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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LUIS BRANDON GARCIA, Plaintiff and Appellant, v. VINCENT C. KENT et al., Defendants and Respondents.	B176081 (Los Angeles County Super. Ct. No. BC298400)

APPEAL from judgments of the Superior Court of Los Angeles County, Daniel Solis Pratt and Brian F. Gasdia, Judges. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis and Suzanne E. Rand-Lewis for Plaintiff and Appellant.

Schmid & Voiles and Suzanne De Rosa for Defendants and Respondents Vincent C. Kent and Robert E. Schatz.

Thomas, Donahue, Thomas & Hurevitz and Craig Donahue for Defendant and Respondent Thomas Heric.

Bragg & Kuluva and Sydnee R. Singer for Defendant and Respondent Matthew Maibaum.

Herzfeld & Rubin, Michael A. Zuk, Suhasini S. Sawkar, and Napoleon G. Tercero for Defendants and Respondents Glenn Marshak and Peter Mendelsohn.

Lewis Brisbois Bisgaard & Smith, Gregory G. Lynch, Khuong Do, Jeffry A. Miller, and Lisa W. Cooney for Defendant and Respondent Jesus Perea Ochoa.

Riley & Reiner, Raymond L. Riley, Douglas D. Winter, and Kimberly A. Westmoreland for Defendants and Respondents Premier Medical Management Systems, Inc., and Catalino D. Dureza.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Patricia Egan Daehnke, and Vangi M. Johnson for Defendants and Respondents Afshin A. Mashoof and Frank J. Coufal.

In this medical malpractice action, we affirm the respective judgments of dismissal and summary judgments in favor of the defendants who owed no duty of care to the plaintiff, Luis Brandon Garcia.

BACKGROUND

The first amended complaint (FAC) alleged as follows: Plaintiff's workers' compensation attorney referred him "to Dr. Robere J. Missirian at 'The Doctors' (DMG Doctors Medical Group) at 'Premier Medical'" for treatment of a work-related shoulder injury. Premier[1] referred plaintiff to defendant Francis Gerard D'Ambrosio, M.D., for referral, care, and surgery. Because plaintiff "was being referred for Workers' Compensation treatment, he believed the group was made up of qualified, competent practitioners who would manage, screen, evaluate and monitor their members, such as

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[1] Although the complaint refers to DMG and Premier jointly as "DMG/Premier," we will refer to them as "Premier."

[Dr. D'Ambrosio], and the services they provided." Dr. D'Ambrosio, who is not a party to this appeal, negligently operated on plaintiff's shoulder and negligently allowed two physician's assistants to perform parts of the surgery. The surgery "exceed[ed] the scope of Plaintiff's understanding of the proposed procedure and severed Plaintiff's deltoid muscle, in what has been referred to by a subsequent treating physician as an 'operative misadventure[.'] Upon being seen . . . by a new treating orthopedic surgeon, Plaintiff was informed that [Dr. D'Ambrosio] had battered him by severing his muscle in a procedure he did not know had been undertaken and to which he did not consent." Plaintiff "was shocked to find out that [Dr. D'Ambrosio] had lost his medical license in two other states and had numerous prior lawsuits for causing substantially similar injuries" to other patients.[2]

Plaintiff sued Dr. D'Ambrosio for intentional tort (battery), general negligence, and fraud. Plaintiff also sued, among others, the physician's assistants who allegedly performed parts of the surgery (Jesus Perea Ochoa and John Dodd), the hospital where the surgery was performed (Tri-City Regional Medical Center), Premier, and nine Premier physicians who did not treat plaintiff before the surgery (Catalino D. Dureza, M.D., Matthew Maibaum, Ph.D., Glenn Marshak, M.D., Peter Mendelsohn, M.D., Afshin A. Mashoof, M.D., Frank J. Coufal, M.D., Thomas Heric, M.D., Vincent C. Kent, M.D., and Robert E. Schatz, M.D.) (referred to for the sake of convenience as the nontreating physicians even though one is a psychologist and some may have provided post-surgical treatment to plaintiff).

