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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEPHANIE BROWNSTEIN,

Plaintiff and Respondent,

v.

BAKER EQUINE HOSPITAL, INC.,

Defendant and Appellant.

B228740

(Los Angeles County
Super. Ct. No. EC048700)

APPEAL from a judgment and order of the Superior Court of Los Angeles
County, William D. Stewart, Judge. Affirmed.

Wallace, Brown & Schwartz, Steve R. Schwartz, Lisa J. Brown and
George M. Wallace for Defendant and Appellant.

The Tenenbaum Law Firm and Michael Tenenbaum for Plaintiff and
Respondent.

AJ, a show horse, underwent surgery at Equine Medical Center and suffered a torn trachea during the insertion or removal of an anesthesia tube. He later developed a severe case of laminitis and was euthanized.

Stephanie Brownstein, AJ's owner, sued Baker Equine Hospital, Inc. (Baker), as the owner of Equine Medical Center and three individual veterinarians, alleging professional negligence. A jury returned a special verdict finding that Baker was negligent but the individuals were not negligent. The trial court entered a judgment on the verdict awarding Brownstein \$46,332.32 in damages. The court denied Baker's motions for a new trial and for judgment notwithstanding the verdict. Baker appeals the judgment and the order denying its motion for judgment notwithstanding the verdict.

Baker contends there is no substantial evidence that it failed to satisfy the applicable standard of care or that its act or omission contributed to any injury. We conclude that substantial evidence supports the verdict and therefore will affirm the judgment and postjudgment order.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background

Equine Medical Center is an outpatient veterinary hospital located in Cypress, California adjacent to the Los Alamitos Race Course. Dr. Cyril W. McIlwraith, a veterinarian, performed arthroscopic surgery on AJ's left hock (part of the left hind leg) at the medical center on December 15, 2007. Prior to the surgery, Dr. Scott T. Meyer, another veterinarian, inserted a tube into AJ's mouth and down his throat to administer an anesthesia. Dr. Meyer removed the tube at approximately

10:00 a.m. that morning, shortly after the surgery. AJ was standing in the recovery stall by 10:15 a.m., at which time he was led to a holding stall in a barn.

Brownstein observed AJ in the holding stall and alerted the hospital staff that he was showing signs of distress. Ann Saska, a staff member, told Dr. Meyer that Brownstein was concerned that AJ was breathing heavily and sweating. Dr. Meyer did not enter the stall to examine AJ at that time, but instead, on his way to lunch one or two hours later, performed a brief visual inspection from outside the stall in a matter of seconds. Dr. Meyer determined that AJ had recovered sufficiently to leave the facility.

Equine Medical Center discharged AJ at approximately 1:00 p.m. on December 15, 2007. Fernando Covarrubias hauled AJ away in a trailer. Before leaving he commented to an assistant at the medical center that AJ was breathing hard. Covarrubias hauled AJ for 30 to 45 minutes to the Los Angeles Equestrian Center (LAEC) in Burbank. Upon arrival, Covarrubias noticed that AJ's face was swollen and that he had bumps all over his body. Covarrubias asked the grooms to call for help. Brownstein arrived at approximately 2:00 p.m. to 2:15 p.m., and a veterinarian examined AJ shortly thereafter.

The veterinarian determined that AJ was suffering from severe subcutaneous emphysema, which he suspected was caused by a tracheal tear.¹ The veterinarian called Equine Medical Center and asked Dr. Meyer to receive AJ for further treatment.

¹ Subcutaneous emphysema is a condition in which air is trapped under the skin, resulting in bubbles that can be visually observed. Subcutaneous emphysema is a major indication of a torn trachea. Dr. McIlwraith testified at trial that it was likely that AJ's trachea was torn during the insertion or removal of an anesthesia tube.

Dr. Meyer stated that AJ should be taken instead to Chino Valley Equine Hospital, a 24-hour care facility.

Covarrubias had left LAEC by this time. Approximately two hours after AJ's arrival at LAEC, he was hauled in a trailer for two hours to Chino Valley Equine Hospital, where he arrived at about 6:00 p.m. A veterinarian at Chino Valley Equine Hospital confirmed that AJ had suffered a tracheal tear. AJ was treated at Chino Valley Equine Hospital and remained there until January 2, 2008, when he returned to his home at LAEC. His walk was fine at that time, but two days later he appeared to Brownstein to be foundering.

AJ was diagnosed with laminitis in his left front foot on January 22, 2008. Laminitis is an inflammation of tissues inside the hoof. It can be a very debilitating and painful condition and can be fatal.

