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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DESALEGN ALEMU, Plaintiff and Appellant, v. EDWARD VENN-WATSON et al., Defendants and Respondents.	D044992 (Super. Ct. No. GIC820459)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

In this medical malpractice action, Desalegn Alemu alleges Edward Venn-Watson, M.D., and Pomerado Outpatient Surgical Center, L.P. (the Surgical Center) failed to adhere to the standard of care expected of medical practitioners in Southern California

when treating Alemu for a plantar fibroma.[1] The court granted the Surgical Center's motion for summary judgment and denied Alemu's motion to amend his complaint to allege an agency relationship between the Surgical Center and Venn-Watson. The court also granted in part Venn-Watson's motion to compel Alemu's deposition and awarded $682.30 in sanctions against Alemu because he "walked out" of the noticed deposition session.

Alemu appeals from both the order granting summary judgment in favor of the Surgical Center and the discovery sanctions order. He contends he did not know, and could not reasonably have known, of Venn-Watson's status as an independent contractor to the Surgical Center, and "[t]herefore, [t]he Surgical Center [i]s [v]icariously [l]iable" for damages stemming from the operation Venn-Watson performed on him, making summary judgment inappropriate. Alemu also asserts "[t]he trial [c]ourt imposed sanction[s] against [Alemu] without any obvious reason and legal principle which is an abuse of discretion."

We affirm the summary judgment. For reasons we shall discuss, we conclude this court lacks jurisdiction to consider Alemu's interlocutory appeal of discovery sanctions because the sum awarded is less than $5,000.

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[1] A plantar fibroma is "a non-cancerous tumor that forms within a ligament in the arch of the foot called the plantar fascia." (Koepsel, *Plantar Fibromatosis* http://www.podiatrynetwork.com/document_disorders.cfm?id=140> (as of Sept. 20, 2005).)

FACTUAL AND PROCEDURAL BACKGROUND

A. *Treatment of Alemu's Foot*

Alemu began experiencing pain in his right foot in 2001, during his employment as a valet parking attendant. Based on a referral from his employer, Alemu went to Dr. Gary Douglas for evaluation. Following an MRI and a second visit, Douglas referred Alemu to Venn-Watson, a colleague at Spruce Medical Group, Inc. Alemu saw Venn-Watson, who recommended surgery, and met again with Douglas. In June 2002, Venn-Watson excised a plantar fibroma from Alemu's right foot. Venn-Watson placed Alemu under general anesthesia for the procedure, which he performed on the Surgical Center's premises.

After the surgery and followup treatment, Alemu continued to suffer discomfort and partial loss of the use of his foot. He filed a complaint against Venn-Watson, the Surgical Center, and others in November 2003, alleging "[d]efendants . . . were negligent in their examination, diagnosis, care and treatment of [Alemu's] foot while he was under their care."

B. *Summary Judgment and Alemu's Motion To Amend*

The Surgical Center moved for summary judgment, supplying expert testimony that its medical attention to Alemu "complied with the standard of care in the community in all respects." The Surgical Center argued that, having failed to supply countervailing expert testimony, Alemu "is unable to establish the element of breach necessary to maintain a cause of action for medical negligence." Simultaneously, Alemu moved for leave to amend his complaint. Alemu sought to allege the Surgical Center "is also

vicariously liable for the [negligence] of [Venn-Watson because Venn-Watson] was not [an] independent contractor and had [an] ownership interest" in the Surgical Center in 2002.

The court granted summary judgment in favor of the Surgical Center, ruling the undisputed facts showed "[t]he nursing care and treatment rendered by [the Surgical Center] fell within the applicable standard of care," and the Surgical Center's staff "did not make any recommendations as to whether or not [Alemu] should undergo surgery to his right foot." The court further found the undisputed facts established Alemu "signed an Informed Consent to Operation form that stated that the doctors were independent contractors and therefore the patient's agents." The court denied Alemu's motion to amend his complaint "in light of [the ruling granting summary judgment]."

C. *Deposition and Sanctions*

The various defense attorneys began deposing Alemu on July 22, 2004, at the office of Venn-Watson's attorney. Alemu arrived, went home to get a tape recorder, and returned for about two hours of deposition. That session did not go entirely smoothly, and Venn-Watson's counsel opined Alemu was "being extremely evasive and difficult to deal with." For his part, Alemu complained about the deposing attorney's demeanor: "He makes me nervous. He says you are a difficult person. I get nervous."

The next day's deposition session did not take place at all. Alemu had requested the participation of an interpreter.[2] Alemu arrived seven minutes after the scheduled start

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2 Alemu speaks Amharic, a Semitic language widely spoken in Ethiopia.

time. The interpreter telephoned about eight minutes later to say he "was having difficulty finding parking." About 10 minutes later, the interpreter called again and said that he found a parking space and was on his way to the deposition. Alemu did not believe the interpreter would actually arrive soon and departed to meet with his lawyer. The interpreter arrived shortly thereafter.

