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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JULIA MARIE FORD et al.,

Plaintiffs and Appellants,

v.

COMMUNITY MEMORIAL HOSPITAL et al.,

Defendants and Respondents.

2d Civil No. B279918
(Super. Ct. No. 56-2014-00461840-CU-CO-VTA)
(Ventura County)

Annette Ford (Ford) died shortly after her discharge from Community Memorial Hospital (Hospital). Her children, Julia Marie Ford and Greg Daniel Ford, brought a wrongful death action against Hospital and Community Memorial Health System (respondents). The action was based on the allegedly negligent discharge of Ford from Hospital.

Ford's children appeal from the judgment entered after the trial court granted respondents' motion for summary judgment. The trial court concluded that there was no triable

issue of material fact as to the "breach of duty" element of negligence. We affirm.

Undisputed Facts

On February 5, 2013, Ford was admitted to the emergency department of St. John's Regional Medical Center. She had fallen and hit her head. She complained of headaches and left-sided facial weakness. A CT scan showed that she had suffered various injuries. The following day, she was transferred to Hospital. On February 7, 2013, Dr. Westra examined Ford and made "a primary diagnosis of traumatic brain bleed status post fall."

In the morning on February 8, 2013, physical therapist Katheryn Reeves concluded that Ford "was safe in terms of her mobility to be discharged home." Dr. Grundler ordered that Ford be discharged from Hospital after her physical therapy session. Ford was discharged as ordered "with a diagnosis of subarachnoid hemorrhage [bleeding in the space between the brain and the surrounding membrane] and intraparenchymal hemorrhage [bleeding in the brain] secondary to her fall."

While at her parents' home in the early morning on February 9, 2013, Ford died as a result of an intracerebral hemorrhage (bleeding in the brain).

Factual Conflicts

The facts are in conflict as to the communications between Ford's parents and Hospital's nursing staff on the date of Ford's discharge. Marie Darocha, Ford's mother, declared in opposition to the motion for summary judgment: In the morning she and her husband "advised nursing personnel . . . : (1) That [Ford] was not responding normally; (2) That her speech was not

normal; (3) That her gait and balance [were] not normal; (4) That she complained about severe headache and the absence of relief from pain medications; and (5) That overall, we were very concerned about her condition and her apparent deterioration." (Bold omitted.) "We were told by nursing personnel . . . that a decision had been made to discharge [Ford]. We begged the nursing staff to allow us to speak to whichever doctor had made the decision to discharge her, and to inform the doctor of our concerns. The nurses with whom we dealt were not professional and were belligerent. I recall one of them telling me that the decision had been made and nothing else could be done, or words to that effect."

Darocha's declaration in opposition to the motion for summary judgment conflicts with her prior deposition testimony. She initially testified that, when she came to Hospital on the day Ford was discharged, she noticed that Ford "can't walk too well, can't talk too well, and . . . looked sickly." Darocha "asked the nurse why are you people discharging my daughter? Look at her. She looked, like, dead. [¶] She's still sick, and . . . they say well, the doctor's order, bring her home . . . . [A]nd I say well, they say you have to go home. You go home. I take care of you."

Later in her deposition, Darocha testified: When Ford was discharged from Hospital, Darocha did not question anyone there about the discharge. She would have liked to have asked, "Why is she going home? I'd like to know why. She not well [*sic*]. Why are you sending her home?" Darocha explained why she had remained silent: "I don't want to argue with them because that stupid nurse is so rude, and . . . it's a big nurse and she said doctor's order. So what the hell can I say? Fight with her? No. So I do what she said." Darocha did not ask the nurse

to speak to the doctor who had ordered that Ford be discharged. Daracho testified: "I listened to her [the nurse]. She's the boss." Darocha did not speak to any other nurse. She did not tell a nurse or doctor at Hospital that she "didn't think [her] daughter needed to be discharged."

Declarations of Appellants' Experts

Appellants' experts opined that nursing staff's conduct fell below the applicable standard of care because they discharged Ford without informing her attending physicians of her parents' "strong protests and concerns." The experts' opinions were based on Darocha's declaration that she and her husband had informed the nurses of Ford's deteriorated condition and had "begged" them to so inform her doctor. All of the experts declared: "According to . . . Darocha, on the morning of February 8, 201[6], she and her husband . . . pled with the nursing staff . . . not to discharge [Ford]. . . ." The experts did not review Darocha's deposition.

