Filed 9/18/12 Andrews v. Aurora Charter Oak Hosp. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LESLIE ANDREWS et al.,	
Plaintiffs and Appellants,	E053311
v.	(Super.Ct.No. RIC466688)
AURORA CHARTER OAK HOSPITAL,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of Riverside County. John W. Vineyard, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Equity Law Group and Lotfy Mrich for Plaintiffs and Appellants.

Law Offices of James R. Rogers, Keith E. Zwillinger and Rachael H. Mills for Defendant and Respondent.

Plaintiffs Leslie Andrews and Holly Fallon appeal from a summary judgment in favor of defendant Aurora Charter Oak Hospital in a lawsuit alleging the wrongful death of their 18-year-old son, Eric Andrews. The trial court denied a motion to continue the

summary judgment motion because plaintiffs failed to specify what admissible evidence they expected to be able to obtain if the continuance were granted. The trial court granted the summary judgment motion because plaintiffs failed to produce admissible evidence showing the existence of triable issues of material fact concerning plaintiffs' claims that the hospital was vicariously liable for the negligence of the attending physician, Dr. Gillespie, and that the hospital was liable for negligent hiring or supervision of its staff.

We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs' operative fourth amended complaint alleges multiple causes of action arising from the death of plaintiffs' 18-year-old son, Eric Andrews (Eric). The complaint alleges that Eric was shot and killed by Riverside County Sheriff's deputies on February 28, 2006, following a 911 call by plaintiff Holly Fallon saying that her son needed help. Eric had been admitted to Aurora Charter Oak Hospital (the hospital) earlier in February on an involuntary hold after threatening suicide. He was suicidal because of the break-up of his relationship with a girlfriend. The complaint alleges that Eric was negligently discharged from the hospital by his attending physician, William S. Gillespie.

With respect to the hospital, the complaint alleges negligent infliction of emotional distress (third cause of action); medical malpractice in Eric's treatment and discharge by Dr. Gillespie and unnamed other members of the hospital's staff (sixth cause of action);

and negligent hiring and supervising of "[d]octors[,] medical staff and employees" (seventh cause of action).

The hospital filed a motion for summary judgment or summary adjudication as to the sixth and seventh causes of action.[1] Plaintiffs filed opposition to the motion and requested continuance of the motion for further discovery. The trial court denied the motion to continue and granted the motion for summary adjudication of the sixth and seventh causes of action. The court entered judgment for the hospital. Plaintiffs filed a timely notice of appeal.

LEGAL ANALYSIS

1.

THE MOTION FOR SUMMARY ADJUDICATION WAS PROPERLY GRANTED

Standard of Review

We review orders granting motions for summary judgment de novo, applying the same rules the trial court was required to apply in deciding the motion. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 753.)

A defendant moving for summary judgment has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense

[1] The hospital's demurrer to the third cause of action in the fourth amended complaint (for negligent infliction of emotional distress) was sustained without leave to amend on March 26, 2009. Consequently, with the summary adjudication of the sixth and seventh causes of action, the judgment finally disposes of all of the issues between plaintiffs and the hospital.

to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2);[2] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).) If a defendant's moving papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that a triable issue of material fact actually exists as to those elements or the defense. (*Aguilar*, at p. 849.) In order to meet that burden, "'[t]he plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation]." (*Ibid*., quoting former § 437c, subd. (o)(2), now subd. (p)(2).) Further, the opposing party must produce admissible evidence demonstrating the existence of a triable issue of material fact. (§ 437c, subds. (d), (p).) We review a trial court's evidentiary rulings on summary judgment for abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

The Trial Court's Ruling That Plaintiffs Failed to Produce Admissible Evidence in Support of the Sixth and Seventh Causes of Action Was Not an Abuse of Discretion.

