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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SANDRA BENTLEY et al.,

Plaintiffs and Appellants,

v.

RIVERSIDE COMMUNITY HOSPITAL,

Defendant and Respondent.

E037566

(Super.Ct.No. RIC373137)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison,  
Judge. Affirmed.

Mark A. Shoemaker for Plaintiffs and Appellants.

Dummit Briegleb Boyce & Buchholz, Heather F. Solomon, and Steven E. Kushner  
for Defendant and Respondent.

**INTRODUCTION**

Plaintiffs, Sandra Bentley and her husband Todd Bentley, appeal from a judgment entered in favor of defendant, Riverside Community Hospital (RCH), on plaintiffs'

complaint for medical malpractice. The judgment was entered following a bifurcated court trial on the limited issue of whether RCH or its personnel *had a duty to ask Sandra whether she was or might be pregnant* before her radiologist, Dr. Gilbert Zimmerman, using RCH's nuclear medicine facilities, administered radioactive iodine therapy to Sandra to treat symptoms of her Graves disease or hyperthyroidism. Pregnancy is a contraindication for radioiodine treatment because the treatment causes birth defects. Sandra later discovered she was pregnant at the time of her treatment. Fearing birth defects, plaintiffs terminated the pregnancy.

Following the bifurcated court trial and based on the evidence presented, the trial court concluded that RCH did not have a duty to ask Sandra whether she was or might be pregnant. The court based its conclusion "primarily on the ground that the physician's duty [to obtain Sandra's informed consent to the radioiodine therapy] is not delegable." We affirm. On independent review, we conclude that plaintiffs failed to meet their burden of presenting sufficient evidence that RCH had a duty to ask Sandra whether she was or might be pregnant, immediately before Dr. Zimmerman administered radioiodine therapy to Sandra.

## FACTUAL BACKGROUND<sup>1</sup>

Sandra was originally diagnosed with Graves disease in 1999. Graves disease is caused by a malfunctioning, overactive thyroid gland, and causes a protrusion of the eyes and retraction of the eyelids due to a proliferation of tissue behind the eyes. (2 Attorneys Medical Advisor, § 113:116-7.) Sandra's primary care physician referred her to Dr. Bonner, a specialist in the treatment of thyroid problems.

In August 1999, Dr. Bonner advised Sandra that radioactive iodine treatment or radioiodine therapy would be the best treatment for her condition. Radioiodine treatment involves the placement of unsealed radionuclide sources in or on the target tissue. The radionuclide sources emit median to high-energy beta rays into the tissue to weaken or destroy the thyroid gland. (2 Attorneys Medical Advisor, § 31:5-9.) The treatment carries a "significant risk of undue side effects," including genetic mutation and birth defects. (*Ibid.*) Thus, pregnancy is a contraindication for radioiodine therapy.

Dr. Bonner advised Sandra to schedule radioiodine treatment with the nuclear medicine department at RCH. In late 1999, Sandra telephoned RCH to schedule an appointment, but was told an appointment would not be scheduled until RCH received the results of a current pregnancy test. Dr. Bonner had ordered a pregnancy test. Sandra

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<sup>1</sup> Some of the facts stated in this section were not presented in evidence at trial but are based on the representations set forth in plaintiffs' briefs. These facts include the causes and symptoms of Graves disease, the procedures involved in administering radioiodine treatment, and the adverse effects of radioiodine treatment on unborn fetuses. These facts are set forth in this section as background to explain the relevance of what little evidence was presented at trial on the issue of duty.

later discovered through Dr. Bonner's office that she was pregnant. Sandra did not undergo any radioiodine therapy during this pregnancy. In April 2000, she gave birth to a son, Kyle, at RCH.

Following the birth of Kyle, Sandra continued to suffer from symptoms of Graves disease. In November 2000, Dr. Bonner again advised Sandra to undergo radioiodine treatment at RCH. Dr. Bonner's office scheduled an appointment for January 5, 2001, with a radiologist, Dr. Gilbert Zimmerman, at RCH. In December 2000, RCH adopted a policy that required its radiology technician to ask "[a]ll females of child bearing age (11-55) . . . when their last menstrual period (LMP) was or if there is a possibility that they could be pregnant." The policy further stated, "[i]f there is a possibility that the patient could be pregnant, the Radiology staff will inform the unit and ordering physician for further direction." Dr. Zimmerman signed the policy.

Sandra went to RCH for radioiodine treatment on January 5, 2001, as scheduled. She was greeted by a radiology technician who had her complete and sign several forms, including an informed consent form.<sup>2</sup> She was then taken into a room where Dr.