AJ was taken to another veterinary care facility, Alamo Pintado Equine Medical Center, on February 5, 2008, where he remained for two months. From there he was taken to yet another veterinary care facility where he remained until he was euthanized on June 30, 2008.

2. Trial Court Proceedings

Brownstein filed a complaint in December 2008 against Baker, Dr. Meyer, Dr. McIlwraith and Dr. Neil Gray. Dr. Gray provided care for AJ but was not associated with Equine Medical Center. She alleged a count for professional negligence against Dr. Gray and a second count for professional negligence against the other defendants.

At trial, Brownstein sought damages for her expenses incurred to restore AJ to good health and for his fair market value. The trial court denied Baker's motion for nonsuit. The jury returned a special verdict finding that the individual defendants were not negligent and that Baker was negligent. The jury found that Baker's negligence was a substantial factor in causing harm to Brownstein, that she suffered \$46,332.32 in damages to restore AJ to good health and that his fair market value before the harm was \$0.

The trial court entered a judgment in August 2010 awarding Brownstein \$46,332.32 in damages against Baker. The court later denied Baker's motions for a new trial and for judgment notwithstanding the verdict. Baker timely appealed the judgment and the order denying judgment notwithstanding the verdict.²

CONTENTIONS

Baker contends (1) there is no substantial evidence of the applicable standard of care or that it failed to satisfy the standard of care, and (2) there is no substantial evidence that any act or omission by Baker contributed to any injury. Baker challenges the judgment and the denial of its motions for nonsuit, new trial and judgment notwithstanding the verdict on these grounds.

² Baker also purported to appeal the denial of its new trial motion. The denial of a new trial motion is not separately appealable, but is encompassed within an appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) The denial of a motion for judgment notwithstanding the verdict is appealable. (Code Civ. Proc., § 904.1, subd. (a)(4).)

DISCUSSION

1. Standard of Review

We review the sufficiency of the evidence to support a judgment on a jury verdict under the substantial evidence standard. Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible and of solid value. We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment if an examination of the entire record viewed in this light discloses substantial evidence to support the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

A nonsuit is proper only if the evidence presented by the plaintiff is insufficient to support a verdict in the plaintiff's favor. The trial court must view the evidence in the light most favorable to the plaintiff, indulge all legitimate inferences and presumptions in favor of the plaintiff, and disregard all conflicting evidence. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) On appeal, we must independently determine whether substantial evidence supports the verdict. (*Ibid.*)

A judgment notwithstanding the verdict is proper only if there is no substantial evidence to support the verdict and the evidence compels a judgment in favor of the moving party as a matter of law. (Code Civ. Proc., § 629; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) The trial court must view the evidence in the light most favorable to the verdict. (*Sweatman, supra*, at p. 68.) On appeal, we

must independently determine whether substantial evidence supports the verdict and whether the moving party is entitled to judgment in its favor as a matter of law. (*Ibid.*)

Thus, the substantial evidence standard governs our review with respect to all challenged rulings.³

2. *Substantial Evidence Supports the Finding of Negligence Based on a Breach of the Standard of Care*

The theory of the case against Baker, as distinguished from the individual veterinarians, with respect to negligence was that the hospital's failure to have a policy in place to determine that the horse was medically fit for discharge after surgery was negligent. Dr. Charles L. Boles testified as an expert in veterinary medicine that the standard of care for an equine hospital requires an examination of the horse after surgery to determine whether it is safe to discharge the horse. Dr. Boles opined that Baker breached this standard of care. Baker does not challenge Dr. Boles's qualifications as an expert.

The evidence shows that Dr. Meyer visually observed AJ from outside the recovery stall for a few seconds on his way to lunch. Despite Brownstein's concerns expressed to the staff, the evidence shows that no veterinarian or staff member conducted a physical examination of AJ after the surgery to determine whether he was in stable condition and ready for discharge.

³ Baker does not separately address the denial of its new trial motion and apparently challenges that ruling based on the absence of substantial evidence to support the verdict.

Baker points out perceived weaknesses in Dr. Boles's testimony on the standard of care. It argues: "The sole basis for each of Dr. Boles' opinions was his generically stated 'background, knowledge, and experience.' He never described the *particular* segment of his 'knowledge' on which he relied, nor the source of that knowledge. Were his opinions based on peer-reviewed research? Professional seminars? Veterinary school texts? Veterinary Board regulations? Dr. Boles did not say. He did not offer any testimony as to where or how the standard he purported to articulate is actually 'recognized'—where, for instance, one might go to 'look it up'—and he did not articulate any basis on which it could be determined that *Dr. Boles'* standard is, in fact, the accepted and recognized standard *in the profession as a whole.*"

We conclude that this argument goes to the weight of the evidence rather than its sufficiency to support the verdict. Dr. Boles's testimony constitutes substantial evidence that the standard of care required an examination of the horse after surgery to determine whether it was safe for discharge and that Baker breached this standard of care by failing to ensure that such an examination was conducted.

