Filed 2/9/17 Mirabadi v. Boshae CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PARVIN MIRABADI et al., Plaintiffs and Appellants, v. CASEY BOSHAE et al., Defendants and Respondents.	B265393 (Los Angeles County Super. Ct. No. BC474286)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed.

Law Offices of Farrah Mirabel and Farrah Mirabel; Vicki Michele Roberts for Plaintiffs and Appellants.

Gregory Burke, in pro per., for Defendant and Respondent.

No appearance for Defendants and Respondents Casey Boshae, Gregory Molina, and Burke Molina Law Firm.

INTRODUCTION

Plaintiffs Parvin Mirabadi, M.D. and Sunrise Medical Center appeal from the court's judgment rendered in favor of Defendants Casey Boshae, Gregory Burke, Gregory Molina, and the Burke Molina Law Firm, following a bench trial on Plaintiff's sole cause of action for malicious prosecution. Plaintiffs assert the court erred in finding that Plaintiffs failed to prove that Defendants prosecuted the underlying action with malice and without probable cause. As Plaintiffs failed to provide this court with a sufficient record on appeal, the judgment is presumed correct. We affirm.[1]

FACTS AND PROCEDURAL BACKGROUND

This case involves an underlying medical malpractice lawsuit brought by Defendants against Plaintiffs, and the present lawsuit for malicious prosecution brought by Plaintiffs against Defendants.

1. Medical Malpractice Action

In March 2008, Boshae sought treatment from Dr. Mirabadi, a gynecologist and cosmetic surgeon, because Boshae suffered from abdominal pain. Dr. Mirabadi examined Boshae, indicated Boshae possibly had an infection, prescribed antibiotics, and administered a test that subsequently came back with abnormal results. Despite taking the antibiotics, Boshae continued to experience severe cramping and heavy bleeding. She returned to Dr. Mirabadi in April 2008, and Dr. Mirabadi stated that the pain might be due to constipation. Dr. Mirabadi did not advise Boshae to return despite her worsening symptoms. In May 2008, Boshae sought a second opinion from Dr. Kamran Torbati, who diagnosed Boshae's pelvic inflammatory disease.

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[1] Although Burke is the only Defendant that makes an appearance on appeal, we affirm the judgment as to all Defendants.

Boshae then underwent a laparoscopic right salpingectomy to remove her right fallopian tube and a portion of the left fallopian tube, causing her to be infertile.

Boshae retained the Burke Molina law firm to prosecute her medical malpractice claim. In January 2009, Burke filed a complaint for medical negligence on Boshae's behalf against Dr. Mirabadi and Sunrise Medical Center (Plaintiffs in the present case). The first expert witness (Dr. Bernard Weiss) that Burke attempted to retain did not work out. Burke had difficulty finding another expert and ultimately tendered a dismissal with prejudice in the case.[2]

2. The Malicious Prosecution Action

On November 29, 2011, Plaintiffs Dr. Mirabadi and Sunrise Medical Center filed a complaint alleging malicious prosecution by Defendants. Plaintiffs asserted that Defendants had been informed in March 2010 by their expert, Dr. Weiss, that Dr. Mirabadi's conduct did not fall below the standard of care but continued to prosecute the action despite being informed of this.

The case was tried to the court. Based on the trial court's reference to the declaration in the statement of decision, it appears that Plaintiffs produced a declaration from Dr. Weiss, dated October 2013 and labeled exhibit 56. In the declaration, Dr. Weiss stated he never told Burke that the care rendered by Dr. Mirabadi and the Sunrise Surgical Center was below the standard of care. His declaration was based on his deduction:

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[2] On March 11, 2013, Dr. Mirabadi entered into a Stipulated Settlement and Disciplinary Order with the Medical Board of California, Department of Consumer Affairs, effective May 31, 2013. Dr. Mirabadi's Physician's and Surgeon's Certificate was revoked, with the revocation stayed and Dr. Mirabadi was placed on probation for two years with several terms and conditions, including attending a medical record keeping course.

"The only reason I would have told Mr. Burke not to spend any money on the case was because I believed the care rendered by Dr. Mirabadi was not below the standard of care."

At trial, Boshae testified[3] Dr. Kamran Torbati told her that earlier detection of the pelvic inflammatory disease would have made the damage less severe. Burke testified that he spoke to Dr. Bernard Weiss to hire him as an expert witness. Burke stated that in March 2010, Dr. Weiss communicated that he could not testify as to causation due to the condition of the records kept by Dr. Mirabadi. Burke then attempted to locate another expert, but did not perform further discovery. After Burke was unable to locate another expert, Burke reduced the settlement demands and ultimately tendered a dismissal with prejudice in order to avoid incurring further costs. The request for dismissal was filed in November 2010.

