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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

MICHAEL BERLIN, Plaintiff and Appellant, v. J. PATRICK JOHNSON et al., Defendants and Respondents.	B291929 Los Angeles County Super. Ct. No. BC612484

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Reversed.

Steiner & Libo and Leonard Steiner for Plaintiff and Appellant.

Fraser, Watson & Croutch, Craig R. Donahue and Daniel K. Dik for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Michael Berlin, M.D.[1] (plaintiff) sued defendant and respondent J. Patrick Johnson, M.D., for professional negligence relating to a spinal surgery Dr. Johnson performed on plaintiff in 2014. The court granted Dr. Johnson's motion for summary judgment, finding Dr. Johnson's treatment did not fall below the standard of care and, in any event, nothing Dr. Johnson did or did not do contributed to plaintiff's condition. A different panel of this division affirmed the judgment in favor of Dr. Johnson.

In the present appeal, plaintiff challenges a portion of the court's cost award—$7,328.37 relating to medical record retrieval—in favor of Dr. Johnson. Plaintiff objected to these, and other items on Dr. Johnson's cost bill, below. Because this item of costs is not expressly authorized by statute, Dr. Johnson was required to submit evidence demonstrating that the record-related costs were reasonably necessary to the litigation and reasonable in amount. He failed to do so and, as a result, the court abused its discretion in approving this item of costs.

Plaintiff also challenges the judgment entered following summary judgment in favor of defendant and respondent The Spine Center, A Medical Group, Inc. (Spine Center). Spine Center was not named as a defendant in either the original complaint or the first amended complaint. But after the statute of limitations

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[1] Dr. Berlin describes himself as a "prominent glaucoma surgeon." For our purposes, however, it is his role as the plaintiff in this medical malpractice action that is most relevant. Intending no disrespect, and in an effort to avoid confusion, we refer to Dr. Berlin simply as "plaintiff."

period had run, plaintiff amended his complaint under Code of Civil Procedure section 474[2] to add Spine Center as a Doe defendant. Spine Center moved for summary judgment, arguing the Doe amendment was improper because plaintiff knew of Spine Center's existence when he filed his original and amended complaints. The court granted Spine Center's motion. We reverse because plaintiff's declaration, submitted in opposition to the motion for summary judgment, created a dispute of material fact concerning his knowledge of the existence of Spine Center at the time he filed his original complaint.

FACTS AND PROCEDURAL BACKGROUND

1. Plaintiff's Challenge to the Cost Award in Favor of Dr. Johnson

Dr. Johnson performed spinal surgery on plaintiff in April 2014. In the operative complaint, plaintiff alleged that Dr. Johnson's treatment " 'fell below the applicable standard of care in the community and [was] negligent in the preoperative treatment and evaluation, and negligently performed spine surgery … .' " The trial court granted Dr. Johnson's motion for summary judgment, finding that plaintiff failed to raise a triable issue of fact about whether Dr. Johnson had exercised reasonable care in performing the surgery and whether any aspect of the surgery injured plaintiff. A different panel of this division agreed with the trial court and affirmed the judgment in favor of Dr. Johnson. (*Berlin v. Johnson* (Oct. 16, 2019, B288003) [nonpub. opn.].)

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[2] All undesignated statutory references are to the Code of Civil Procedure.

As discussed in detail *post*, Dr. Johnson filed a cost memorandum seeking $7,328.37 in costs designated as "record retrieval." Plaintiff filed a motion to tax costs asserting, among other things, that the record retrieval costs were not properly recoverable. The court approved that expense and plaintiff timely appeals.

2. Plaintiff's Challenge to the Judgment in Favor of Spine Center

Plaintiff did not name Spine Center as a defendant in either his original or first amended complaint. Instead, he amended his complaint under section 474, substituting Spine Center for one of the Doe defendants named in the previously-filed complaints. Spine Center moved for summary judgment on statute of limitations grounds, claiming the amendment was improper and therefore did not relate back to the originally filed complaint. The court agreed and entered judgment in favor of Spine Center. Plaintiff timely appeals.

DISCUSSION

1. Plaintiff's Challenge to the Cost Award in Favor of Dr. Johnson

Plaintiff contends the court erred in denying the portion of his motion to tax Dr. Johnson's costs relating to medical record retrieval. We agree.