The sixth cause of action alleged professional negligence by Dr. Gillespie and other unnamed medical staff at the hospital. The cause of action incorporates by reference an earlier allegation that the hospital was vicariously liable for the actions of

[2] All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

Dr. Gillespie and other staff, who were acting as agents and/or employees of the hospital. The seventh cause of action alleged that the hospital negligently supervised "[d]octors[,] medical staff and employees." In its ruling on the summary judgment motion, the trial court found that the hospital presented admissible evidence showing that Dr. Gillespie was neither an employee nor acting as the hospital's agent, and that the hospital did not directly control or supervise the care provided by an attending physician such as Dr. Gillespie. Further, the hospital produced the declaration of Dr. Mark Kalish, who opined that the hospital and its employees provided appropriate care for Eric Andrews and that, according to the hospital's rules and regulations and accepted medical practice, Dr. Gillespie, as attending physician, had complete control of the treatment and discharge of Eric Andrews.

The trial court held that the burden therefore shifted to plaintiffs to produce evidence that showed the existence of a triable question of fact concerning Dr. Gillespie's status with respect to the hospital and of the hospital's negligence in hiring or supervising Dr. Gillespie. However, the court found that in their separate statement of undisputed and disputed facts, plaintiffs failed to produce any properly authenticated evidence and failed to cite to any specific evidence in support of the purported disputed facts. For these reasons, the court granted the summary judgment motion. We find no abuse of discretion.

Section 437c, subdivision (b)(3) provides: "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving

party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. *Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion*." (Italics added.) Further, rule 3.1350(f) of the California Rules of Court provides that citations to the evidence in support of a disputed fact "must be supported by citation to exhibit, title, page, and line numbers in the evidence submitted."

Plaintiffs' separate statement of disputed facts asserted that Dr. Gillespie was the agent and employee of the hospital and that the hospital did directly control and supervise his care and treatment of patients. In support of those purported facts, plaintiffs cited merely to the "medical chart" and "deposition transcripts." This does not comply with section 437c, subdivision (b)(3) and California Rules of Court, rule 3.1350(f), and plaintiffs do not present any legal analysis or argument as to why it was an abuse of discretion for the court to grant the motion because of that lack of compliance.[3]

---

[3] The trial court also ruled that the exhibits plaintiffs attached to their opposition to the summary judgment motion were not authenticated and therefore inadmissible. It is true that the excerpted deposition transcript was not identified with the title page, deponent's name and the date of the deposition, as required. (Cal. Rules of Court, rule 3.1116(a).) However, the opposition included a declaration by the office manager for plaintiffs' attorney, which stated that the exhibits attached to the opposition were copies of Dr. Gillespie's "Original Deposition" and "the medical Chart from Aurora Charter Oaks." Authentication of an exhibit merely requires evidence "sufficient to sustain a finding that [the document] is the writing that the proponent of the evidence claims it

[footnote continued on next page]

In any event, the evidence plaintiffs describe in their opening brief is not sufficient to meet their burden. Our Supreme Court has held that "[t]here is a triable issue of material fact if, and only 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, fn. omitted.) As to Dr. Gillespie's alleged status as an employee, the sole evidence plaintiffs cite is the following excerpt from his deposition:

"Q: Now, just explain to me your relationship as a doctor with Charter Oak.

"A: My relationship with Charter Oak? I'm an attending physician there. And I have a position as a - an associate medical director. . . . [¶] . . .[¶]

"Q: Is [associate medical director] a salaried position?

"A: Yes - is it salary? I don't know if it's called salary. There's some compensation. There's some – maybe call it a stipend is maybe a good way to look at it or – I don't know if I'd call it a salary. There's a financial compensation.

"Q: Okay. Is that on a monthly basis?

"A: Yes, it is."

[footnote continued from previous page]
is . . . ." (Evid. Code, § 1400; see *Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1409.) If lack of authentication were the only basis for the trial court's rejection of the evidence in support of plaintiffs' separate statement of disputed facts, we might be inclined to find it an abuse of discretion, given that the identical exhibits were also attached to the hospital's summary judgment motion. However, plaintiffs' failure to cite to specific portions of the exhibits is a legitimate basis for granting the motion. (Code Civ. Proc., § 437c, subd. (b)(3).)

