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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARVIN MARON, et al., Plaintiffs and Appellants, v. ALLAN KLASS, M.D., Defendant and Respondent.	B234034 (Los Angeles County Super. Ct. No. LC086908)

APPEAL from a judgment of the Superior Court of Los Angeles County. James A. Kaddo, Judge. Affirmed.

Ron Nelson for Plaintiffs and Appellants.

La Follette, Johnson, De Haas, Fesler & Ames, Don Fesler, David J. Ozeran for Defendant and Respondent.

This is a medical malpractice case.

In October of 2008, appellant Marvin Maron went to his internist, respondent Dr. Allan Klass, complaining of abdominal pain. He soon had surgery for repair of an abdominal aortic aneurysm. He and his wife, appellant Mary Maron, later sued Dr. Klass and others for negligence and related causes of action, alleging that Mr. Maron suffered brain damage as a result of the surgery. Judgment was entered in favor of Dr. Klass after his motion for summary judgment was granted. We affirm.

Standard of Review

Summary judgment is properly granted if all the papers submitted show that there is no triable issue of fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (a) and (c).) A defendant meets the burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. Once the defendant has met that burden, the burden is on the plaintiff to show a triable issue of fact exists. (Code Civ. Proc., § 437c, subd. (o); *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573.)

We review an order granting a defendant's motion for summary judgment by applying the same three-step analysis applied by the trial court: We identify the issues raised by the pleadings. We determine whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case. Then, if the defendant has met its burden, we consider whether the opposition raised triable issues of fact. We review these matters de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-855, 860.)

Background

At summary judgment, it was undisputed that in May of 2006, a chest x-ray revealed that Mr. Maron's aorta was calcified. Dr. Klass noted the abnormal finding and

ordered an ultrasound, which revealed "aortic ectasia . . . with the aorta distally measuring 2.6 cm in maximal transverse diameter." Mr. Maron had another ultrasound on July 29, 2008. That ultrasound showed that the aorta dilation had increased to 3.3 cm.

Three months later, on October 23, 2008, Mr. Maron again consulted Dr. Klass, complaining of lower abdominal pain. Dr. Klass sent him for a CT scan. The scan showed a stone in Mr. Maron's ureter and a 4.1 cm abdominal aortic aneurysm.

Dr. Klass told Mr. Maron to go to the emergency room, where a new CT scan showed a 5 cm abdominal aortic aneurysm.

Dr. Klass also obtained a vascular surgery consult from Dr. Robert Oblath,[1] who saw Mr. Maron in the emergency room, and opined that he needed surgery for repair of the aneurysm. Mr. Maron was admitted to the hospital. Surgery was scheduled for the next morning, which is when it took place. After surgery, Dr. Oblath reported that Mr. Maron had a 5-6 cm aneurysm.[2]

After surgery, Mr. Maron had some cerebral dysfunction. Dr. Klass arranged for him to be seen by a neurologist, then a psychiatrist.

Mr. Maron remained in the hospital until November 10, 2008, at which point he was discharged to a convalescent facility. Dr. Klass saw Mr. Maron every day while he was in the hospital, and saw him regularly while he was at the convalescent facility. However, by letter of January 20, 2009, appellants' attorney advised Dr. Klass that he had been retained to evaluate legal issues arising from the care provided to Mr. Maron. After that, Dr. Klass withdrew as Mr. Maron's doctor.

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[1] Dr. Oblath was a defendant in this action, but judgment has already been entered in his favor, after his motion for summary judgment was granted.

[2] These are Dr. Klass's proposed undisputed facts. Appellants objected on foundational grounds, but the objection was overruled, a ruling not challenged on appeal. We take the facts to be undisputed.

In the third amended complaint at issue here, Mr. Maron brought a cause of action against Dr. Klass for negligence, and Mrs. Maron brought causes of action for intentional infliction of emotional distress and loss of consortium.

In the negligence cause of action, Mr. Maron alleged that in October of 2008, he sought medical attention from Dr. Klass for kidney stones, was admitted to the hospital for that reason, and suffered brain injury due to oxygen deprivation during surgery, or from other negligence during surgery.