1.1. Standard of Review

Generally, the prevailing party in civil litigation has the right to recover costs enumerated by statute and other costs reasonably necessary to the litigation and reasonable in amount. (§§ 1032, 1033.5.) " 'Whether a cost item was reasonably

necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.] However, because the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized. [Citations.]' [Citation.] Whether a cost is statutorily authorized is a question of law we review de novo. [Citation.]" (*Naser v. Lakeridge Athletic Club* (2014) 227 Cal.App.4th 571, 575–576.)

1.2. Additional Facts

After the court entered judgment in his favor, Dr. Johnson filed a memorandum of costs seeking a total of $36,380.52 including, as pertinent here, $7,328.37 in record retrieval costs. Plaintiff filed a motion to tax costs challenging the record retrieval costs related to the photocopying of plaintiff's medical records. Plaintiff explained that photocopying costs are not recoverable under section 1033.5, subdivision (b)(3), and in any event appeared to relate to medical records already in Dr. Johnson's possession.

Dr. Johnson opposed the motion to tax costs arguing that the cost to photocopy trial exhibits is properly recoverable under section 1033.5, subdivision (a)(13), even where the case is resolved prior to trial. In addition, Dr. Johnson urged, in order to provide a proper foundation for his summary judgment motion, it was necessary to provide complete copies of plaintiff's medical records both to the court and to the retained medical experts who submitted supporting declarations. Dr. Johnson did not submit any evidence in support of his opposition, however.

The court issued a tentative ruling granting plaintiff's motion to tax costs in full. Ultimately, however, the court granted plaintiff's motion to tax in part but approved Dr. Johnson's

claimed record retrieval costs. The record does not disclose the basis of the court's ruling.

1.3. Analysis

One of plaintiff's primary arguments is that in its tentative ruling, the court granted his motion to tax costs in full but the court's subsequent ruling denied his motion as to the record retrieval costs "without any explanation whatsoever." On this preliminary point, we note that "[a] tentative ruling is just that, tentative." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1378.) "[A] trial court's tentative ruling is not binding on the court; the court's final order supersedes the tentative ruling." (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300.) Moreover, a tentative ruling carries no weight on appeal. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646–647); *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1756 [court's tentative decision may not be relied upon either to support or impeach the court's judgment].) Thus, the court's decision to change its ruling is immaterial.

Turning to the substance of plaintiff's argument, it is well settled that a prevailing party is generally entitled to an award of costs. (§ 1032.) Allowable costs include, as pertinent here, "(13) Models, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact." (§ 1033.5, subd. (a).) Costs that are not generally allowable include "(3) Postage, telephone, and photocopying charges, except for exhibits." (§ 1033.5, subd. (b).) Section 1033.5 further provides that "[a]llowable costs shall be reasonably necessary to the

conduct of the litigation rather than merely convenient or beneficial to its preparation ... [¶] ... [and] shall be reasonable in amount. [¶] Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (§ 1033.5, subd. (c)(2)–(4).)

Plaintiff contends the record retrieval costs are plainly photocopying costs prohibited by section 1033.5, subdivision (b) but Dr. Johnson asserts the court could have properly awarded the record retrieval costs as relating to trial exhibits under section 1033.5, subdivision (a)(13). In response, plaintiff maintains that where, as here, no trial is conducted, the court may not award costs for exhibits prepared for use at trial, citing *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 775 (*Ladas*). In *Ladas*, judgment was entered in favor of the defendant before trial. The court concluded that costs for trial exhibits should not have been awarded under what is now section 1033.5, subdivision (a)(13),[3] because "fees are not authorized for exhibits not used at trial. Since the case was dismissed before trial, [defendant] failed to qualify for recovery of exhibit costs under this standard." (*Ladas*, at p. 775.) We need not resolve this issue because Dr. Johnson did not submit any evidence that the record retrieval costs related to the preparation of trial exhibits.

Dr. Johnson also argues that even if the record retrieval costs are not authorized under section 1033.5, subdivision (a)(13), they still may be allowed in the trial court's discretion pursuant

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[3] The Legislature amended the statute in 2011 and former subdivision (a)(12) was renumbered as subdivision (a)(13). (Stats. 2011, ch. 409, § 3.)

to subdivision (c)(4) of that section. This is a point not considered in *Ladas*, the only case upon which plaintiff relies.

Section 1033.5, subdivision (c)(4), provides that "[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." Items not specifically allowed under subdivision (a) and not prohibited under subdivision (b) may be recoverable in the discretion of the court if "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (§ 1033.5, subd. (c)(2).) As noted, whether a cost item was "reasonably necessary" to the litigation presents a question of fact for the trial court and is reviewed for abuse of discretion. (*Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364.) " 'A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence.' [Citation.]" (*In re Khalid B.* (2015) 233 Cal.App.4th 1285, 1288.)

