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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THOMAS J. CORELIS,

Plaintiff and Appellant,

v.

TRI-CITY MEDICAL CENTER,

Defendant and Respondent.

D045236

(Super. Ct. No. GIN030335)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

Thomas J. Corelis appeals from a summary judgment in his medical malpractice action against Tri-City Medical Center (Tri-City). Corelis contends the trial court erroneously granted the motion because his evidence created a triable issue of fact as to whether Tri-City breached its duties of care under the doctrine of corporate responsibility. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 21, 2001, Corelis broke his leg and underwent surgery the same day at Tri-City. Satish A. Kadaba, M.D., an orthopedic surgeon with hospital privileges at Tri-City, performed the surgery. Although not in the record, Corelis states in his opening brief that he went to the Tri-City emergency room and Dr. Kadaba, the "on-call" physician, told him that he needed an emergency operation.

Corelis discussed the surgery with Dr. Kadaba and believed he would use plates and screws or a rod to repair his leg; they did not discuss the use of cerclage wires. He also signed two consent forms listing the procedure as an internal fixation with plates and screws and acknowledged that he discussed the procedure with the surgeon. During the surgery, however, Dr. Kadaba decided to use cerclage wires to reduce the fracture because one bone fragment was "flimsy."

About one year after the surgery, Corelis saw another doctor because his leg was still bothering him. The doctor told him that his leg was not healing properly and he became suspicious about the way Dr. Kadaba performed the surgery. On September 20, 2002, Corelis mailed notices of intent to sue to Dr. Kadaba and Tri-City that stated he became aware of the negligence in June 2002. About a month later, Tri-City sent Corelis a letter stating it considered his correspondence as a government tort claim and returned the document as late because Corelis did not present it within six months after the surgery. The letter further informed Corelis that Tri-City took "no action" on his claim and that his recourse was to apply to Tri-City for leave to present a late claim. Corelis obtained counsel months later and filed a complaint against Dr. Kadaba and Tri-City on June 4, 2003.

The complaint alleged causes of action against Dr. Kadaba and Tri-City for medical negligence and lack of informed consent. Corelis asserted that Dr. Kadaba used an archaic wire wrap procedure on his leg that was below the standard of care and caused his leg to heal improperly. He alleged that Tri-City authorized the procedure, falsely held Dr. Kadaba out as a board certified orthopedic surgeon and failed to investigate and inform patients of known problems with Dr. Kadaba, including several lawsuits and lack of board certification. Corelis also contends that Dr. Kadaba and Tri-City failed to obtain his informed consent for the treatment and ignored his right to choose this treatment when they decided to use a wire wrap to repair the bone in his leg.

According to Tri-City, Dr. Kadaba settled with Corelis and was dismissed from the case. Thereafter, Tri-City moved for summary judgment on the ground Corelis could not prove negligence, lack of informed consent or causation against it. It also argued that Corelis failed to comply with the Tort Claims Act (Gov. Code, § 810 et seq.) by not filing his complaint within six months after Tri-City "rejected" his claim. The trial court granted summary judgment on the ground Corelis failed to show the existence of a triable issue of material fact regarding Tri-City's alleged negligence in credentialing Dr. Kadaba, obtaining informed consent or causation. The trial court did not address Tri-City's argument regarding the Tort Claims Act. Corelis appeals.

DISCUSSION

I. *Standard of Review*

We review the trial court's decision granting summary judgment de novo (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)), applying the same three-step

analysis required of the trial court. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1431-1432.) After identifying the issues framed by the pleadings, we determine whether the moving party has established facts justifying judgment in its favor. If the moving party has carried its initial burden, we then decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Id.* at p. 1432.) We must strictly construe the moving party's evidence and liberally construe the opposing party's evidence (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838-839) and we may not weigh the evidence or conflicting inferences. (*Aguilar, supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

II. *Evidentiary Objections and Tri-City's Motion to Strike*

Tri-City filed written evidentiary objections to Corelis's separate statement of facts, his exhibit number one consisting of portions of Corelis's deposition testimony and portions of the two expert witness declarations filed by Corelis in opposition to the motion. The trial court overruled the objections as to the portions of Corelis's deposition testimony and refused to rule on the objections to Corelis's separate statement. The trial court did not address Tri-City's objections to Corelis's expert witness declarations in its written tentative ruling and its statements at oral argument on the tentative ruling suggest it admitted the two declarations and considered them inadequate to support his contentions.