A reasonable trier of fact could not find, based on that evidence alone, that plaintiffs had proven by a preponderance of the evidence that Dr. Gillespie was an employee of the hospital rather than an independent contractor. Dr. Gillespie also testified that he maintained an office separate from the hospital and that his staff billed patients and their insurers for his services, and the hospital's medical director likewise stated in a declaration that Dr. Gillespie had never been an employee of the hospital but was at all times an independent contractor. The evidence that Dr. Gillespie received a stipend for his services as associate medical director does not refute the hospital's evidence that he was an independent contractor—the two are not mutually exclusive—and it is not sufficient, standing alone, to support the conclusion that he was an employee of the hospital. Similarly, the mere fact that Dr. Gillespie served as associate medical director is not sufficient, in and of itself, to prove that Dr. Gillespie was the hospital's agent. (See *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103-104.)

Plaintiffs' contentions concerning the evidence in support of the seventh cause of action, for negligent hiring and supervision of staff, are even flimsier. A claim of negligent hiring, retention or supervision requires proof that the plaintiff suffered damages because the person hired or supervised was in some manner unfit to perform those duties, and the injury caused must be directly related to the person's employment. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139-1140.) Plaintiffs assert that the hospital is liable for their damages because Dr. Gillespie and unnamed hospital personnel were "not properly credentialed[,] not members in good standing[,

and] responsible for the premature release of . . . Eric Andrews." The hospital produced evidence that Dr. Gillespie was properly credentialed and properly screened for appointment and reappointment to its staff, and plaintiffs produced no evidence to the contrary. Moreover, in the context of this case, the hospital's liability for negligent hiring, retention or supervision depends upon a finding that Dr. Gillespie or other medical staff were negligent in releasing Eric. Whether medical care falls below acceptable standards can be established only by expert testimony. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) Plaintiffs proffered no expert testimony that Dr. Gillespie or any hospital employee was negligent. Consequently, they did not meet their burden of producing evidence showing a triable issue of fact with respect to the seventh cause of action.

2.

THE DOCTRINE OF PECULIAR RISK DOES NOT APPLY TO MEDICAL MALPRACTICE

Plaintiffs contended below that if Dr. Gillespie was indeed an independent contractor, rather than an employee, the hospital was liable for his negligence under the doctrine of peculiar risk. They assert that theory on appeal as well. The trial court held that the doctrine does not apply to medical malpractice and that plaintiffs had failed to provide any authority that the doctrine does apply. We agree.

The doctrine of peculiar risk "pertains to contracted work that poses some inherent risk of injury to others." (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 693.) That

doctrine arose from the recognition "that a landowner who chose to undertake inherently dangerous activity on his land should not escape liability for injuries to others simply by hiring an independent contractor to do the work." (*Id.* at pp. 693-694.) "The courts adopted the peculiar risk exception to the general rule of nonliability to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." (*Id.* at p. 694.)

Plaintiffs have provided no authority that this doctrine, which originated to hold *landowners* responsible for the negligence of contractors engaged to perform work on their property, has ever been applied in the context of medical malpractice, nor have they made any argument as to why the doctrine should be so applied. In the absence of such authority or argument, we need not address their contention. (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, overruled on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.)

3.

THE MOTION TO CONTINUE WAS PROPERLY DENIED

Stating that discovery was still being conducted, plaintiffs sought to continue the hearing on the summary judgment motion. The trial court denied the request because plaintiffs failed to submit a declaration in compliance with section 437c, subdivision (h).

In pertinent part, section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary

adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." A continuance is "virtually mandated" upon a proper showing. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) Here, however, the declaration of plaintiffs' attorney stated only that he was "in the middle of discovery" and had sent notices of deposition for several witnesses. He did not, however, state what facts "essential to justify opposition" (§ 437c, subd. (h)) to the summary judgment motion he expected to obtain via those depositions. In the absence of such a showing, no continuance was required.

DISPOSITION

The judgment is affirmed. Aurora Charter Oaks Hospital is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.