Dr. Johnson argues, as he did below, that he needed to obtain copies of plaintiff's abundant medical records so that the expert witnesses (who submitted declarations in support of his motion for summary judgment) could review those records and formulate their opinions accordingly. But as plaintiff points out, photocopying costs are generally not recoverable. (§ 1033.5, subd. (b)(3).)

In the face of plaintiff's objection, the burden of proof shifted to Dr. Johnson to establish both the reasonableness of the charges and the necessity of the expense. (See, e.g., *Ladas, supra*, 19 Cal.App.4th at p. 774 [noting that "if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs"].) Unfortunately for Dr. Johnson, his opposition to plaintiff's motion to tax costs was unsupported

by a declaration from counsel or any other evidence demonstrating, for example, the need for the record retrieval, the ultimate use of those records, and the reasonableness of the expense. In the absence of any evidence on these points, we must conclude the court abused its discretion in approving this item of costs.

2. Plaintiff's Challenge to the Judgment in Favor of Spine Center

2.1. Standard of Review

The applicable standard of review of a ruling on a motion for summary judgment is well established. "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." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As such, the summary judgment statute (§ 437c), "provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) A summary judgment motion must demonstrate that "material facts" are undisputed. (§ 437c, subd. (b)(1).) The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, reversed on other grounds by *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490; *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.)

The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to

judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must " 'show[ ] that one or more elements of the cause of action … cannot be established' by the plaintiff." (*Id.* at p. 853 [quoting § 437c, subd. (o)(2)].) A defendant meets its burden by presenting affirmative evidence that negates an essential element of plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar*, at p. 855.)

On appeal from a summary judgment, we review the record de novo and independently determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Guz, supra,* 24 Cal.4th at p. 334.) We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment. (*Saelzler,* at p. 768.)

In performing an independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 629–630.) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Ibid.*)

2.2. Additional Facts

The relevant facts are undisputed. Plaintiff alleged he first discovered that his condition resulted from improper surgical techniques utilized by Dr. Johnson on December 9, 2014. By letter dated December 5, 2015, plaintiff notified Dr. Johnson and "Spine Center, Cedars Sinai Medical Center" of his intent to file a professional negligence claim against them.[4] Plaintiff filed his original complaint in March 2016 and his first amended complaint in August 2016, both of which named Dr. Johnson and Cedars-Sinai Medical Center as defendants. Plaintiff represented himself at the time he filed both complaints.

Neither the original complaint nor the first amended complaint named Spine Center as a defendant. But both complaints alleged that additional defendants (designated as "Does"), whose true names were not known, were also legally responsible for plaintiff's alleged injuries. On August 21, 2017, plaintiff, who was then represented by counsel, filed an amendment to his complaint substituting Spine Center for one of the Doe defendants.

Spine Center moved for summary judgment, arguing plaintiff's Doe amendment was improper because plaintiff's December 2015 letter referred to Spine Center, thus demonstrating his awareness that Spine Center existed. As a result, Spine Center asserted, the August 2017 amendment did not relate back to the filing of the original complaint and, therefore, the amendment fell outside the applicable one year statute of limitations.

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[4] This letter notified the defendants of plaintiff's intent to sue and tolled the statute of limitations for 90 days. (§ 364, subds. (a), (d).)

In opposition, plaintiff provided a declaration in which he stated he had been unaware of Spine Center's existence, separate and apart from named defendant Cedars-Sinai Medical Center. That evidence, he argued, created a dispute of material fact which precluded summary judgment in favor of Spine Center. As noted, the court granted the motion for summary judgment and entered judgment in favor of Spine Center.

2.3. Analysis

A medical malpractice action must be commenced three years after the date of the injury "or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." (§ 340.5.) Here, as noted, plaintiff alleged he first discovered his injury in December 2014 and concedes he did not amend his complaint to name Spine Center as a defendant until August 2017—well after the limitations period expired. Accordingly, in order for plaintiff to maintain his action against Spine Center, the Doe amendment must relate back to the date the original complaint was filed.