Of the nine nontreating physicians, the trial court dismissed six of them (Drs. Mendelsohn, Mashoof, Coufal, Heric, Kent, and Schatz) after sustaining their demurrers to the FAC without leave to amend. The trial court dismissed two others (Drs. Dureza and Marshak) after sustaining their demurrers to the third amended

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[2] According to the reporter's transcript, the trial court noted that Nevada did not file an action against Dr. D'Ambrosio's license until March 2002, and California's licensing board did not act to incorporate the Nevada proceedings until November 2002, which was *after* plaintiff's surgery by Dr. D'Ambrosio in April 2002.

complaint (TAC) without leave to amend. The remaining nontreating physician, Dr. Maibaum, was not dismissed although his demurrer to the FAC was also sustained without leave to amend.[3] The trial court cited *Armato v. Baden* (1999) 71 Cal.App.4th 885 in sustaining the demurrers on the legal theory that the nontreating physicians owed no duty of care to plaintiff merely because of their affiliation with Premier.[4]

The trial court sustained Premier's demurrer to the FAC's intentional tort (battery) and fraud allegations without leave to amend, stating "[t]he facts alleged do not support either fraud or battery. It is not clear how defendants performed a surgery with no consent at all, taking the case outside of mere negligence. See Cobbs v. Grant (1972) 8 Cal.3d 229." The trial court sustained the demurrer to the fraud allegations for lack of "the requisite specificity."

The trial court also sustained physician's assistant Ochoa's demurrer to the battery and fraud allegations without leave to amend, stating: "The basis for the battery claim is failure to obtain informed consent. Plaintiff does not allege what treatment [h]e believed he was going to receive or how his consent to undergo any surgery was obtained. [¶] With respect to the fraud claim, plaintiff did not meet the level of specificity required to overcome demurrer. See Lazar v. Superior Court (1996) 12 Cal.4th 631. From the first

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[3] We previously denied Dr. Maibaum's motion to dismiss the appeal from the nonappealable order sustaining his demurrer to the FAC. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780 [the appeal must be taken from a subsequent judgment of dismissal].) In the interests of justice and to prevent unnecessary delay, we deemed the order sustaining the demurrer as incorporating a judgment of dismissal and treated the plaintiff's notice of appeal as applying to that judgment. (*Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1440-1441.)

[4] The order sustaining the nontreating physicians' demurrers stated in relevant part: "An individual officer will not be held liable in tort for the wrongdoings of another member of the group. Armato v. Baden (1999) 71 Cal.App.4th 885. Such allegation, without more, is insufficient to sustain the claims against the other doctors in the group. The first amended complaint is completely devoid of facts to support the causes of action as to them. Plaintiff did not meet his burden of showing the possibility of amendment. The demurrer is therefore sustained without leave."

amended complaint, one cannot ascertain the conduct which allegedly constituted fraud by the demurring defendant. Generally alleging that 'defendants' represented that defendant D'Ambrosio was competent is insufficient, particularly when there are more than a dozen defendants named in the action. [¶] In opposition to the demurrer, plaintiff failed to meet his burden of showing the possibility of a successful amendment. Burchett v. City of Newport Beach (1995) 33 Cal.App.4th 1472. Accordingly, the demurrer is sustained without leave to amend."

After the demurrers were sustained, Premier and Ochoa moved for summary judgment of the remaining negligence claim in the TAC. The trial court granted Premier's motion on the ground that Premier owed no duty of care to plaintiff as a matter of law, either as a health care provider or under an ostensible agency theory. The trial court granted Ochoa's motion on the ground that he had complied with the applicable standard of care and did not perform the surgery.

On appeal, plaintiff challenges the respective summary judgments for Premier and Ochoa and judgments of dismissal for the nontreating physicians (Drs. Mendelsohn, Mashoof, Coufal, Heric, Kent, Schatz, Dureza, Maibaum, and Marshak).[5]

DISCUSSION

I

Premier

In granting Premier's motion for summary judgment, the trial court found no triable issues of material fact and determined as a matter of law that Premier is merely a billing and administrative service that does not provide health care and does not employ the physicians, including Dr. D'Ambrosio, who practice under the name Premier. Plaintiff seeks reversal of the summary judgment on the ground that triable issues of

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[5] The other defendants who are not parties to this appeal (including Dr. D'Ambrosio, Dodd, and Tri-City Regional Medical Center) will not be discussed in this opinion.

material fact exist as to whether Dr. D'Ambrosio was Premier's implied or ostensible agent.[6] (See Civ. Code, §§ 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"], 2317 ["Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess"], and 2334 ["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"].) The contention lacks merit.