In paragraph 15 of the complaint, the negligence cause of action alleged that Dr. Klass violated his duties through the following acts:

-- he failed to follow up subsequent ultrasounds revealing expansion of Mr. Maron's abdominal aorta,

-- he failed to communicate with Mr. Maron regarding the result of the ultrasounds,

-- he communicated false information to Dr. Oblath and other physicians prior to Mr. Maron's 2008 surgery,

-- he concealed the cause of Mr. Maron's brain injury subsequent to the surgery,

-- he failed to follow recommendations by other physicians,

-- he refused to cooperate with requests to have other physicians and examiners review the records of treating physicians and surgeons,

-- he refused to produce documents in compliance with statute,

-- he abandoned Mr. Maron in a manner inconsistent with the laws of the State of California.

There are also allegations that Dr. Klass treated appellants in an angry and abusive manner, telling them that Mr. Maron's brain damage was the result of smoking; treated hospital staff in an angry and abusive manner, so that Mrs. Maron and other family members were uncomfortable at the hospital; failed to recuse himself from treating Mr. Maron even though he had no capacity to do so unaffected by anger or a desire to protect himself from liability; gave his counsel in this case privileged information, provided false

and or privileged information to friends of the Marons, and engaged in acts designed to hide the facts.

The cause of action for intentional infliction of emotional distress alleges that at the time of Mr. Maron's surgery, Dr. Klass knew that Mrs. Maron was in extreme duress because she was in the process of learning whether breast cancer had recurred, and that Dr. Klass caused her extreme emotional distress by telling her that Mr. Maron's brain damage was the result of smoking, even though he told others that the cause was mistakes during surgery and his own negligence; by angrily refusing Mrs. Maron's multiple requests to have other doctors look at the surgical records; by consistently responding to her requests for information in an angry and abusive fashion, and by treating hospital staff in an angry and abusive fashion.

Discussion

1. Negligence

With his motion for summary judgment, Dr. Klass submitted, inter alia, the declaration of Dr. Richard Johnson, who opined that Dr. Klass met the standard of care in all respects.[3] Dr. Klass proposed undisputed facts based on the declaration.

Appellants, too, submitted a declaration, and opposed the proposed facts with reference to that declaration.

Dr. Richard Spellberg opined that Dr. Klass's treatment of Mr. Maron fell below the standard of care through:

-- His failure to prescribe beta blockers to Mr. Maron after the discovery of the aneurysm in July of 2008, which to a reasonable degree of medical probability would have slowed the growth of the aneurysm.

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[3] Dr. Johnson also opined on other aspects of the allegations of the complaint, opining, for instance, that even if Dr. Klass had failed to produce documents, that failure did not cause Mr. Maron to suffer any injury.

-- His failure to order further serial testing to track the growth of Mr. Maron's aneurysm following its discovery in July of 2008.

-- His failure to accurately report the findings of the ultrasound to Dr. Oblath prior to the October 2008 surgery. (According to Dr. Spellberg, on October 23, Dr. Klass reported to Dr. Oblath that the repeat ultrasound on July 29 revealed no growth since May of 2006 and still measured 2.6 cm.)

-- His failure to report the 2008 ultrasound results in his discharge summary following the October 2008 surgery. (According to Dr. Spellberg, Dr. Klass's discharge summary following the October 24 surgery omitted any reference to the July 29, 2008 ultrasound.)

Dr. Spellberg declared that to a reasonable medical probability, those acts and omissions "most specifically the failure to treat Mr. Maron with appropriately prescribed beta blockers and order further testing in connection with the growth of the aneurysm," resulted in Mr. Maron having surgery on October 24, 2008, and that "to a reasonable degree of medical probability, it is my expert opinion that Mr. Maron would not have suffered from the cerebral dysfunction reflected in his medical records if he did not undergo invasive surgery on October 24, 2008."

Appellants argue that this declaration meant that there were disputed issues of material fact, such that summary judgment should not have been granted. We conclude that Dr. Klass was entitled to prevail on his motion.

First, "[i]t is well established that the pleadings determine the scope of relevant issues on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co*. (2010) 181 Cal.App.4th 60, 74.) Thus, a defendant's response to summary judgment must be directed to the issues raised in the complaint, and may not create issues outside of the pleadings. (*Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 320.)