Section 474 permits a plaintiff to amend a complaint by adding parties as Doe defendants "[w]hen the plaintiff is ignorant of the name of a defendant" at the time the complaint is filed.[5] " 'The purpose of section 474 is to enable a plaintiff to avoid the bar of the statute of limitations when he [or she] is ignorant of

[5] The statute provides, in pertinent part, "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly … ."

the identity of the defendant.' [Citation.]" (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 386.) Generally, a plaintiff must show that he or she was truly ignorant of the identity of the person brought into the case as a Doe defendant. If that requirement is met, the amendment to the complaint relates back to the date the complaint was filed and the statute of limitations is preserved.

" '[T]he relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed.' [Citation.] 'It is when [plaintiff] is actually ignorant of a certain fact, not when [plaintiff] might by the use of reasonable diligence have discovered it. Whether [plaintiff's] ignorance is from misfortune or negligence, [plaintiff] is alike ignorant, and this is all the statute requires.' (*Irving v. Carpentier* (1886) 70 Cal. 23, 26.)" (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170, italics omitted.)

"The phrase 'ignorant of the name of a defendant' is broadly interpreted to mean not only ignorant of the defendant's identity, but also ignorant of the facts giving rise to a cause of action against that defendant. '[E]ven though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his name) the plaintiff is "ignorant" within the meaning of the statute if [plaintiff] lacks knowledge of that person's connection with the case or with [plaintiff's] injuries. [Citations.] The fact that the plaintiff had the means to obtain knowledge is irrelevant. [Citation.]' [Citation.]" (*Fuller v. Tucker*, *supra*, 84 Cal.App.4th at p. 1170; see *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942–943.)

Citing *Lipman v. Rice* (1963) 213 Cal.App.2d 474, Spine Center argues plaintiff should not be permitted to avail himself of section 474. In that case, the former superintendent of a school district brought a suit against the district and several public officials alleging a collective course of conduct designed to remove her from her position and impair her professional reputation. (*Id.* at p. 476.) Rice, a school principal, was mentioned in the original complaint as a participant in the alleged conduct but was not named as a defendant. (*Ibid.*) Several years later, the plaintiff attempted to amend her complaint under section 474 to add Rice as a Doe defendant. (*Ibid.*) The Court of Appeal concluded the plaintiff could not avail herself of section 474 because, as evidenced by the original complaint, Rice was known to her when she filed her original complaint and she also alleged Rice had been involved in the conduct targeted by the complaint. Accordingly, she was not "ignorant" of Rice's identity, as required under section 474. (*Id.* at pp. 477–478.)

Spine Center contends that like the plaintiff's original complaint in *Lipman*, plaintiff's December 2015 letter advising Dr. Johnson and "Spine Center, Cedars Sinai Medical Center" that he intended to file a medical malpractice action against them conclusively demonstrates that plaintiff was aware of Spine Center's existence and its connection to plaintiff's alleged injury. Although the letter could support that inference, it is far from conclusive.

In opposition to Spine Center's motion for summary judgment, plaintiff submitted a declaration in which he stated that "[t]he first time I learned that Dr. Johnson practiced medicine through any medical corporation, including his medical corporation titled The Spine Center A Medical Group, Inc., was

when I was so informed by [my attorney] Mr. Levine shortly before he filed Doe amendment no. 1. Thus, at no time until well after Mr. Levine substituted into this action as my attorney on February 21, 2017, was I aware that Dr. Johnson practiced medicine through any medical corporation, including one titled The Spine Center A Medical Group, Inc." Plaintiff further explained that when he addressed his letter to "Spine Center, Cedars Sinai Medical Center," he believed that "Spine Center was part of the Cedars Sinai Medial [*sic*] Center, which is why [he] named Cedars Sinai Medical Center as a defendant … ." Nothing in the record contradicts plaintiff's statements, which must therefore be accepted as true for the purposes of the summary judgment motion. (See *McOwen v. Grossman*, *supra*, 153 Cal.App.4th at pp. 946–947 [noting that "where the 'sworn statement by a plaintiff claiming ignorance' is not contradicted by previous admissions or concessions, the rule is that facts alleged in the declaration opposing the motion must be accepted as true for the purposes of the summary judgment motion"].)

In sum, a triable issue of material fact exists regarding plaintiff's knowledge of Spine Center's existence at the time he filed his original complaint. The trial court therefore erred in granting Spine Center's motion for summary judgment.

DISPOSITION

The court's order granting in part and denying in part plaintiff's motion to tax costs is reversed. The court is instructed to enter a new order granting plaintiff's motion to tax costs in full. The judgment in favor of Spine Center is reversed. Plaintiff shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.