In support of his argument, plaintiff cites *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, which reversed a nonsuit for a defendant hospital because of triable issues of fact regarding the existence of an implied or ostensible agency between the hospital and the radiologist who misread an X-ray during the plaintiff's emergency room visit. We conclude that *Mejia's* rationale for inferring an ostensible agency does not apply to this case because Premier is not a hospital and does not provide medical services. As the appellate court explained in *Mejia*, the hospital's provision of emergency room care was significant to its analysis and holding because "a hospital is generally deemed to have held itself out as the provider of care, unless it gave the patient contrary notice. [Citations.] Many courts have even concluded that prior

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[6] Summary judgment is appropriate only where no material issue of fact exists or where the record establishes as a matter of law that none of the causes of action has merit. After examining the facts before the trial judge on a summary judgment motion, an appellate court independently determines their effect as a matter of law. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1664.)

"An issue of fact can only be created by a conflict of evidence. It is not created by 'speculation, conjecture, imagination or guess work.' [Citation.] Further, an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions' [citation], or mere possibilities [citation]." (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196-197.)

Although plaintiff alleged in his complaint that Premier referred him to Dr. D'Ambrosio and disputed Premier's showing to the contrary in the trial court, he has abandoned that argument on appeal.

notice may not be sufficient to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information. [Citations.]" (*Id.* at p. 1454.) "Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician--i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician--ostensible agency is readily inferred." (*Id.* at pp. 1454-1455.)

In this case, the trial court determined that because Premier is not a hospital or medical services provider, it owed no duty of care to plaintiff under *Armato v. Baden*, *supra*, 71 Cal.App.4th 885. In *Armato*, a physician's assistant (DeLeon, the employee of a medical group) allegedly provided negligent treatment for the plaintiff's broken wrist. After the plaintiff in *Armato* settled her malpractice claim with the medical group and its employee DeLeon, she sued the medical group's independent contractor physicians for battery, fraud, negligent supervision, medical malpractice, and other claims, even though they did not treat her injury or supervise DeLeon. On appeal from the summary judgment for the nontreating physicians, the plaintiff in *Armato* argued for the imposition of a duty of care based on the implied or ostensible agency created by the listing of the physicians' names and medical degrees on the medical group's appointment cards, prescription pads, and office door. The plaintiff in *Armato* contended that the medical group's display of the physicians' names and medical degrees had misled her to believe that DeLeon was also a medical doctor. (*Id.* at pp. 888-889.)

The *Armato* court rejected the plaintiff's implied agency theory and concluded that the nontreating physicians had owed no legal duty to supervise DeLeon's treatment of the plaintiff, who was not their patient, in the absence of a special relationship giving rise to an obligation or duty to take affirmative action to assist or protect her. (*Armato*, *supra*, 71 Cal.App.4th at pp. 894-897.) The court held: "The listing of respondents' names in connection with the Managed Care office is insufficient as a matter of law to establish any agency or ostensible partnership between any respondent and Managed Care or DeLeon. Generally, the law indulges in no presumption tha[t] an agency exists but

instead presumes that a person is acting for himself and not as agent for another." (*Id.* at pp. 898-899.)

Whether a legal duty exists is a question of law for the court. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237.) In this case, the trial court granted Premier's motion for summary judgment based on its legal determination under *Armato* that no duty of care was owed to plaintiff. Plaintiff argues on appeal that the trial court erroneously applied *Armato* because, according to plaintiff's declaration supplied in opposition to the summary judgment motion, Premier did more than simply display the physicians' names on its office door and appointment slips in that Premier also "set up the surgery, chose the facility and had me transported to the facility in their limousine. I only learned where the surgery was going to be when they called me the night before. Premier provided my physical therapy at Premier Medical's therapy unit. . . . The staff at Premier referred to the unit as Premier's physical therapy unit. If I had an emergency or other medical need, I would call Premier. Premier provided care for me by providing doctors, physical therapy, doctor's offices, physical therapy facilities, processing liens, medical reports and medical records, prescriptions, transportation, and surgery."

We fail to see a meaningful distinction, however, between the facts of this case and *Armato.* The services that plaintiff allegedly received from Premier--including the scheduling of the surgery, the selection of the surgical facility, transportation to the hospital by limousine, and physical therapy--merely facilitated the medical services ordered or provided by Dr. D'Ambrosio and were insufficient, as a matter of law, to establish an implied agency or partnership.[7] We conclude that the record does not contain a triable issue of material fact regarding an ostensible agency between Premier and Dr. D'Ambrosio.