Declaration of Dr. Mamelak

In support of their motion for summary judgment, respondents submitted the declaration of Dr. Adam Mamelak, a neurosurgeon. He declared: "A physical therapy inpatient daily progress note at 9:45 a.m. [on the date of discharge] indicated that [Ford] had generally steady gait movements of instability requiring her to use the handrail in the hallway, however she did not lose her balance. [Ford] negotiated up and down one flight of stairs and had steady reciprocal step patterns. Her headache pain had decreased to a three out of ten. Physical Therapist Katheryn Reeves's assessment was that [Ford] was safe in terms of her mobility to be discharged home. . . . [¶] Dr. Grundler's orders were to discharge [Ford] after her physical therapy session

and discontinuation of her IV . . . . [¶] Nurse Crystal discontinued the IV . . . . [Ford] was dressed with the assistance of her parents and was noted to be stable at discharge."

Dr. Mamelak opined: "The decision to . . . discharge a patient from the hospital is a medical decision and discharge is carried out pursuant to a physician's order, as it was here. . . . [T]the nursing staff appropriately carried out the order discharging the patient."

Trial Court's Ruling

The trial court granted the motion for summary judgment because there was "no genuine issue of material fact on the issue of breach of duty" by respondents. "The elements of an action for negligence are the existence of *duty* (the obligation to other persons to conform to a standard of care to avoid unreasonable risk of harm to them); *breach of duty* (conduct below the standard of care); *causation* (between the defendant's act or omission and the plaintiff's injuries); and *damages*. [Citation.]" (*Merrill v. Navegar*, *Inc.* (2001) 26 Cal.4th 465, 500.) The court concluded that respondents had "complied with the standard of care."

The trial court reasoned: "[Respondents] met their burden of producing admissible expert evidence on the issue of breach of duty by submitting the declaration of Dr. Adam Mamelak. The responsive expert declarations from [appellants] rely very heavily on the declaration of Marie Darocha submitted in opposition to the motion. However, this declaration contradicts Ms. Darocha's prior deposition testimony on the same subject matter as to what she told nursing staff. [¶] Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a

motion for summary judgment. [Citation.] Ms. Darocha admitted at deposition that she did not argue with the nurse at discharge, she did not ask any questions (other than 'why are you discharging her'), . . . and she never asked the nurse to speak to the discharging doctor. This directly contradicts her declaration in which she states that . . . she advised nursing personnel that [Ford] was not responding normally, that [Ford's] speech was not normal, that [Ford's] gait and balance were not normal, that [Ford] complained of severe headaches and the absence of relief from pain medication and that Ms. Darocha 'begged' nursing staff to allow her to speak to the discharging doctors. [¶] As such, [Darocha's] declaration cannot be relied upon, either by the court or by [appellants'] experts. This makes [appellants'] expert declarations insufficient on the issue of [respondents'] negligence."

Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists 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 v. Atlantic Richfield Co., supra*, at p. 850, fn. omitted.)

"A defendant moving for summary judgment 'bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" thereto. [Citation.]' [Citations.] The defendant also 'bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.' [Citation.] Where, as here, the burden of proof at trial is by a preponderance of the evidence, the defendant must 'present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not . . . .' [Citation.] If the defendant carries this burden, the burden of production shifts to the plaintiff 'to make a prima facie showing of the existence of a triable issue of material fact.' [Citation.] The plaintiff must present evidence that would allow a reasonable trier of fact to find the underlying material fact more likely than not. [Citation.]" (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1326.)

"[W]e independently review the record that was before the trial court when it ruled on [respondents'] motion. [Citations.] In so doing, we view the evidence in the light most favorable to [appellants] as the losing parties, resolving evidentiary doubts and ambiguities in their favor. [Citation.]" (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68.) "We must presume the judgment is correct . . . ." (*Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376.) "'As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. . . .' [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224,

230.) "'All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment.' [Citation.]" (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757.)

The Trial Court Properly Granted the Motion for Summary Judgment

Based on the declaration of Dr. Mamelak, respondents met their "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact" concerning respondents' alleged breach of duty. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) Dr. Mamelak declared: "The decision to . . . discharge a patient from the hospital is a medical decision . . . carried out pursuant to a physician's order, as it was here." Relying on Ford's medical records, he opined that the nursing staff at Hospital "appropriately carried out [Dr. Grundler's] order discharging the patient."

