiff's mouth. A piece of the wooden instrument broke off, and Dr. Chen "lost" it in plaintiff's mouth. Neither a visual search nor three x-rays disclosed the wooden piece, because wood does not appear on an x-ray. The doctors called in a pulmonologist, Dr. Yoshpe. She performed an esophogram, but did not locate the object. Defendants then authorized plaintiff's discharge from the hospital.

Suffering symptoms such as coughing and vomiting, plaintiff consulted outside physicians, but they diagnosed her condition as bronchitis. One of them told plaintiff that her post-operative report contained no mention of the tongue depressor piece. Plaintiff then returned to Dr. Young-Nguyen, who now documented the post-operative course. Another doctor, also unable to visualize the obstruction, ordered a CAT scan for plaintiff, scheduled for January 12, 2004. On January 10, however, plaintiff went to the hospital's emergency room with vomiting and difficulty breathing. She was seen but then discharged by Dr. Tom, who also relied on an x-ray, over plaintiff's objections, and then told her never to return to the emergency room with a cough.

---

[1] Plaintiff's separate appeal, from a judgment after jury trial in favor of codefendant Dr. Dennis Chen, was argued together with this appeal, and we decide it concurrently.

The CAT scan of January 12 showed the tongue depressor piece in plaintiff's trachea. Plaintiff was referred to a vascular surgeon, who removed the fragment on January 16, 2004.

Plaintiff asserted a professional negligence cause of action against the hospital and Doctors Young-Nguyen, Chen, and Yoshpe, contending their care for her had fallen below the standard of practice.[2]

The hospital moved for summary judgment. As evidence, the hospital relied on a declaration by Kathleen Jermain, a registered nurse, who opined that the hospital's nursing staff did not breach the standard of care in treating plaintiff. In opposition, plaintiff presented her own declaration, reviewing the medical events from ingestion to extraction of the depressor piece, together with a brief declaration by the surgeon who had extracted it. Plaintiff also offered a declaration by anesthesiologist Sherman Elpas, who opined that Dr. Chen had acted negligently both in using a tongue depressor in the removal of plaintiff's laryngeal airway mask, and in discharging plaintiff while aware that the missing piece was unrecovered.[3]

With respect to the nursing staff, the hospital relied on Jermain's declaration of due care. Plaintiff argued that the attending nurse had been negligent, in failing to report plaintiff's symptoms to her superiors, and in not informing them of her belief that a CAT scan was necessary.

Plaintiff also asserted vicarious liability of the hospital on account of physician negligence. She argued that Dr. Chen and Dr. Toms should be found to have been the hospital's agents, through ostensible agency. Plaintiff supported this contention with

---

[2] Two further causes of action were asserted only against Dr. Young-Nguyen, for allegedly fraudulently representing, in notes, that no complications had attended plaintiff's surgery. These causes of action are not at issue here. Plaintiff subsequently settled the case with Dr. Young-Nguyen.

[3] Plaintiff's opposition also included some deposition excerpts.

statements in her declaration that she had believed that the doctors were employees of the hospital, and was never told otherwise.

The hospital responded to the ostensible agency claim by adducing copies of its "Conditions of Admission," which plaintiff had received and signed upon both her admission for surgery and her readmission at the emergency room. In a paragraph entitled "Legal Relationship Between Hospital and Physician," this document stated that all physicians serving plaintiff, including anesthesiologists and emergency physicians, were independent contractors with the patient, not employees or agents of the hospital. Regarding the nurses, the hospital argued that its own exonerating declaration could not be contradicted except by further expert opinion, which plaintiff had not offered.

The trial court granted the motion for summary judgment, ruling that the evidence did not establish a triable issue of the hospital staff's negligence, or of ostensible authority of the physicians.[4]

DISCUSSION

We review the grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*.) In so doing, we follow the rules set forth in Code of Civil Procedure section 437c, as explicated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*). In brief, to obtain summary judgment, the hospital had to show either that one or more elements of plaintiff's claim against it could not be established, or that there existed a complete affirmative defense to that claim. (Code Civ. Proc., § 437c, subds. (a), (o)(1), (2), (p)(2).) The hospital could do this by advancing evidence that either negatived the claim or element, showed that plaintiff had insufficient evidence to

---

[4] On the latter issue, the court stated: "With respect to the issue of agency, the court finds, really, that is a non-issue in this case. I'm not going to say it's common knowledge, but it's generally known that doctors are, most of them, are independent contractors. That's the way all these hospitals are set up. That's why you sue the hospital individually and sue the doctors individually, otherwise you just sue the hospital and not even name the doctors on an agency theory."

establish it, or established the complete defense. (*Ibid.*) The hospital bore the burden of persuading the court to this effect. (*Aguilar*, at p. 850.)

