Filed 3/15/06 Covarrubias v. Kady CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RUBEN COVARRUBIAS, a minor, etc., et al. Plaintiffs and Appellants, v. TAREK KADY, Defendant and Respondent.	D046529 (Super. Ct. No. GIS12877)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Affirmed.

The record in this case shows that under the prevailing interpretation of our "Good Samaritan" statute, the defendant pediatrician is immune from liability for emergency care he provided to the plaintiff shortly after his birth following a Cesarean section performed on his mother. Accordingly, we affirm the order granting the defendant's motion for summary judgment.

SUMMARY

Plaintiff and appellant Ruben Covarrubias (Ruben) was born on February 28, 2002. Prior to Ruben's birth, his mother received prenatal care from defendant Dr. Kofi Sefa-Boayke. On the morning of his birth, Ruben's mother arrived at defendant Sharp Coronado Hospital (Sharp Coronado) at some point before 7:00 a.m. The initial fetal heart tracing showed "poor variability." At 7:00 a.m. Dr. Sefa-Boyake evaluated Ruben's mother and did not detect any fetal movement. In the early afternoon the fetal heart monitor indicated fetal distress and at 1:46 p.m. Dr. Sefa-Boakye ordered a Cesarean section "STAT."

In the early afternoon of February 28, 2002, defendant and respondent Dr. Tarek Kady was in the nursery at Sharp Coronado checking on one of his pediatric patients. He was not on call at the hospital and had no agreement to attend to Dr. Sefa-Boakye's high-risk deliveries. According to Dr. Kady at approximately 12:30 p.m. he was advised by a nurse that a baby in distress was going to be delivered and his assistance with the baby might be needed. Instead of leaving the hospital and returning to his office, Dr. Kady remained at the hospital.

At 2:53 p.m. a Cesarean section was performed on Ruben's mother and at 2:54 p.m. he was delivered. Dr. Kady and others immediately began three hours of resuscitative efforts on Ruben. Ruben was eventually transferred to the neonatal intensive care unit at the Sharp Mary Birch Hospital on an emergency basis.

Initially, Ruben's parents filed a complaint against Sharp Coronado and Dr. Sefa-Boakye on his behalf. Dr. Kady was deposed by Ruben's attorney and appeared without

counsel at his deposition. Following his deposition, Dr. Kady was added as a defendant and served with the complaint as amended.

Dr. Kady moved for summary judgment. Dr. Kady argued he was responding to an emergency and is therefore immune from liability under the Good Samaritan statute, Business and Professions Code[1] sections 2395 and 2396. Ruben argued that because Dr. Kady had a longstanding relationship with Dr. Kofi Sefa-Boayke and regularly attended at Dr. Kofi Sefa-Boayke's deliveries and because Dr. Kady was asked to attend Ruben's delivery two to three hours before it occurred, Dr. Kady was not responding to an emergency. According to Ruben, Dr. Kady was doing what was expected in light of his pre-existing relationship with Dr. Kofi Sefa-Boayke.

The trial court rejected Ruben's arguments and granted Dr. Kady's motion. A judgment in favor of Dr. Kady was entered and Ruben filed a timely notice of appeal.

DISCUSSION

I

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant satisfies this burden by showing " 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' " to that cause of

---

1 All further statutory references are to the Business and Professions Code unless otherwise specified.

action. (*Ibid.*) " 'Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Id.* at p. 849.) But "if the showing by the defendant does not support judgment in his favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534.) In determining whether these burdens have been met, we review the record de novo. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.)

II

Section 2395 states in pertinent part: "No licensee, who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care." Section 2396 states: "No licensee, who in good faith upon the request of another person so licensed, renders emergency medical care to a person for medical complication arising from prior care by another person so licensed, shall be liable for any civil damages as a result of any acts or omissions by such licensed person in rendering such emergency medical care."

"The legislative purpose behind sections 2395 and 2396 'is to induce physicians to render medical assistance to persons in need of such care.' [Citation.] The provisions are ' "directed towards physicians who, by chance and on an irregular basis, . . . are called to render emergency medical care." ' [Citation.] The statutory purpose is best served by 'discouraging even the commencement of an action against a health care professional who

has rendered emergency medical assistance.' [Citation.]." (*Reynoso v. Newman* (2005) 126 Cal.App.4th 494, 499 (*Reynoso*).)

"[T]he 'test for determination of the existence of an emergency is objective: whether the undisputed facts establish the existence of an exigency of "so pressing a character that some kind of action must be taken." ' . . . '[A]bsent a duty of professional care preexisting the emergency, the Good Samaritan law is applicable to protect a physician *who renders emergency assistance* in a hospital to the patient of another doctor. [Citation.] 'The heart of the application of the Good Samaritan statutes is the inquiry whether a duty of professional care pre-existed the emergency." ' [Citation.] The 'Good Samaritan statutes . . . provide immunity for any acts or omissions of a medical volunteer who in good faith renders emergency medical assistance.' [Citation.]" (*Reynoso, supra,* 126 Cal.App.4th at p. 500; see also *Kearns v. Superior Court* (1988) 204 Cal.App.3d 1325, 1328 (*Kearns*); *Burciaga v. St. John's Hospital* (1986) 187 Cal.App.3d 710, 716 (*Burciaga*); *McKenna v. Cedars of Lebanon Hospital* (1979) 93 Cal.App.3d 282, 286 (*McKenna*).)

In *Reynoso* a dentist who had performed oral surgery at an outpatient clinic called an internist to examine a patient who was having difficulty recovering from anesthesia. When he arrived, the internist examined the patient and advised that the patient needed to be transported promptly to the nearest hospital.