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[7] As plaintiff's opening brief does not challenge the sustaining of Premier's demurrer to the battery and fraud claims, we will not discuss that ruling.

II

The Nontreating Physicians

"In examining the sufficiency of the complaint, '[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citations.] '[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.]" (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662.)

According to plaintiff's opening brief, each defendant was directly negligent in referring him to Dr. D'Ambrosio for surgery, failing to obtain his consent for the surgical procedure that was actually performed (severing the muscle), and misrepresenting and concealing information concerning Dr. D'Ambrosio's lack of qualifications and competence to perform a surgical procedure that was unnecessary (severing the muscle). The complaint, however, does not allege sufficient facts to support an allegation of direct negligence against the nontreating physicians as a result of their direct communications or physician-patient relationships with him. No facts were alleged in the complaint to show that any of the nontreating physicians had ever met or communicated with plaintiff before the surgery, or had directly referred him to Dr. D'Ambrosio. On the contrary, the FAC alleged that plaintiff was referred to Dr. D'Ambrosio by *Premier*. According to the FAC, plaintiff "was met at the front counter by *office personnel who then directed and referred*" him to Dr. D'Ambrosio. (Italics added.) Read as a whole, the negligence allegations against the nontreating physicians are based on an indirect or vicarious liability theory resulting from plaintiff's contacts with Premier's office staff,

Dr. D'Ambrosio's alleged negligence, and the names on the office door. Plaintiff was allegedly misled to believe that Premier was a medical group comprised of the persons named on the door. Plaintiff allegedly believed that Premier, "including the individual Defendants, was a qualified medical organization which had standards and protocols concerning themselves as a group in order to secure referrals from attorneys and others in the Workers' Compensation system. Because Plaintiff was being referred for Workers' Compensation treatment, he believed the group was made up of qualified, competent practitioners who would manage, screen, evaluate and monitor their members, such as [Dr. D'Ambrosio], and the services they provided."

Although plaintiff's counsel claims to have alleged theories of both direct and vicarious liability against the nontreating physicians, we read the complaint as alleging only a vicarious theory of liability against the nontreating physicians based on their use of Premier's office space and support staff. We view the allegation of negligent referral not as binding factual allegation but rather as nonbinding legal conclusion.

Plaintiff contends that the nontreating physicians' demurrers were erroneously sustained under *Armato* because they owed plaintiff a direct duty of care "to ensure that members of their medical group to whom patients were referred were qualified in the areas of their stated specialties." We disagree. As stated in *Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 543: "In the usual case of medical malpractice the duty of care springs from the physician-patient relationship which is basically one of contract. [Citation.] It is clear that the imposition on defendant of a duty of care to plaintiff here cannot rest on the physician-patient relationship. There was none."

Plaintiff argues that the nontreating physicians, by allowing their names to be listed on Premier's appointment cards and office door, created an implied or ostensible agency relationship with Dr. D'Ambrosio, which gave rise to a duty of care, including the duty to warn him of Dr. D'Ambrosio's lack of qualifications. Plaintiff contends that *Armato* does not shield nontreating physicians from liability for their *own* negligent acts or omissions. The complaint, however, omitted the allegation of facts showing the existence of a special relationship giving rise to an obligation or duty on the part of the

nontreating physicians to take affirmative actions to assist or protect him. (*Armato*, *supra*, 71 Cal.App.4th at pp. 894-897.) Under *Armato*, the listings of the nontreating physicians' names on the medical group's office door and appointment slips were insufficient as a matter of law to show an implied or ostensible agency between Dr. D'Ambrosio and the nontreating physicians. (*Ibid.*) The allegation that the nontreating physicians had referred plaintiff to Dr. D'Ambrosio was nothing more than a legal conclusion that may be ignored under the circumstances.