Moreover, the hospital had the initial burden of producing evidence sufficient to make a prima facie showing, i.e., one that would require a trier of fact to find in its favor, more likely than not, on the issue in question. (*Aguilar, supra,* 25 Cal.4th at pp. 850-851.) If so, then the burden would shift to plaintiff, to produce evidence establishing a triable issue of material fact, i.e., a prima facie case that would support a jury finding in plaintiff's favor under the applicable burden of proof. (*Ibid.*) In determining whether these burdens were met, we view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing the hospital's. (*Id.* at p. 856; *Saelzler, supra,* 25 Cal.4th at p. 768.)

1. Expert Opinion.

On the issue of liability for negligence of its nursing staff, the hospital adduced an expert's opinion that the staff had performed in conformity with the standard of care. Plaintiff did not rebut this opinion with a contrary expert opinion, and so the court concluded that plaintiff had failed to establish a triable issue on the question.

Plaintiff does not contest that in a medical malpractice case expert opinion is necessary on the question of conformity with the standard of care, either affirmatively or to rebut another party's showing. (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 86, pp. 631-632.) Plaintiff contends, however, that her own testimony regarding symptoms the attending nurse witnessed impeached the hospital's expert's opinion, because it showed that that opinion was not based on all the relevant facts.

The hospital's expert's declaration actually did indicate that she had reviewed notes reflecting plaintiff's symptoms. But in any event, appellant's lay evidence appeared without expert opinion, even to qualify its own significance. The symptoms plaintiff advanced did not manifest malpractice within the common knowledge of laypersons. (See 1 Witkin, *supra*, Opinion Evidence § 86, p. 632.) Absent an expert's showing, plaintiff's testimony did not raise a triable issue.

2. Ostensible Agency.

Plaintiff's further effort to establish responsibility by the hospital involved contending that some of the allegedly negligent physicians were the hospital's agents. Plaintiff sought to show this through principles of ostensible agency, under which a person becomes another's agent if the principal causes the claimant to believe such agency exists. As set forth in Civil Code section 2300, "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Cf. *id.*, § 2317 (ostensible authority).)

Mejia v. Community Hospital of San Bernardino (2002) 99 Cal.App.4th 1448 (*Mejia*), reviewed modern doctrine concerning ostensible agency of physicians practicing at hospitals. Case law had refined the elements necessary for such agency to two. The first is that the hospital hold itself out as a provider of medical care; this constitutes conduct that would cause a reasonable person to believe in the agency. The second is that the patient look to the hospital for services, rather than the individual physician; that constitutes reliance on the apparent relationship. (*Id.* at pp. 1453.) *Mejia* further discerned that in this context, the only relevant factual issue is whether the patient had reason to know the doctor was not an agent of the hospital. (*Id.*. at p. 1454.)

Noting a history of declarations that "Agency is always a question of fact for the jury" (*Stanhope v. L. A. Coll. of Chiropractic* (1942) 54 Cal.App.2d 141, 146; *Seneris v. Haas* (1955) 45 Cal.2d 811, 831; *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 168), the *Mejia* court found California law to be consistent with the observed trend. (*Mejia*, at p. 1457.) And deciding the case before it, the court stated that to avoid a nonsuit – roughly equivalent to a summary judgment – the patient needed to show simply "that he or she sought treatment in the hospital . . . . Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Id.* at p. 1458.)

Under these tests, plaintiff made a sufficient showing on the question of ostensible agency to avoid summary judgment. The hospital argues that the issue is foreclosed because of the "Conditions of Admission," which stated that the physicians were not the hospital's agents, but rather independent contractors. Plaintiff declared, however, that she had no reason to believe that Drs. Chen and Tom were not hospital employees, that she believed they were, "and was never told otherwise." In the face of these affirmations, the presence of the Conditions of Admission does not establish "conclusively" that plaintiff should have known there was no agency. (*Mejia, supra*, 99 Cal.App.4th at p. 1458; see *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 748.)[5]

DISPOSITION

The judgment is reversed. Plaintiff shall recover costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.

---

[5] The parties agree that if we affirm Dr. Chen's victory at trial, plaintiff's claim of hospital malpractice based on his conduct will be rendered moot. Although we do affirm that judgment, that does not remove all potential basis for plaintiff's cause of action.