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<sup>2</sup> The informed consent form, entitled "Authorization For and Consent to Surgery or Special Diagnostic or Therapeutic Procedures," stated in pertinent part: "1. The hospital maintains personnel and facilities to assist your/the patient's physicians and surgeons in their performance of various surgical operations and other special diagnostic or therapeutic procedures. These operations and procedures may all involve risks of unsuccessful results, complications, injury, or even death, from both known and unforeseen causes, and no warranty or guarantee is made as to result or cure. [¶] You have the right to be informed of such risks as well as the nature of the operation or procedure; the expected benefits or effects of such operation or procedure; and the available alternative methods of treatment and their risks and benefits. Except in cases of emergency, operations or procedures are not performed until you have had the

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Zimmerman administered the radioiodine treatment. Neither the radiology technician nor any other RCH personnel asked Sandra whether she was or might be pregnant before Dr. Zimmerman administered the treatment.

After the treatment was administered, Sandra discovered she was pregnant. At the time of the treatment, she did not believe she was pregnant because she believed Dr. Bonner had ordered a pregnancy test with her “prelabs” sometime before January 5, 2001. She knew, at the time of the treatment, that pregnancy is contraindicated for radioiodine therapy because the therapy causes birth defects. Sometime between January 1 and 5, 2001, Dr. Zimmerman discussed with Sandra the risks and benefits of radioiodine therapy.

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*[footnote continued from previous page]*

opportunity to receive this information and have given your consent. You have the right to consent or to refuse any proposed operation or procedure any time prior to its performance.

“2. Your/the patient’s physicians and surgeons have recommended the operations or procedures set forth below. Upon your authorization and consent, the operations or procedures set forth below, together with any different or further procedures which in the opinion of the supervising physician or surgeon may be indicated due to any emergency, will be performed on you/the patient. The operations or procedures will be performed by the supervising physician or surgeon named above . . . together with associates and assistants, including . . . radiologists from the medical staff of Riverside Community Hospital *to whom the supervising physician or surgeon may assign designated responsibilities.* . . . [¶] . . . [¶]

“5. Your signature below constitutes your acknowledgement (1) that you have read and agree to the foregoing; (2) that the operation or procedure set forth below has been adequately explained to you by the above-named physician or surgeon . . . and that you have received all of the information you desire concerning such operation or procedure; and (3) that you authorize and consent to the performance of the operation or procedure.” (Italics added.) Dr. Zimmerman was designated on the form as the physician performing the procedure, and the procedure to be performed was described as “Nuclear Medicine Iodine-131 Therapy 15mCi.”

## PROCEDURAL HISTORY

In April 2002, plaintiffs filed a complaint against Drs. Bonner and Zimmerman and RCH alleging a single cause of action for medical malpractice. The complaint generally alleged that defendants negligently failed to diagnose, treat, and care for Sandra's thyroid problems.

RCH brought two motions for summary judgment, both of which were denied. The trial court entered judgment in favor of Dr. Bonner after he moved for summary judgment and plaintiffs did not oppose the motion. Before trial, plaintiffs settled with Dr. Zimmerman.

In September 2004, a bifurcated court trial was held on the issue of whether RCH owed plaintiffs a duty to *ask* Sandra whether she was or might be pregnant before Dr. Zimmerman administered the radioiodine therapy to Sandra at RCH's nuclear medicine facility. Sandra was the only witness who testified. In addition, the parties stipulated that: (1) Dr. Zimmerman was not an actual or ostensible agent of RCH; (2) Sandra was a patient of RCH on January 5, 2001; (3) RCH did not have a duty to diagnose Sandra's pregnancy, to order a pregnancy test, or to direct Sandra's course of treatment; and (4) RCH policy No. IND 30, requiring RCH radiology technicians to ask women of childbearing age whether there is a possibility they could be pregnant, was in effect at the time in question.

Following trial, the trial court entered judgment in favor of RCH and later denied plaintiffs' motion for a new trial. This appeal followed.

## DISCUSSION

Plaintiffs contend the trial court erroneously concluded that RCH did not have a duty to ask Sandra whether she was or might be pregnant before she underwent radioiodine therapy at RCH on January 5, 2001. They argue that RCH had this duty of inquiry, as a matter of law, because it had a policy of asking female radiology patients of childbearing age whether they might be pregnant and, if so, to convey the information to the physician. They request reversal of the judgment and a new trial on the issues of breach, causation, and damages.

### A. *Standard of Review*

“The elements of a cause of action for negligence are well established. They are “(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury.” [Citation].” (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) At trial on the bifurcated issue of duty, plaintiffs had the burden of proving “facts which gave rise to a legal duty” on the part of RCH. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, fn. 4; Rest.2d Torts, § 328A.)

Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) Accordingly, we independently review whether plaintiffs met their burden of proving that RCH had a duty to ask Sandra whether she was or might be pregnant before she underwent radioiodine therapy at RCH. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.) Based on the evidence presented at trial, we conclude that plaintiffs failed to meet this burden.

## B. *The Duty of Care*

“In California, the general rule is that all persons have a duty “to use ordinary care to prevent others [from] being injured as [a] result of their conduct. . . .”” (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 572, fn. 6, citing *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 and Civ. Code, § 1714.) In accordance with the general rule, a “hospital’s ‘. . . conduct must be in accordance with that of a person of *ordinary prudence* under the circumstances. . . .” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 998, quoting *Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302.)