Corelis filed no written evidentiary objections; however, at oral argument his counsel objected to the two expert witness declarations filed by Tri-City in support of the motion.

The trial court did not expressly rule on the objections and had previously admitted them in deciding the motion. Thus, the trial court impliedly overruled all objections to the expert witness declarations and we shall consider these documents in our de novo review of the court's ruling.

Although not addressed by the parties, we note that in the trial court, Tri-City filed additional evidence with its reply brief addressing Corelis's lack of informed consent theory of recovery. Corelis never objected to the inclusion of this new evidence and absent any such challenge, the trial court was entitled to consider this evidence as within the record before it when evaluating whether Tri-City met its initial burden of proof on the motion. (Code Civ. Proc., § 437c, subds. (b)(5) & (p)(2); *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426.) We shall do the same.

Finally, Tri-City filed a motion to strike certain arguments made in Corelis's opening brief as not supported by the record. Specifically, Tri-City states that just before the oral argument on the court's tentative ruling, Corelis submitted a notice of errata that included additional pages of deposition testimony erroneously omitted from his opposition based on a pagination error when citing to the testimony. Although the court commented that the notice was "a little late," it never expressly ruled on the admissibility of these documents, file-stamped the notice and accepted the documents. The trial court's actions indicate it impliedly overruled Tri-City's objection and we shall consider this evidence in deciding the appeal. Accordingly, the motion to strike is denied.

III. Analysis

As a threshold matter, we note that in his separate statement of facts Corelis presented evidence suggesting Tri-City was negligent in testing his blood sugar levels and in removing a catheter. The pleadings define the issues in a summary adjudication motion (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663) and Corelis's complaint does not contain these factual allegations. Corelis's failure to plead these theories precludes his reliance on them to defeat Tri-City's motion.

A. Physician Credentialing

A hospital such as Tri-City has a duty to use reasonable care in selecting and reviewing the competency of its staff physicians to ensure the adequacy of medical care rendered to patients at its facility, and it can be held liable for corporate negligence if it fails to do so. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346.) To establish a prima facie case based on negligent credentialing, the plaintiff must prove that the hospital breached its duty by granting privileges to an incompetent or unqualified physician and that the physician caused harm to the patient. (Cf. 6 Witkin, Summary of Cal. Law (9th ed. 1990) Torts, § 732, p. 60.) Expert testimony is required to establish the appropriate standard of care in an action alleging negligent credentialing of a hospital's medical staff. (Flahavan, Rea & Kelly, Cal. Practice Guide: Personal Injury (The Rutter Group 2004) ¶ 9:414, p. 9-100.)

In support of its summary judgment motion, Tri-City submitted the declaration of Arlene Becton, Tri-City's Credentials Coordinator, who detailed the credentialing process at Tri-City. Physicians are required to fill out an initial application packet, which includes an

application, privilege request form, Division/Department Rules and Regulations and Tri-City's Medical Staff Bylaws. After Tri-City obtains the completed packet, the medical staff office verifies the information by mail and through database systems, including malpractice claims history, and makes a recommendation to the board of directors. The completed file is then presented to the Departmental/Division Committee, the Credentials Committee and the Medical Executive Committee and the board of directors makes a final decision based on the recommendations of these committees. After a physician is granted initial privileges, Tri-City repeats the credentialing process every two years. Becton reviewed Dr. Kadaba's credentialing documents and verified that Tri-City initially granted him privileges in 1987 and re-credentialed him every two years based on these procedures.

Tri-City also submitted the declaration of Michael Lenihan, M.D., a board certified orthopedic surgeon familiar with the standard of care in hospital credentialing and involved in a supervisory committee overseeing the credentialing process at another local hospital. Dr. Lenihan reviewed Tri-City's medical records, Becton's declaration, Tri-City's initial application procedure and re-credentialing procedure, and all documents pertaining to Tri-City's credentialing and privilege procedures. Based on his review of these documents, Dr. Lenihan concluded that Tri-City met the standard of care in terms of its involvement with Corelis and concluded that Tri-City did not breach the standard of care in its credentialing and privilege procedures.