Venn-Watson subsequently moved to compel Alemu's continued deposition and requested sanctions totaling $3,237.85. The court reviewed the record, heard arguments, and viewed a video record of the first deposition session. The court's award of $682.30 against Alemu represented "$290.00 in attorney's fees, $36.30 in filing fees, $171.00 for court reporting fees and $185.00 for the videographer."

DISCUSSION

A. *Motion To Augment*

Alemu moves this court to augment the appellate record. He seeks to add portions of the transcript of his July 22, 2004 deposition, the credentials and statement of expert witness Dr. Ivar E. Roth, the consent form Alemu signed prior to surgery, portions of Alemu's discovery demands of Venn-Watson and Venn-Watson's responses, and documents establishing the nature of the business relationship between Venn-Watson and the Surgical Center.[3] Neither Venn-Watson nor the Surgical Center has opposed Alemu's motion to augment the record on appeal. We grant the motion.

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[3] To document the nature of the relationship between Venn-Watson and the Surgical Center, Alemu supplies copies of 1) the letter from the Surgical Center to Venn-Watson confirming the establishment of the Surgical Center as a partnership, 2) Venn-Watson's

B. *Timeliness of the Appeal*

Venn-Watson contends we should dismiss this appeal because Alemu did not file his opening brief on time. Specifically, he contends that under California Rules of Court,[4] rule 17 and *Hollister Convalescent Hospital, Inc. v. Rico* (1975) 15 Cal.3d 660 (*Hollister*), Alemu's appeal "was untimely and therefore *must* be dismissed." (Original italics.) We reject this contention.

When an appellant fails to timely file an opening brief, rule 17(a)(1) requires the court to notify the appellant "the brief must be filed within 15 days after the notice is mailed, [or] the court will dismiss the appeal . . . ."[5] This does not mandate actual dismissal. Rather, rule 17(c) grants the court discretion to dismiss the appeal: "If a party fails to comply with a notice under (a), the court *may* impose the sanction specified in the notice." (Italics added.) *Hollister, supra*, 15 Cal.3d 660, and the case it followed in this regard, *Estate of Hanley* (1943) 23 Cal.2d 120, established that "when . . . *notice* [*of appeal*] has not . . . been filed within the relevant jurisdictional period . . . the appellate

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check for $7,500 to purchase his share; 3) the signed subscription agreement between Venn-Watson and the Surgical Center; 4) the signed spousal consent form accompanying the subscription agreement.

4 All further rule references are to the California Rules of Court unless otherwise specified.

5 Rule 17(a)(1) provides: "(a) If a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party by mail that the brief must be filed within 15 days after the notice is mailed, and that failure to comply will result in one of the following sanctions: [¶] (1) if the brief is an appellant's opening brief, the court will dismiss the appeal . . . ."

court . . . lacks all power to consider the appeal on its merits and must dismiss . . . ." (*Hollister* at p. 674, italics added.)

Here, Alemu filed a timely notice of appeal and ran afoul of rule 17(a)(1) only in failing to file his opening brief by the deadline set by this court. This court may, in its discretion, dismiss Alemu's appeal. (Rule 17(c).) Venn-Watson having made no showing of prejudice compelling dismissal, and Alemu having filed his brief only a few days after the deadline, we decline to exercise that discretion.

C. *Summary Judgment*

Alemu contends the court erroneously granted summary judgment in favor of the Surgical Center. We reject this contention.

1. *Background and Standard of Review*

In appealing from the summary judgment in favor of the Surgical Center, Alemu relies on the allegation of vicarious liability that he sought to add when he moved for leave to amend his complaint.[6] Alemu does not expressly challenge the denial of his motion for leave to amend.

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6 Alemu's original, and operative, complaint alleges: "Defendants, and each of them, were negligent in their examination, diagnosis, care and treatment of [Alemu's] foot while he was under their care. Defendants, and each of them, breached the standard of care in their treatment of care of [Alemu] and these breaches of the standard of care [proximately] caused injury to [Alemu's] person, as well as proximately causing general damage to [Alemu], and economic loss to [Alemu]. [Alemu] first suspected something was wrong and/or negligent with the treatment he received from defendants and each of them in or about January 2003."

With his motion to amend, Alemu sought to allege that "[the Surgical Center] is also vicariously liable for the [negligence] of [Venn-Watson because Venn-Watson] was

We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to Alemu as the losing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

2. *Vicarious Liability Arising from a Partnership Relationship*

Alemu sought leave to allege the "[Surgical Center] is vicariously liable for the alleged malpractice of [Venn-Watson]." To support this claim, he submitted Venn-Watson's admission that he held a partnership stake in the Surgical Center. It is undisputed that Venn-Watson owned 0.028% of the Surgical Center as a limited partner. As we shall discuss, however, participation as a limited partner does not confer agency.