More specifically, a ““hospital owes its patients the duty of protection, and must exercise such reasonable care toward a patient as his [or her] known condition may require.”” (*Rice v. California Lutheran Hospital, supra*, 27 Cal.2d at p. 299.) In addition, “[a] hospital must provide *procedures, policies, facilities, supplies, and qualified personnel reasonably necessary* for the treatment of its patients.” (Judicial Council of Cal., Civil Jury Instns. (2006) CACI No. 514, italics added; see *Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465, 469; *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 340-341.)

The determination that a legal duty is owed in a particular set of circumstances is ““only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”” (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 572, fn. 6, citing *Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) “[A] court’s task—in determining ‘duty’—is not to decide whether a *particular* plaintiff’s



injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe, supra*, at p. 573, fn. 6.)<sup>3</sup>

Here, the evidence was insufficient to establish that RCH had a duty to ask Sandra whether she was or might be pregnant. The evidence showed -- indeed, the parties stipulated -- that RCH had a policy of requiring its radiology technicians to ask its females of childbearing age whether there was a possibility they could be pregnant. If there was such a possibility, the radiology staff was to "inform the unit and ordering physician for further direction." It was also undisputed that RCH did not follow its policy in Sandra's case. Sandra testified that no one at RCH asked her whether there was a possibility she might be pregnant at any time between November 2000, when her January 5, 2001, appointment was scheduled, and January 5, 2001, the date Dr. Zimmerman administered her radioiodine treatment.

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<sup>3</sup> Courts have considered a number of factors, in various contexts, in determining whether a particular duty of care is owed under a given set of circumstances. These include "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Ballard v. Uribe, supra*, 41 Cal.3d at pp. 572-573, fn. 6, citing *Rowland v. Christian, supra*, 69 Cal.2d at p. 113.)

But there was no evidence that RCH's failure to follow its policy -- in the typical case -- was "sufficiently likely" to result in the administration of radioiodine treatment on a pregnant female, such that it would be appropriate to impose upon RCH a legal duty to follow its policy. As noted, our task in determining whether a duty is owed in a particular circumstance is to evaluate "whether the category of negligent conduct at issue is *sufficiently likely* to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe, supra*, at p. 573, fn. 6, italics added.)

Here, plaintiffs did not even present evidence that radioiodine treatment causes birth defects or otherwise adversely affects unborn fetuses. Nor was there any evidence that adherence to RCH's policy was at all likely, in the typical case, to ensure that pregnant female radiology patients would not be subjected to radioiodine treatment. There was no evidence, for example, concerning what procedures, if any, the hospital's contracting radiologists were required to follow or generally did follow to ensure that their female patients of childbearing age were not pregnant. Nor was there any evidence that the radiologists or patients were relying on RCH to ensure that the patients were not pregnant,<sup>4</sup> or that RCH violated any statute or regulation by not following its policy. In

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<sup>4</sup> Instead, the evidence suggested that the pregnancy issue was addressed, in the typical case, by the patient's doctors. The evidence also showed that, on January 5, 2001, Sandra: (1) was aware that pregnancy was contraindicated for radioiodine therapy; (2) gave her informed consent to the treatment; and (3) did not believe she was pregnant, because she believed Dr. Bonner had ordered a pregnancy test before January 5, 2001. Further, by signing the informed consent form, which RCH personnel presented to her immediately before she received her treatment, Sandra acknowledged that Dr.

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this context, the evidence that RCH had a policy of asking female radiology patients whether they might be pregnant was insufficient to impose a legal duty upon RCH to follow that policy.

Plaintiffs argue that: (1) by adopting its policy, RCH assumed a duty of inquiry where none may have existed before; (2) once a person assumes a duty, the person must act reasonably in undertaking the duty; (3) the risk of injury to Sandra of not asking her whether she might be pregnant was foreseeable; (4) the trial court's conclusion "ignores the common practicality that doctors constantly depend on hospital staff to screen and assess patients" (capitalization omitted); and (5) RCH's duty of inquiry is "independent" of Dr. Zimmerman's duty to obtain Sandra's informed consent to the radioiodine therapy.<sup>5</sup> Each of these arguments is unavailing, in light of the foregoing discussion.

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Zimmerman had adequately explained the radioiodine treatment to her and that she had received "all of the information [she] desire[d]" concerning the treatment.

<sup>5</sup> Under the facts as developed on this record, we do not believe that in adopting the policy, RCH assumed any duty beyond that provided for under the above discussed general principles of tort law. There are no facts to demonstrate that the enactment of the policy increased any risk of harm to Sandra, or that Sandra in any way knew of or relied on the policy in conducting her activities. (See *Williams v. State of California* (1983) 34 Cal.3d 18, 23 [where one voluntarily assumes a protective duty toward another and undertakes action toward that person, thereby inducing reliance, a duty of care is assumed].)

DISPOSITION

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

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/s/ King  
J.

We concur:

/s/ Ramirez  
P.J.

/s/ Richli  
J.