At the time his deposition was taken in the later medical malpractice action, the internist had no recollection as to whether, when he had been called by the dentist, he had been told the situation was urgent. Nonetheless, relying on the Good Samaritan statute,

the internist moved for summary judgment. The patient argued that because the internist could not show he subjectively believed he was responding to an emergency, he could not show he was protected by the statute. The trial court granted the internist's motion and we affirmed.

We found that because the patient's theory of liability against the medical professionals was based on the existence of an emergency, there was no dispute an emergency existed. We also found there was no dispute the internist was a volunteer. Because there was an emergency in fact and because the internist responded on a volunteer basis, we concluded the internist's "subjective belief as to the existence of a medical emergency when [the dentist] contacted him and while he was on the way to the [outpatient surgery center] is irrelevant." (*Reynoso, supra,* 126 Cal.App.4th at p. 500.)

Our holding in *Reynoso* was consistent with the earlier holding in *Bryant v. Bakshandeh* (1991) 226 Cal.App.3d 1241, 1247 (*Bryant*). In *Bryant* a urologist responded to a "stat" call from operating room surgeons who were attempting to commence elective surgery on an infant. The urologist was needed because the surgeons had been unable to insert a catheter into the infant's urethra and the surgery could not commence without the catheter. Upon his arrival in the emergency room, the urologist was advised as to the elective nature of the surgery and the need for a catheter. The urologist then attempted to insert the catheter, but failed. The surgery was postponed. Unfortunately in attempting to insert the catheter, one of the physicians had ruptured the infant's rectal pouch. As a result the child contracted an infection and died.

Because the urologist was aware the surgery was elective, the court held he was not entitled to the protection of the Good Samaritan Statute as a matter of law. The court found that although the existence of an emergency was an objective matter, "it is for the trier of fact to determine whether the [urologist] had a reasonable, good faith belief that he was responding to an emergency situation when he performed the requested procedures; or whether, under these circumstances, a physician acting in good faith would have reasonably concluded his immediate assistance was not required because no emergency existed." (*Bryant, supra*, 226 Cal.App.3d at p. 1247.) However, as this court explained in *Reynoso*, "*Bryant* does not suggest the Good Samaritan statutes are inapplicable when a physician unquestionably renders emergency care, but was unaware until he or she reached the patient that the situation was an emergency." (*Reynoso, supra*, 126 Cal.App.4th at p. 500.)

As the foregoing indicates, in addition to showing he was responding to an emergency, a physician must also show he had no pre-existing duty to the patient. (*Burciaga*, *supra*, 187 Cal.App.3d at p. 716; *McKenna*, *supra*, 93 Cal.App.3d at pp. 286-288.) In *Burciaga* a pediatrician was in a hospital examining some of his patients when he was asked to go to a delivery room and provide care to an infant who had been born with his umbilical cord wrapped around his neck. Although there was evidence it was the custom and practice of physicians who were on the hospital's staff to treat newborns, the court found the custom and practice was not sufficient to establish any pre-existing duty to provide care. Rather, the court found the pediatrician's declaration that the child was

not his patient was sufficient to establish he acted as a volunteer. (*Burciaga, supra*, 187 Cal.App.3d at p. 717.)

A similar result was reached in *McKenna*. There the chief resident physician at a hospital responded to a call for help with a patient who was suffering from a seizure. The chief resident treated the patient, who later died. The court found the chief resident was protected by the statute because he was not the patient's physician and because responding to such emergencies was not part of the chief resident's regular duties. Importantly, the court found the fact that he was employed by the hospital as chief resident did not deprive him of immunity under the statute. (*McKenna*, *supra*, 93 Cal.App.3d at p. 286.)

III

Here there is no dispute Ruben's condition was an emergency within the meaning of the Good Samaritan statute. At the time of his delivery he needed to be resuscitated. Indeed, his theory of liability against both Dr. Sefa-Boayke and Dr. Kady is that they failed to react promptly enough to his condition both before and after he was delivered. Thus as in *Reynoso*, Ruben's theory of liability presupposes the existence of an emergency.

Contrary to Ruben's argument, the fact that Dr. Kady was given notice at approximately 12:30 p.m. his assistance would be needed, did not alter the fact that upon delivery Ruben's condition was "so pressing a character" that some kind of action had to be taken. (See *Kearns, supra*, 204 Cal.App.3d at p. 1328.) The record is undisputed that at delivery Ruben was in such grave condition that unlike the infant in *Bryant*, who was

undergoing an elective procedure and did not need care in order to avoid harm or death, Ruben needed urgent and heroic pediatric care. The notice Dr. Kady was given of the potential emergency did not alter the fact that at birth Ruben in fact needed emergency care within the meaning of the statute. (See *Reynoso, supra*, 126 Cal.App.4th at pp. 499-500.)

The record is also clear Dr. Kady was a volunteer. Ruben was not Dr. Kady's patient and Dr. Kady was not on call or otherwise obligated to respond to the request to assist Dr. Sefa-Boayke at the delivery. (See *Burciaga, supra*, 187 Cal.App.3d at p. 717; *McKenna, supra*, 93 Cal.App.3d at p. 286.) Ruben argues that because Dr. Sefa-Boayke had previously referred patients to Dr. Kady, their pre-existing relationship created some duty to care for Ruben. We have not been cited to any case which holds that such an informal, noncontractual understanding among physicians will deprive the responding physician of the immunity provided by the Good Samaritan statute. (See *McKenna, supra*, 93 Cal.App.3d at p. 286.) Because such informal relationships and understandings are ubiquitous in the medical profession, any such holding would no doubt seriously undermine the statute's goal of encouraging physicians to render emergency assistance to the patients being care for by other physicians.

In sum because Ruben needed emergency care and because Dr. Kady voluntarily provided it, Dr. Kady is immune from liability.

Judgment affirmed. Respondent to recover his costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.