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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SANDRA HAGAN, et al., Plaintiffs and Appellants, v. TORRANCE MEMORIAL MEDICAL CENTER, Defendant and Respondent.	B280140 (Los Angeles County Super. Ct. No. BC523691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen Czuleger, Judge. Affirmed.

Law Offices of Michels & Lew, Philip Michels and Steven B. Stevens for Plaintiffs and Appellants.

Horvitz & Levy LLP, David M. Axelrad and Peter Abrahams; Moore McLennan LLP, Raymond R. Moore and Laura C. McLennan for Defendant and Respondent.

In a tragic incident, Kent Hagan lost consciousness while riding his bicycle and was taken to the emergency room at Torrance Memorial Medical Center. Days after his admission, he underwent heart surgery, and subsequently died. His family sued the hospital for the negligence of the physicians involved in his treatment. After trial, the court entered judgment for the hospital. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

According to the testimony at trial, on February 27, 2013, at about 1:30 in the afternoon, Kent Hagan was riding with a friend, Scott Hooper. Hooper saw Hagan tip over on his bicycle; Hagan appeared to be in distress.

After emergency services arrived, they transported Hagan to Torrance Memorial Hospital, where he was evaluated in the emergency room. Dr. Lorber evaluated him at about 2 pm; at that time Hagan had a medical emergency that required attention. He was sweaty and pale, and an EKG showed ischemia. He had nausea, had vomited on the way to the emergency room, but did not complain of chest pain. Hagan was alert and oriented: he knew where he was, why he was there, and what the date was, and he could communicate with the medical staff and provide his medical history. Lorber contacted Dr. Castleman, the cardiologist on call, who ordered additional tests which showed arterial blockage. Dr. Castleman also found

Hagan to be cognitively intact, able to focus, to answer questions and to give a medical history.[1]

Other hospital staff also interacted with Hagan while he was in the emergency room. At approximately 2:20 pm, Maria Hagan, the staff person responsible for registering patients, met with Hagan and provided forms for him to sign regarding his treatment. She explained the forms, and had Hagan sign them. She had no trouble communicating with him. She testified that she specifically pointed out the section of the forms stating that the physicians were not agents of the hospital, and had Hagan initial that paragraph.

Dr. Castleman called Dr. Stoneburner, a cardiac surgeon whom he recommended to Hagan. When Dr Castleman arrived, Hagan asked if he was having a heart attack; the doctor replied that he was not. The doctors admitted Hagan to the hospital, with the intent of performing additional tests the next morning. Those tests revealed additional vascular issues, and the doctors recommended surgery.

Sandra Hagan, Hagan's wife, did not arrive at the hospital until tests were underway. She testified that, after her arrival and until the surgery, neither she nor her husband asked whether they could move to another hospital or seek another surgeon, although they did ask Dr. Castleman his opinion of Dr. Stoneburner. She testified that no one told them that the doctors

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[1] The EMT who transported Hagan and another nurse also testified that Hagan was competent, and communicating clearly when they worked with him.

were independent contractors; she assumed they worked at the hospital.

On March 3, Hagan signed additional consent forms;[2] the nurse who provided the forms to him testified that she assessed his ability to sign the forms before he signed them, and Hagan was alert and oriented when he did so.

On March 4, 2013, Dr. Stoneburner performed an aortic valve replacement and coronary artery bypass. Post-operatively, Hagan developed complications, and died on March 12, 2013.

On March 11, 2014, Hagan's surviving wife and child sued the Hospital, and medical personnel involved in his treatment, for wrongful death and negligent infliction of emotional distress.

After finalizing settlements with the individual defendants, plaintiffs and the Hospital waived their rights to a jury trial, and stipulated to a bifurcated bench trial. The first phase was limited to the issue of whether Dr. Stoneburner, the treating cardiac surgeon, was the Hospital's ostensible agent. Pursuant to the stipulation, if the Hospital received a defense verdict following the first phase, the Hospital was to receive judgment and the remainder of the case was to be dismissed. If the verdict after the first phase was in favor of the plaintiffs, however, the second phase would address damages. Plaintiffs dismissed their claims for Negligent Infliction of Emotional Distress, and the Hospital

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2 These exhibits were not included in the Appellant's Appendix, and, as a result, appellants have failed to demonstrate that they did not provide additional notice of the agency disclaimer.

stipulated to the negligence of Dr. Stoneburner and the causal nexus of his negligence to the damages alleged.

After the trial, the court entered judgment for the Hospital on November 18, 2016. Plaintiffs appealed.

DISCUSSION

On appeal, the Hagans argue that the trial court's conclusion that the surgeon was not the Hospital's ostensible agent was error because there was not substantial evidence to support the conclusion that notice was adequate and that Hagan had a meaningful opportunity to act on the notice he was given. Appellants also assert that the Hospital had a non-delegable duty to its patients that precludes judgment in its favor.[3] Finding no error, we will affirm.

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[3] We decline to address the non-delegable duty argument, as the scope of issues to be tried was expressly defined by the parties, and the Hagans present no grounds on which to relieve them of that stipulation. Moreover, no evidence was presented with respect to the determinations necessary to imposing, and complying with, any alleged duty; accordingly, we are not presented with a record sufficient to consider the issue. (See *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287-1288 [discretion to consider on appeal a pure question of law applied to undisputed facts].)