"A partnership is liable for . . . actionable conduct[] of a partner acting in the ordinary course of business of the partnership or with authority of the partnership." (Corp. Code, § 16305, subd. (a).) But "[a] limited partner is not liable for any obligation of a limited partnership unless named as a general partner in the certificate or, in addition to the exercise of the rights and powers of a limited partner, the limited partner participates in the control of the business." (Corp. Code, § 15632, subd. (a).)

Here, in addition to his limited partnership, Venn-Watson maintained a separate subcontracting relationship with the Surgical Center. Alemu failed to show Venn-Watson participated in the Surgical Center as a general partner, and thus the evidence he

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not [an] independent contractor and had [an] ownership interest [in the Surgical Center] in 2001 and 2002 while [Alemu] was under their care."

submitted cannot as a matter of law establish Surgical Center's liability for Venn-Watson's acts under a partnership theory.

3. *Vicarious Liability Arising from an Agency Relationship*

Alemu contends the Surgical Center "is vicariously liable" for the harm to Alemu "even though [Venn-Watson] was an independent contractor." We reject this contention.

Alemu asserts, "California law holds a hospital liable for the acts of [a] physician if he is an actual or ostensible agent. An ostensible agency is established when a principal intentionally, or by want of ordinary care, cause[s] a third person to believe another is an agent. [Citation.]" He argues the Surgical Center did not make sufficiently clear at the time of surgery that Venn-Watson worked at the Surgical Center as an independent contractor.

"In California, ostensible agency is defined by statute. Civil Code section 2300 provides: '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.' . . . Civil Code section 2334 further provides: 'A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.'" (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1456 (*Mejia*).) In plain language, according to *Mejia*, a showing of ostensible agency requires: "(1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff." (*Id.* at p. 1457.) The *Mejia* court went on to note

the difficulty modern hospitals face in overcoming the presumption of agency, and thus winning summary judgment: "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, italics added.)

Alemu's reliance on *Mejia, supra*, 99 Cal.App.4th 1448 is misplaced. The *Mejia* plaintiff arrived at the defendant hospital's emergency room, whereupon treatment commenced. (*Mejia* at p. 1451.) The plaintiff could not have known the allegedly negligent radiologist worked not as an employee, but as an independent contractor. (*Id.* at p. 1459.) The court held, "absent evidence that plaintiff should have known that the radiologist was not an agent of respondent hospital, plaintiff has alleged sufficient evidence to get to the jury merely by claiming that she sought treatment at the hospital." (*Id.* at p. 1460.)

Here, in contrast, the evidence shows Alemu should have known the Surgical Center did not directly employ Venn-Watson. Venn-Watson began treating Alemu more than two months before Alemu entered the Surgical Center for his operation. Therefore, Venn-Watson and Alemu had already established their doctor-patient relationship before the day of surgery. In effect, Venn-Watson acted as Alemu's "personal physician" within the meaning of *Mejia*. (*Mejia, supra*, 99 Cal.App.4th at p. 1458.)

4. *No Triable Issue of Material Fact Exists Regarding the Surgical Center*

The Surgical Center provides nursing and support services to surgeons. Alemu's alleged harm lies in the advice and care he received from Venn-Watson, not in the

support provided by the Surgical Center. The Surgical Center did not affirmatively represent that Venn-Watson was its agent. The Surgical Center's informed consent form, which Alemu signed, stated that generally surgeons using the Surgical Center's facilities "are not agents, servants or employees of the facility, but independent contractors and, therefore, are the patient's agents or servants."

Regardless of whether one considers Alemu's original complaint or his proposed amended complaint, no triable issue of material fact exists with respect to the Surgical Center. Because none of the new allegations Alemu sought to make through his motion to amend his complaint changes this determination of law, the trial court properly denied that motion. Therefore, we affirm summary judgment in favor of the Surgical Center.

D. *Discovery Sanctions*

Last, Alemu challenges the discovery sanctions order entered against him. Code of Civil Procedure, section 904.1, subdivision (a)(12) provides in part: "An appeal, other than in a limited civil case, may be taken from any of the following: [¶] . . . [¶] (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." Subdivision (b) of that section provides: "Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ."

"[T]he weight of authority concludes that orders imposing monetary discovery sanctions (regardless of the amount) are not directly appealable; they are reviewable only

on appeal from final judgment in the action or, in the appellate court's discretion, upon a petition for extraordinary writ. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) § 2:82.4, p. 2-46.5, italics omitted.)

Here, the court awarded sanctions against Alemu in the amount of $682.30 after granting Venn-Watson's motion to compel his deposition attendance. Judgment has not been entered with respect to Alemu's claims against Venn-Watson. The sanctions order is not appealable because the amount of the sanctions is less than $5,000, and final judgment has not been entered. (Code Civ. Proc., § 904.1, subd. (b).)

DISPOSITION

Summary judgment in favor of Surgical Center is affirmed. Alemu's appeal of discovery sanctions levied against him is dismissed without prejudice to asserting the claim on an appeal from a final judgment.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.