This means that summary judgment could not be defeated by Dr. Spellberg's declaration that Dr. Klass was negligent in that he failed to prescribe beta blockers, failed

to accurately report to Dr. Oblath prior to the October 2008 surgery, or failed to report the 2008 ultrasound results in the discharge summary. None of that is in the complaint.

In their reply brief, appellants contend that even if the allegations are not among the specific allegations of the complaint, they are in, or are encompassed by, paragraphs 13 and 14 of the complaint. However, paragraph 13 concerns informed consent, and paragraph 14 generally alleges that all defendants (Dr. Klass, Dr. Oblath, the hospital, and others) were negligent in their care of Dr. Maron *while he was in the hospital.* Neither paragraph encompasses the allegations.

Dr. Spellberg's opinion that Dr. Klass was negligent in that he failed to order further serial testing after July of 2008 is arguably encompassed by the allegation in the complaint that Dr. Klass was negligent in that he failed to follow up subsequent ultrasounds. However summary judgment cannot be defeated on that ground, because of the lack of causation, a problem which the other parts of Dr. Spellberg's opinion suffer from, too.

To begin with the simplest: Appellants offered no evidence which would show that any failure of Dr. Klass's to "accurately report the findings of the ultrasound to Dr. Oblath" before Mr. Maron's surgery, or "failure to report the 2008 ultrasound results in his discharge summary," harmed Mr. Maron or indeed had any consequence at all.

Dr. Spellberg did opine that there was a consequence from the failure to prescribe beta blockers and failure to order additional tests, declaring that beta blockers would have slowed the growth of the aneurysm and that the failure to prescribe beta blockers and the failure to order tests "resulted in" the October 2008 surgery. That is not sufficient.

As Dr. Klass argues, Dr. Spellberg nowhere opined that surgery could have been avoided entirely, and Dr. Klass did propose undisputed facts on the issue.

In response to the contention, in the complaint, that Dr. Klass failed to appropriately follow up after the initial ultrasound, Dr. Johnson opined, "To a reasonable medical probability, there was nothing that Dr. Klass could have or should have done in follow up to the ultrasounds that would have prevented the growth of the aneurysm to a

point that surgery could have been avoided. Dr. Klass appropriately sent the patient to the hospital on October 23, 2009 . . . . Prior to that time, the aneurysm was not large enough to justify surgical intervention. To a reasonable medical probability, there was no 'follow up' Dr. Klass could have done after the prior tests that would have resulted in a different outcome; namely, the need for surgical treatment of the aneurysm." Appellants disputed the fact with reference to Dr. Spellberg's declaration, writing that Dr. Spellberg had stated that proper medical treatment would have avoided surgery. That is not what Dr. Spellberg said.

Thus, to the extent that appellants' theory is that surgery caused Mr. Maron's brain dysfunction, the lack of such an opinion means that there is no causation. Under the undisputed facts proposed by Dr. Klass, surgery was inevitable.

However, the complaint includes another theory, that Mr. Maron suffered from cerebral dysfunction because of this particular surgery, in which negligence occurred. The complaint alleges that the anesthesiologist, also a defendant, negligently administered anesthesia, causing the brain damage. In support of this theory, Dr. Spellberg opined (if his declaration is liberally construed (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206)) that without Dr. Klass's failures, Mr. Maron would have had surgery at a different time, when it, inferentially, would have been, or might have been, negligence free.[4]

However, appellants offered no evidence that Mr. Maron's problems were caused by negligence in this surgery. In contrast, Dr. Klass offered evidence that negligence during surgery was not the cause.

Dr. Klass proposed as undisputed that after his surgery, Mr. Maron was seen by a neurologist and a psychiatrist, who opined that his cerebral dysfunction was likely to have had many causes. Appellants purported to dispute the fact by writing that the fact

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[4] That is, Dr. Spellberg opined that beta blockers would have slowed the growth of the aneurysm. He did not opine that additional monitoring would have led to an earlier surgery, but it can perhaps be inferred.

omitted critical information, found in the doctors' reports. In the reports, which are part of Dr. Klass's motion, the neurologist wrote that Mr. Maron's problems were "likely multifactoral in nature, potentially related to narcotic pain medications and other sedating medications . . . his recent surgery, his renal insufficiency . . . ." The psychiatrist wrote that Mr. Maron had "other things going on," besides the surgery, "including life stressors," and diagnosed "delirium, likely multifactoral with possible medication, toxic metabolic and some ischemic contribution. 2. Likely pre-existing mild cognitive impairment or dementia . . . ."