At the close of Plaintiff's evidence, the court granted Defendants' motion for judgment against Sunrise Surgical Center because the court found no evidence presented on its behalf. As to Plaintiff Dr. Mirabadi, the court found in favor of Defendants, concluding that she was unable to prove all of the elements of malicious prosecution, the sole cause of action. Specifically, the court found that Defendants had probable cause to initiate the malpractice action, and no bad faith in prosecuting the action following interactions with Dr. Weiss in March 2010.

In its proposed statement of decision, which later became the final statement of decision, the court found that there was "clearly sufficient probable cause to initiate an action for medical malpractice against Dr. Mirabadi" based on Boshae's testimony

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[3] Plaintiffs have not provided this court with a reporter's transcript. The summary of the testimony is based on the trial court's summary of the evidence in its statement of decision.

regarding Dr. Torbati's comment that damage could have been lessened by earlier detection of the disease. The court noted that it "did not receive any evidence at trial that Dr. Torbati ever unequivocally denied making such a statement to Ms. Boshae."

The court also explained that the declaration by Dr. Weiss did not prove bad faith or lack of probable cause:

> "[W]ith respect to Dr. Weiss, Exhibit [56] indicates that Mr. Burke had sent emails to Dr. Weiss indicating that he was going to use him as an expert, and that medical records and a check were on the way. Now, years later, in a declaration, Dr. Weiss denies that he ever agreed to be retained as an expert, or that he ever expressed an opinion about substandard care by Dr. Mirabadi. (Exhibit 56.) The court, however, was not presented with any emails from the relevant time period, February 2010, wherein Dr. Weiss advised Mr. Burke that he did not, in fact, agree to be an expert . . . .
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> "Moreover, when Dr. Weiss did express reservations on March 22, 2010 about proceeding with the case, Dr. Weiss did not indicate that Ms. Boshae had no case. Rather, all the evidence at trial suggests that Dr. Weiss was unable to conclusively testify regarding liability because of the poor condition of Dr. Mirabadi's medical records. In addition, Mr. Burke essentially stopped prosecuting the case after that, and instead worked towards a dismissal of the matter (as evidenced by the settlement demands diminishing to no money at all)."

Plaintiffs filed written objections to the court's proposed statement, which the court overruled. The court's proposed statement of decision became the final and judgment was entered in May 2015. Plaintiffs appeal.

DISCUSSION

"To establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice." (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.) We review the verdict for substantial evidence. (*Alderson v. Alderson* (1986) 180 Cal.App.3d 450, 465.)[4]

Plaintiffs argue that Dr. Weiss's declaration proved that Defendants knew Dr. Mirabadi did not breach the standard of care. Plaintiffs assert that the only evidence to rebut this was Burke's testimony, which was based on inadmissible hearsay. Yet, Plaintiffs failed to furnish this Court with the reporter's transcript, making it impossible for this Court to evaluate the testimony at trial and evaluate it in the context of Dr. Weiss's declaration.

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[4] Plaintiffs assert their appeal warrants a de novo standard of review because the case involves the determination of probable cause. Probable cause is a question of law reviewed objectively to the extent the facts the defendants acted on are resolved or undisputed. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881.) Plaintiffs mainly dispute the content of Defendants' correspondence with an expert witness, and whether Defendants knew their case was frivolous. Substantial evidence is our primary standard of review where, as here, there is a factual dispute. In asserting a de novo standard of review, Plaintiffs also ignore that they dispute the malice element, which presents a question of fact. (*Id.* at p. 874 ["The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that the defendant's motivation is a question of fact to be determined by the jury."].)

It is well established that " '[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.) The appellants bear the burden of affirmatively showing prejudicial error, (*City and County of San Francisco v. Funches* (1999) 75 Cal.App.4th 243, 244-245) and must "provide an adequate record to assess error." (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) The appellants "must not only present an analysis of the facts and legal authority on each point made, but must also support arguments with appropriate citations to the material facts in the record. If [they fail] to do so, the argument is forfeited." (*Ibid.*)

Plaintiffs make arguments regarding testimony without furnishing this court a copy of that testimony. As such, they have waived any arguments regarding this dispute. We must presume the trial court's decision regarding probable cause and malice, which is based on this testimony, is correct.

In making its decision, the trial court considered the facts regarding the initial consultation with Dr. Mirabadi, the opinion of the physician who ultimately treated Boshae, and the facts relating to hiring a medical expert for the underlying malpractice suit. Boshae testified that within weeks of being diagnosed with constipation by Dr. Mirabadi, she experienced such severe pain and bleeding that she required surgery to remove damaged fallopian tubes. Moreover, the court heard testimony from Boshae that the treating physician, Dr. Torbati, confirmed that earlier detection would have averted at least some of the damage

she suffered.[5] And finally, attorney Burke testified that proposed expert, Dr. Weiss, would not testify in the underlying malpractice suit because of the poor condition of Dr. Mirabadi's medical records. Taken together, this testimony supports the trial court's finding of probable cause and no bad faith on the part of Defendants.