Given the absence of factual allegations showing a special relationship that gave rise to a duty of care, the nontreating physicians owed no duty, as a matter of law, to investigate and warn plaintiff of Dr. D'Ambrosio's alleged lack of qualifications as a surgeon. Just as the facts in *Armato* failed to create a duty of care on the part of the nontreating physicians to disclose to the plaintiff that an employee of their medical group who had treated her on six occasions was not a physician, we similarly conclude that the facts alleged in the complaint failed to create a duty of care on the part of the nontreating physicians to warn plaintiff against Dr. D'Ambrosio, who was not alleged to be their partner or an employee of Premier, which is not a medical group. (See *Griffin v. County of Colusa* (1941) 44 Cal.App.2d 915, 922.)

Plaintiff contends that the trial court abused its discretion in denying leave to amend, but offers no explanation of how the complaint can be amended to cure the defect. As we see no reasonable possibility that the defect can be cured by amendment, we find no abuse of discretion.

III

Ochoa

The trial court granted physician's assistant Ochoa's motion for summary judgment based on its determination that there were no triable issues of fact and its conclusion that Ochoa had complied, as a matter of law, with the applicable standard of care and did not perform the surgery. Plaintiff seeks reversal on the ground that the trial court erroneously relied upon excluded evidence. We are not persuaded.

To establish the applicable standard of care and his compliance with that standard, Ochoa submitted the expert declaration of Richard Scheinberg, M.D. Paragraph 7 of Dr. Scheinberg's declaration stated in relevant part that "Mr. OCHOA, at all times relevant to this action, acted within *the standard of care in the community for Internists* in his care and treatment of the patient, Luis Garcia. Specifically there is no evidence that Mr. OCHOA performed any part of the surgery."[8] (Italics added.)

Plaintiff contends on appeal that paragraph 7 was excluded by the trial court for the following reasons: The trial court initially overruled plaintiff's evidentiary objection that Dr. Scheinberg, as a surgeon, was unqualified to discuss the standard of care "for Internists," but took the matter under submission to issue a final written ruling. In its written ruling, the trial court sustained the evidentiary objection to paragraph 7 without specifying whether any portion of the paragraph was admissible.

Ochoa contends that paragraph 7's reference to the standard of care "for Internists" was an obvious mistake that did not render the rest of the paragraph inadmissible because it is clear that Dr. Scheinberg was discussing the standard of care for physician's assistants and not the standard of care for internists. We agree. "As a general rule, a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case. [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 226.) In this case, to the extent the written evidentiary ruling is inconsistent with the oral evidentiary ruling and the summary judgment ruling, it can be harmonized by striking the words "for Internists" from paragraph 7 and leaving the rest of the paragraph intact. (See

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[8] Paragraph 7 of Dr. Scheinberg's declaration stated: "It is my medical opinion to a reasonable degree of medical probability that Mr. OCHOA, at all times relevant to this action, acted within the standard of care in the community for Internists in his care and treatment of the patient, Luis Garcia. Specifically, there is no evidence that Mr. OCHOA performed any part of the surgery. His participation was limited to performing external rotation or abduction of the patient's left shoulder and positioning the patient. Nor did Mr. OCHOA make any incision or excision during the surgery."

Denham v. Superior Court (1970) 2 Cal.3d 557, 564 [the judgment is presumed correct and all intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown].) As harmonized, the remainder of the declaration supports the summary judgment ruling and is consistent with the court's ruling that Ochoa "acted within the *applicable* standard of care." (Italics added.)[9]

IV

Costs

The trial court awarded Premier and Ochoa costs under Code of Civil Procedure sections 1032 and 1033.5 after partially granting plaintiff's motion to tax costs of $19.86 against Ochoa. Plaintiff argues on appeal that the awards must be reversed for abuse of discretion because neither Premier nor Ochoa established the reasonableness or necessity of any of their claimed costs. Because plaintiff has failed to support this contention with appropriate record references and argument, however, we may reject it without further discussion. (See *Kostecky v. Henry* (1980) 113 Cal.App.3d 362, 378 [contention that damages were unsupported by the evidence was waived by the failure to set forth in the brief all of the evidence relevant to the issue and not merely the evidence favorable to the appellant].)

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[9] As plaintiff's opening brief does not challenge the sustaining of Ochoa's demurrer to the battery and fraud claims, we will not discuss that ruling.

DISPOSITION

The judgments of dismissal for defendants Mendelsohn, Mashoof, Coufal, Heric, Kent, Schatz, Dureza, Maibaum, and Marshak are affirmed, and the summary judgments for Premier and Ochoa are affirmed. The defendants are awarded their costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.