With this evidence, Tri-City met its initial burden of showing that its credentialing and re-credentialing of Dr. Kadaba was not below the standard of care for a hospital, shifting the burden to Corelis to show the existence of a triable issue of material fact on this issue.

(Code Civ. Proc., § 437c, subd. (p)(2).) To satisfy his burden, Corelis was required to present expert testimony regarding the standard of care for hospital credentialing and showing how Tri-City breached the standard. The expert must demonstrate sufficient knowledge of a subject so that his or her opinion is helpful to the jury. (Evid. Code, § 801, subd. (a).) If the expert passes this threshold, the question of the degree of the witness's knowledge goes to the weight of the testimony rather than to its admissibility. (*Brown v. Colm* (1974) 11 Cal.3d 639, 646; *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1443.)

Here, Corelis presented the declaration of Peter Bastone, the Chief Executive Officer of a medical center, with Masters degrees in Public Health, Corporate Management and Business Administration. Bastone did not indicate that he has ever been involved in hospital physician credentialing and was familiar with the relevant standard of care; nor did he comment upon the procedures utilized by Tri-City in credentialing Dr. Kadaba. He also failed to indicate how his employment and educational background qualified him to render an expert opinion on the standard of care in hospital credentialing. (Evid. Code, § 720.) Thus, after considering Bastone's declaration, the trial court concluded it was not sufficient to meet Corelis's burden of proof. The trial court did not abuse its discretion because Bastone's declaration did not disclose sufficient knowledge of the subject area. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 39.)

Even if we assumed that Bastone was qualified to present an expert opinion on the standard of care in hospital physician credentialing, he presented insufficient facts to support his conclusion that Tri-City breached the standard of care when it initially granted Dr.

Kadaba privileges and then re-credentialed him over the years. Bastone reviewed Corelis's medical records and concluded that Tri-City fell below the standard of care in continuing to grant privileges to Dr. Kadaba based on (1) the number of malpractice actions against Dr. Kadaba and (2) the fact that Tri-City's own bylaws and Orthopedic Rules and Regulations state that a doctor must be board certified or have comparable training.

Bastone did not state the number of malpractice actions against Dr. Kadaba or indicate how the existence of these actions should have caused Tri-City to refuse to credential him. Although Corelis presented evidence showing that as of the date of his surgery four medical malpractice complaints had been filed in San Diego County against Dr. Kadaba, he presented no evidence regarding the outcome of these actions. Corelis also failed to present any expert testimony showing how four lawsuits in fourteen years rendered Dr. Kadaba unfit for credentialing.

Bastone also stated that credentialing a non board-certified physician for an "urgent/emergent [*sic*] trauma call list" fell below the "current standard of care in San Diego County;" he admitted, however, that "[s]ome years prior, allowing non board-certified doctors to be on an urgent/emergent [*sic*] trauma call list was acceptable" Thus, Corelis's own evidence does not negate that at the time of his surgery the standard of care allowed non board-certified physicians. Corelis also submitted a document showing that in 2003 Tri-City's orthopedic surgery division consisted of physicians that were board-certified, actively pursuing board-certification or possessing comparable ability, training and experience. He presented no evidence, however, showing Dr. Kadaba did not have comparable ability, training or experience or the makeup of this division when Dr. Kadaba

performed the surgery in 2001. Finally, although Tri-City's web site listed Dr. Kadaba's specialty as orthopedics, it did not represent that he was board-certified in this specialty.

Because Corelis provided no adequate showing of negligence by Tri-City in the selection and review of its staff, his claim of negligent credentialing fails.

B. Lack of Informed Consent

A *physician* has a duty to disclose to a patient "the available choices with respect to proposed therapy and . . . the dangers inherently and potentially involved in each." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243; see *Arato v. Avedon* (1993) 5 Cal.4th 1172, 1182-1183.)