I. The Law of Ostensible Agency in California

Ostensible agency in California is defined by Civil Code sections 2300, 2317, and 2334.[4] As applied to a hospital's liability for the negligence of a physician, ostensible agency "is now commonly expressed as having two elements: (1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453 (*Mejia*).) In the physician-hospital patient context, this is a factual issue. (*Id.* at pp. 1454, 1458.)

Mejia arose from the grant of a non-suit in an emergency room patient's claim against the hospital for negligent treatment. After reviewing the development of the ostensible agency theory as a basis for hospital liability for the actions of treating physicians, the court concluded that while a hospital is generally viewed to hold itself out as a provider of care, the first element of the test is not satisfied when the hospital gives contrary notice to the patient. (*Ibid.*) As to the second element, reliance, that too is often presumed "absent evidence that the plaintiff knew or

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[4] Section 2300 states: "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." Section 2317 states: "Ostensible authority is such a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Section 2334 states: "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."

should have known that the physician was not an agent of the hospital." (*Ibid*.)

The court concluded that the only relevant factual issue was whether the patient had reason to know that the physician was not an agent of the hospital. In that case, there was no evidence that the plaintiff should have known that the treating physician was not an agent of the hospital; accordingly, non-suit was improper. (See also *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475 [patient treated in emergency room and referred to related clinic but never given notice of lack of agency; ostensible agency shown].)

II. This Record Demonstrates Effective Notice

A. The Hagans Rely on Cases Reversing Findings of Ostensible Agency as a Matter of Law

The Hagans argue that the notice given in the emergency room to Hagan, a patient in distress, was insufficient to constitute the notice required to avoid a finding of ostensible agency. They rely on *Mejia, supra*, 99 Cal.App.4th 1448, where the reviewing court reversed the grant of nonsuit in the emergency room context. They also rely on *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631. *Whitlow* was a summary judgment case, and the court concluded that an admission form with an agency disclaimer was not sufficient to prove notice as a matter of law. *(Id.* at p. 637.) Rather, the reviewing court concluded the trier of fact must hear the evidence and weigh the notice given along with the evidence of the patient's physical condition and capacity to understand the form. (*Id*. at pp. 640-641.)

B. The Determination In This Case Was Based on Facts Proven At Trial

In *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, the reviewing court considered the evidence at trial, as we do here. The court reversed the jury's conclusion the plaintiff had established ostensible agency in light of the patient's signature of forms clearly stating disclaimer of an agency relationship. The forms required the patient to initial that disclosure; there, as here, the patient did so. *(Id.* at p. 1039.) As in this case, the matter was fully tried and the facts demonstrated that the language of the disclaimer stated that the physicians were independent contractors, and not employees or agents of the hospital; as in this case, the language was in boldface print. Unlike this case, however, the patient signed numerous forms over a period of time, and was not receiving emergency treatment.

The facts established at the trial in this case demonstrate that we can neither evaluate this as a strictly emergency room situation, nor as a long-term relationship as in *Markow*. Rather, the testimony establishes that Hagan received treatment and testing in the emergency room, after signing the admission form containing the disclaimer, but that the treatment that the parties stipulated to be the negligent cause of death took place days later. During that time period, according to the testimony of Mrs. Hagan, both she and her husband asked questions about the qualifications of Dr. Stoneburner, but never asked whether they could seek treatment by another doctor or at another hospital. During their questioning of Dr. Castleman, they did not express any concerns about Dr. Stoneburner; had they done so, Dr. Castleman would have insisted that they get another opinion.

Indeed, they told Dr. Castleman that they had experience with cardiac surgery on a family member; Dr. Castleman testified that they could have gone to another facility for the surgery. While Dr. Castleman advised staying in the hospital, it was to ensure that Hagan remained in a monitored setting. Hagan was given the choice of consulting with an additional physician, but made the decision to remain at the Hospital.

Moreover, there was evidence that Hagan was at all times, both while in the emergency room and during the time prior to the surgery, alert, oriented, and capable of giving consent. Thus, while the Hagans argue that he was not given the disclaimer at a time when he could understand and act upon it, the trial court was presented with substantial evidence that Hagan was aware of the information, had the capacity to understand it, and, during the days that elapsed prior to the surgery, had the ability to seek additional medical advice or to be transferred to a facility of his choice.

This case, unlike *Mejia* and *Whitlow,* was not decided as a matter of law, but after a full trial on the issues. The evidence presented supports the trial court's conclusion that the notice given was sufficient and that Hagan had the capacity and the opportunity to understand that notice. The court concluded that the Hagans had not met their burden of proof, and that the Hospital's evidence was compelling.[5]

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[5] The Hagans argue that the trial court failed to expressly address their assertion that Hagan did not have the opportunity to act on the information provided. The evidence does not mandate their conclusion. Castleman's testimony would support the conclusion that Hagan had the opportunity to act on the

We agree; although there was evidence from which the trial court could have reached a different conclusion, we will not disturb its factual determinations. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*' [Citation.] The substantial evidence standard of review is applicable to appeals from both jury and nonjury trials. [Citation.]" (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143; see also *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489.)

On the facts established at trial, the court did not err in entering judgment for the Hospital, consistent with the stipulation of the parties.

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notice he was given by seeking additional consultation or electing treatment at another facility.

DISPOSITION

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

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.