The burden of production shifted to appellants "to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) To meet this burden, appellants relied on the declarations of experts who in turn had relied on the declaration of Marie Darocha. But they could not rely on her declaration because it was contrary to her prior deposition testimony. "In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 . . . , the Supreme Court first approved the rule that the declaration of facts by affidavit contrary to deposition testimony does not constitute '*substantial* evidence of the existence of a triable issue of fact.'" (*Advanced Micro Devices*,

Inc. v. Great American Surplus Lines Ins. Co. (1988) 199 Cal.App.3d 791, 800.)

D'Amico involved a party deponent. We reject appellants' contention that the rule of *D'Amico* applies only to party deponents and does not extend to nonparty witnesses such as Darocha. "While it is true that motions for summary judgment are to be heard on affidavits or declarations, contradictions raised by discovery may require the trial court to disregard the declarations or affidavits. [Citation.] This applies equally to party and nonparty deponents. [Citation.]" (*St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1540.)

In *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451, the court disregarded the affidavit of a nonparty witness "to the extent [it] contradicts his deposition testimony." The court observed: "'In reviewing motions for summary judgment, the courts have long tended to treat affidavits repudiating previous testimony as irrelevant, inadmissible, or evasive. [Citation.]' [Citation.] The rule is equally applicable to a conflict between the affidavit and the deposition testimony of a single witness." (*Ibid.*)

In *Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, the plaintiff submitted the declaration of Dr. Berg, a nonparty licensed psychologist, in opposition to the defendant's motion for summary judgment. The Court of Appeal held that "[t]he trial court properly rejected Dr. Berg's declaration as contrary to facts established by his deposition." (*Id.* at p. 1270.) The appellate court reasoned, "A court may disregard a declaration, prepared for purposes of a summary judgment motion, which conflicts with deposition testimony of the

declarant. [Citations.]" (*Ibid*.; see also *Schiff v. Prados* (2001) 92 Cal.App.4th 692, 705 [in reviewing the trial court's grant of motion for summary judgment, appellate court disregarded nonparty expert's declaration that conflicted with his deposition testimony].)

Appellants argue that Darocha's declaration and deposition testimony are not inconsistent because at her deposition she initially testified that she had asked nursing staff, "[W]hy are you people discharging my daughter? Look at her. . . . [¶] She's still sick." Darocha opined that Ford "looked, like, dead." This deposition testimony is a far cry from Darocha's declaration that she and her husband "advised nursing personnel . . . : (1) That [Ford] was not responding normally; (2) That her speech was not normal; (3) That her gait and balance [were] not normal; (4) That she complained about severe headache and the absence of relief from pain medications; and (5) That overall, we were very concerned about her condition and her apparent *deterioration*." (Italics added, bold omitted.) In her deposition testimony, Darocha never said she had told nursing staff that Ford's condition had deteriorated. Darocha said she had merely told them that Ford was "still sick." She did not mention Ford's symptoms or complaints.

Furthermore, in her deposition Darocha said nothing about the claim in her declaration that she and her husband had "begged the nursing staff to allow us to speak to whichever doctor had made the decision to discharge her, and to inform the doctor of our concerns." Darocha was asked, "When you spoke to the nurse and she told you that your daughter needed to go home, did you ever ask her to speak to the doctor who gave her that order?" Darocha replied, "No." She explained: "[I]t's a big nurse and she

said doctor's order. So what the hell can I say? Fight with her? No. So I do what she said."

"The dispositive question in all [summary judgment] cases is whether the evidence before the court, viewed as a whole, permits only a finding favorable to the defendant with respect to one or more necessary elements of the plaintiff's claims—that is, whether it negates an element of the claim 'as a matter of law.' [Citation.]" (*Cole v. Town of Los Gatos*, *supra*, 205 Cal.App.4th at p. 757.) The evidence here, when viewed as a whole with the understanding that Darocha's deposition testimony prevails over her declaration, permits only a finding that the nursing staff's discharge of Ford pursuant to Dr. Grundler's order did not fall below the applicable standard of care. We therefore need not consider part IX of appellants' opening brief, the heading of which argues that "triable issues abound as to the cause of [Ford's] death." (Bold and capitalization omitted.)

Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

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