Appellants' response was not sufficient to dispute the proposed undisputed facts, and they thus lacked proof that any of Dr. Klass's alleged failures (even if they resulted from the October 2008 surgery) caused Mr. Maron's brain dysfunction.

2. Intentional Infliction of Emotional Distress

We begin by noting that despite appellants' reference to emotional distress damages suffered by both Mr. and Mrs. Maron, the cause of action for intentional infliction of emotional distress was brought by Mrs. Maron alone. It is true that, as appellants argue, some of the allegations which form the basis for the cause of action claim are also found in the negligence cause of action. That does not make Mr. Maron a plaintiff in the cause of action for intentional infliction of emotional distress. The complaint does not even include an allegation that Mr. Maron suffered emotional distress.

We similarly note that although appellants' brief refers to intentional or negligent infliction of emotional distress, the complaint does not include a cause of action for negligent infliction of emotional distress.

On this cause of action, Dr. Klass proposed undisputed facts based on his declaration and that of Dr. Johnson, to the effect that the conduct described in the complaint did not take place. Mrs. Maron disputed the proposed facts with reference to her own declaration.

She first declared that Dr. Klass was her doctor, too, and was aware that while her husband was in the hospital, she was undergoing testing for recurrence of breast cancer.

As to Dr. Klass's conduct, she declared that on several occasions while her husband was in the hospital, she asked Dr. Klass for copies of his medical records. Dr. Klass "responded angrily" to each request, and refused to provide the records. On several occasions while her husband was in the hospital, she asked Dr. Klass to allow an "outside independent physician" or medical investigator to review Mr. Maron's medical records, to determine the cause of his brain dysfunction. Dr. Klass "responded angrily" to each request and on more than one occasion said "we don't need to bring other doctors into this." Dr. Klass did not tell her that the causes of Mr. Maron's brain dysfunction were multifactoral, but did tell her that it was Mr. Maron's own fault, because he was a smoker. Dr. Klass treated hospital staff members abusively and angrily. Mrs. Maron saw him yell at a head nurse and storm out of the hospital. Hospital staff members seemed reluctant to interact with her husband and her family. She believed that this was due at least in part to Dr. Klass's angry and abusive conduct toward them, toward her, and toward her family. All of this contributed to her emotional distress.

Finally, Mrs. Maron declared that she saw her husband in the convalescent home shortly after Dr. Klass's final visit. Mr. Maron was cowering under his blankets. He told her that Dr. Klass had just told him that he could no longer treat him, asked him repeatedly "how can you do this to me?" and stormed out. On this point, Mr. Maron declared that Dr. Klass visited him on January 22 or 23, told him that he would no longer be treating him because he had gotten a letter from a lawyer, and repeatedly asked "how can you do this to me?"

Thus, there are disputed issues of fact. However, as the trial court found, "these generalized accounts do not provide facts which rise to the level of extreme and outrageous conduct."

"The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of

causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) "That the defendant knew the plaintiff had a special susceptibility to emotional distress is a factor which may be considered in determining whether the alleged conduct was outrageous." (*Ibid.*)

"Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 593, superseded on other grounds in *Melendez v. City of Los Angeles* (1998) 63 Cal.App.4th 1.)

Appellants' declarations do not describe that kind of conduct. Even if Dr. Klass was angry and rude when asked for medical records, or an outside review, he could not prevent Mrs. Maron from obtaining those records, or that review. Nor do we see that that kind of anger or rudeness could constitute the extreme conduct encompassed by the tort, even when the conduct is from a doctor to a patient, especially given that the patient indicated a plan to sue the doctor. We say the same about anger or rudeness to hospital staff members, or Dr. Klass's alleged statement that Mr. Maron's problems were caused by his history of smoking.

Finally, any statement by Dr. Klass to Mr. Maron concerning the end of the doctor-patient relationship, cannot be the basis for this tort, because the statements took place outside Mrs. Maron's presence, and were not directed to her at all. "It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

Disposition

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

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.