Plaintiffs cite a number of cases, arguing that courts have held the record is sufficient where the appeal addresses the court's legal reasoning set forth in the statement of decision. (See *Oliver & Williams Elevator Corp. v. State Bd. of Equalization* (1975) 48 Cal.App.3d 890, 893 [appeal decided on a written stipulation of facts by both parties rather than a reporter's transcript]; *County of Los Angeles v. Ranger Ins. Co.* (1996) 48 Cal.App.4th 992, 994, fn. 2 [the court affirmed the judgment on several legal issues; no disputed facts existed]; *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 987 [affirming and relying on the findings of fact made by the trial court where the record does not include reporter's transcript]; *People v. Hyde* (1975) 49 Cal.App.3d 97, 99, fn. 2 [reversing where the record indicated that the motion was denied without an appearance by defendant and without a hearing on its merits].) These cases are inapt to the case before us, as the courts in these cases relied on an undisputed statement of the facts, decided an issue of law, or reversed where there was no proper hearing on the merits (which would have generated a reporter's transcript). In contrast, this appeal is centered on a dispute regarding communications between an expert witness and Defendants, and whether these communications gave Defendants reason to believe

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[5] The trial court specifically noted it "did not receive any evidence at trial that Dr. Torbati ever unequivocally denied making such a statement to Ms. Boshae."

their claim was meritless. This appeal is not about an issue of law and thus we cannot decide it on the deficient record before us.

To the extent Plaintiffs assert that they do not need the reporter's transcript because their appeal focuses on only one exhibit, they miss the point. Plaintiffs claim that Dr. Weiss's declaration (exhibit 56) proved that Defendants knew Dr. Mirabadi did not breach the standard of care and that the only evidence rebutting this assertion was Burke's testimony about his conversations with Dr. Weiss. Plaintiffs objected to the trial court's consideration of Dr. Weiss's statements to attorney Burke as inadmissible hearsay, noting that the court ruled that it would not consider Dr. Weiss's statements to Burke for the truth of the matter asserted. However, the court's ruling did not bar it from considering Dr. Weiss's statements explaining why he could not testify as a medical expert for a non-hearsay purpose, such as the statement's effect on Burke. (*People v. Jablonski* (2006) 37 Cal.4th 774, 820 ["To the extent that [the out of court] statement was admitted to show its effect on defendant, the statement was not hearsay because it was not admitted for the truth."].) At issue was what attorney Burke knew at the time his client was pursuing a malpractice claim. He testified that Dr. Weiss explained he could not testify as an expert because of the poor condition of Dr. Mirabadi's medical records. Whether true or not, this statement by Dr. Weiss to Burke would have given the Defendants an objectively reasonable basis for maintaining the underlying malpractice suit.

Plaintiffs take issue with the trial court's factual findings regarding what Defendants knew, what Dr. Weiss said, and whether there was reason to believe the medical malpractice claim was frivolous. The court's ruling was based on testimony as well as its consideration of exhibit 56. Without the testimony,

it is impossible for us to determine whether the court's decision was not supported by substantial evidence or even evaluate probable cause under a de novo standard. We must presume that the judgment was correct; Plaintiffs cannot benefit from their own failure to furnish a proper record. (*Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660 ["Failure to provide an adequate record on an issue requires that the issue be resolved against appellant."].)

We further note that exhibit 56, which Plaintiffs rest their entire appeal on, does not prove a lack of probable cause or show malice. In exhibit 56, Dr. Weiss's declaration, written years after the malpractice case was dismissed, consisted of inconclusive negative statements and deductive reasoning about what must have transpired. Dr Weiss attested that (1) he "never opined that Dr. Parvin Mirabadi was negligent," (2) he "never told Burke that the care rendered to Casey Boshae by Dr. Parvin Mirabadi and Sunrise Surgical Center was below the standard of care," and (3) "[t]he only reason [he] would have told Mr. Burke not to spend any money on the case was because [he] believed the care rendered by Dr. Mirabadi was not below the standard of care." As the trial court pointed out, Dr. Weiss never attested to telling Defendants that Dr. Mirabadi adhered to the standard of care or that Defendants had no malpractice case. There are no emails or any other evidence in the record indicating that Defendants knew or should have known Dr. Mirabadi adhered to the standard of care.

We must presume the judgment is correct based on the deficient record before us and affirm the trial court's judgment in favor of Defendants.[6]

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[6] We deny Defendant Burke's motion for sanctions, filed July 1, 2016. An appeal is "frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The Supreme Court has cautioned that, "any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals." (*Ibid.*) The borderline between frivolous and meritless appeals is murky and sanctions "should be used most sparingly to deter only the most egregious conduct." (*Id.* at p. 651.) We do not find that this appeal satisfies the definition of frivolousness outlined by the Supreme Court.

DISPOSITION

The judgment is affirmed as to all Defendants. Defendant Gregory Burke is awarded his costs on appeal.

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GOSWAMI, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.