The California Code of Regulations governing hospital licensing similarly provides that prior to commencing surgery, the anesthesiologist or surgeon must verify the existence of a written informed consent for the contemplated surgical procedure. (Cal. Code Regs., tit. 22, § 70223, subd. (d)(3).)

A physician's duty of disclosure rests on the assumption that patients are generally persons unlearned in the medical sciences and thus they rely on medical information obtained from a physician when deciding to consent to a particular medical treatment. (*Arato v. Avedon, supra*, 5 Cal.4th at p. 1183.) While a hospital may have a duty to ensure that a patient has signed a written consent form before any surgery is performed, we are unaware of any standard of care requiring a hospital to obtain informed consent from a patient, which inherently requires medical knowledge. Tri-City apparently assumed for the purposes of this motion that it had a duty to ensure that it obtained a signed consent form and challenged the claim on the ground it was not negligent because it obtained signed consent forms and had no duty to obtain informed consent from Corelis.

The record shows that Corelis discussed the surgery with Dr. Kadaba and signed two Tri-City consent forms listing the procedure as an internal fixation with plates and screws. Although Dr. Kadaba ultimately used cerclage wires to reduce the fracture, he made this decision *during surgery* based on the condition of the bone fragments. Tri-City presented the deposition testimony of three physicians confirming that Dr. Kadaba, not the nurses, was responsible for making such medical decisions during surgery. Dr. Lenihan concluded that Tri-City "met the community standard" of care for a hospital regarding obtaining informed consent and explained during his deposition that because the surgeon makes the determination regarding how to repair a particular fracture, it is mistake for a hospital, hospital personnel or nonmedical doctors to discuss treatment options with a patient because they are not qualified to do so.

This evidence is sufficient to met Tri-City's initial burden of showing that the procedures it followed in obtaining Corelis's informed consent did not fall below the standard of care for a hospital, shifting the burden to Corelis to show the existence of a triable issue of material fact on this issue.

Bastone presented no explanation as to how his employment and educational background qualified him to render an expert opinion on the standard of care for a hospital in obtaining informed consent or any facts showing his knowledge on this topic and the trial court properly rejected his conclusions on this ground. (Evid. Code, § 720.) Even assuming Bastone was qualified to address this issue, he did not explain how Tri-City could have obtained Corelis's consent for a technique that Dr. Kadaba decided to use during the operation based on the condition of the bone. Thus, Bastone's conclusion that Tri-City

breached the standard of care because the signed consent forms do not indicate the use of cerclage wires is not supported by any facts and is devoid of evidentiary value. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.)

Corelis also presented the declaration of Drucie Dupree, a registered nurse with 30 years of operating room experience. Dupree criticized Dr. Kadaba's use of cerclage wires and concluded that Tri-City did not meet the standard of care because: (1) there was no evidence of an informed consent discussion from the surgeon with Corelis; (2) the surgical consent form only mentioned plates and screws; and (3) the operative report did not state that Dr. Kadaba attempted to apply plates and screws before using cerclage wires.

Dupree did not state any familiarity with the standard of care for a hospital in obtaining patient consent forms and the trial court apparently rejected her conclusions on this ground. (Evid. Code, § 720.) Even assuming Dupree's training and experience qualified her to express an opinion on this issue, she did not explain how Tri-City was responsible for the scope of Dr. Kadaba's pre-surgical discussion with Corelis or his mid-surgery decision to change the procedure. Corelis discussed the surgery with Dr. Kadaba and then signed two consent forms, witnessed by two different nurses, acknowledging that Dr. Kadaba explained the intended procedure and that he received all information he desired about the procedure. Dupree did not explain how Tri-City was properly charged with the knowing all possible treatments and risks and was in a position to dictate to a surgeon the scope of any pre-surgical discussion or how to perform the surgery. In contrast, Tri-City presented physician testimony stating that the surgeon makes the decisions during surgery and that a hospital and its personnel are not qualified to discuss treatment options with a patient.

A liberal construction of the evidence presented by Corelis fails to show the existence of a triable issue of material fact; as such, the trial court did not err in granting summary judgment. In light of our conclusion, we do not address Tri-City's alternative argument that Corelis failed to comply with the Tort Claims Act.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

McINTYRE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.