Johnson v. Superior Court (2006) 143 Cal.App.4th 297, cited by Baker, involved a declaration by an expert filed in support of the defendants' summary judgment motion in a medical malpractice action. *Johnson* held that the statement that the defendants had complied with the standard of care was conclusory because it failed to set forth the applicable standard of care or explain the basis for the expert's conclusion that the defendants had satisfied the standard of care. *Johnson* therefore held that the

declaration failed to satisfy the defendants' initial burden as the parties moving for summary judgment. (*Id.* at pp. 306-308.)

Here, in contrast, Dr. Boles set forth the applicable standard of care and provided a reasoned explanation for his conclusion that Baker failed to satisfy the standard of care. *Johnson* is not on point.

Spann v. Irwin Memorial Blood Centers (1995) 34 Cal.App.4th 644, also cited by Baker, involved an action for professional negligence arising from a blood transfusion through which the plaintiff's decedent contracted AIDS. The plaintiff submitted deposition testimony by an expert in opposition to the defendant's summary judgment motion. The plaintiff's expert stated that the defendant's failure to institute "donor reduction programs" to reduce the number of donors, and thereby reduce the risk of infection, was negligent. But the expert could not identify a single blood bank in the United States that offered a donor reduction program at the time for patients receiving similar transfusions. (*Id.* at pp. 651-652.) *Spann* stated that it was undisputed that no blood bank or other health care provider was offering a donor reduction program for patients receiving such transfusions at the time. (*Id.* at p. 655.) *Spann* concluded that the expert's testimony was based on his personal opinion of the appropriate standard of care rather than the standard of care actually accepted by the industry and therefore did not constitute substantial evidence of the standard of care. (*Id.* at pp. 654-655.) *Spann* therefore held that the deposition testimony failed to create a triable issue of fact and that summary judgment was appropriate. (*Id.* at p. 655.)

Dr. Boles testified as to the standard of care that a reasonably careful veterinary hospital would use in similar circumstances. He explained that his opinion was based in part on his decades of personal experience performing surgery in and managing veterinary hospitals. Here, in contrast to *Spann*, there is no undisputed evidence refuting Dr. Boles's testimony as to the standard of care in the industry. *Spann* therefore is disingenuous.

3. *Substantial Evidence Supports the Finding that Baker's Negligence Was a Substantial Factor in Causing Compensable Damages*

Brownstein sought damages for her expenses incurred to restore AJ to good health and for his fair market value. She sought a total of \$48,808.20 in out-of-pocket expenses, including the full amounts incurred for services rendered by the various veterinary care providers and transporters on and after December 15, 2007. The jury found that Brownstein incurred \$46,332.32 in damages to restore AJ and that his fair market value before the harm was \$0.⁴

Baker moved for a new trial on several grounds, including excessive damages. It argued that recoverable damages for the expenses incurred to restore AJ to good health could not exceed his fair market value and that the damages awarded therefore were excessive. The trial court denied the new trial motion, stating that the expenses incurred were reasonable at the time and that there was no evidence to the contrary.

⁴ The difference between the amount of out-of-pocket expenses sought and the amount awarded is \$2,475.88. Brownstein testified that Baker Equine Hospital billed her in that amount and that she never paid the bill.

Baker does not challenge that ruling on appeal and does not argue excessive damages. Instead, it argues that there is no substantial evidence to support the jury's finding of causation because there is no evidence that either the torn trachea or laminitis resulted from any negligent act or omission by Baker. Specifically, it argues with respect to laminitis that there is no evidence that the delay in treating AJ resulting from his premature release after surgery contributed to his contracting laminitis or his succumbing to that disease.

Several witnesses, including Baker's own expert, testified that stress can cause or exacerbate laminitis. Dr. David W. Ramey testified as an expert for Brownstein that several stressful conditions contributed to AJ's developing laminitis, including his having to endure the two trailer rides while suffering from a seriously torn trachea after being discharged prematurely from surgery to one of his legs. We conclude that Dr. Ramey's testimony constitutes substantial evidence that Baker's negligence in failing to ensure that AJ was in stable condition before discharging him was a substantial factor in his developing laminitis.

DISPOSITION

The judgment and order denying the hospital's motion for judgment notwithstanding the verdict are affirmed. Brownstein is entitled to recover her costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.