Filed 5/18/10 Torihara v. Regents of the University of California CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GENJI TORIHARA, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	B215801 (Los Angeles County Super. Ct. No. SC 097956)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph S. Biderman, Judge. Affirmed.

Law Offices of David C. Byers and David C. Byers for Plaintiff and Appellant.

Garrard & Davis, Steven D. Davis, Diane M. Daly; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendant and Respondent.

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On September 19, 2006, appellant Genji Torihara was injured at the UCLA (University of California at Los Angeles) Medical Center, which is owned and operated by respondent the Regents of the University of California. Appellant filed this action on April 23, 2008. The trial court granted respondent's motion for summary judgment on the ground that the action was barred by the statute of limitations. We affirm.

FACTS

Appellant's complaint alleges that on September 14, 2006, he was a passenger in a vehicle proceeding on Wilshire Boulevard near the premises of the Los Angeles Country Club when a golf ball shattered the rear window of the car, greatly startling appellant and the driver and "causing them to physically react and recoil inside the vehicle." Precisely how appellant hit his head inside the car is not explained but apparently it was the head injury that brought appellant to the UCLA Medical Center on September 19, 2006. In his brief, appellant states that he showed signs of mental confusion and it was feared that he had suffered a serious head injury.[1]

It is not disputed that, while on the premises of the UCLA Medical Center, appellant was seated in a wheelchair and was being taken from a CT procedure to have an X-ray taken. The person handling the wheelchair was not careful and appellant's right foot was rammed into a wall. It is clear that the theory on which appellant's action is predicated, at least vis-à-vis respondent, is negligence and not an intentional tort. We set forth the relevant portion of the complaint in the margin.[2]

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[1] We do not endorse appellant's failure to support these factual assertions by evidence propounded as part of his opposition to the motion for summary judgment. Subdivision (b)(3) of Code of Civil Procedure section 437c empowers the opponent of the motion to propound its own material facts and the evidence that supports those facts. As it is, factual assertions in an appellate brief that are not supported by references to the record violate rule 8.204(a)(1)(C) of the California Rules of Court and may be disregarded by this court. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.) For the sake of convenience and because these introductory facts are solely background and appear to be undisputed, we have included these factual assertions in our opinion.

[2] "Plaintiff sought medical evaluation and treatment following the aforesaid accident, including at UCLA Medical Center, a facility owned, operated and/or controlled by

The injuries for which appellant is suing respondent are the injuries to his right foot. Appellant's action also seeks redress for injuries sustained as a result of the golf ball. The Los Angeles Country Club and the anonymous golfer are also defendants but they are not parties to this appeal.

THE ISSUES ON APPEAL

The question is whether this case is subject to Code of Civil Procedure section 340.5 (hereafter section 340.5), which, in relevant part, provides: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

Appellant contends that there is no evidence that the person handling the wheelchair was a "health care provider." Appellant also contends that there is nothing to show that steering the wheelchair into a wall is an act of "professional negligence."

In addition, appellant contends that there is no evidence when he discovered that the cellulitis, which he states in his brief is a "potentially serious bacterial infection," is the result of his foot striking the wall.[3] Appellant goes on to claim that because there is no evidence when he learned of the foregoing, "an essential element of the defense had not been proved."

In its reply to appellant's opposition, respondent included excerpts from appellant's deposition in which appellant describes the injury to his right foot. Respondent did so to

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defendant Regents. While being pushed from one area to another in a wheelchair at UCLA Medical Center, the attendant pushing the chair engaged in ordinary negligence and carelessness, negligently, carelessly and wrongfully striking the wall with the wheelchair and plaintiff, in the process ramming/jamming a portion of plaintiff's body into the wall, causing plaintiff to suffer injuries . . . ."

[3] Cellulitis is a "diffuse inflammation of the soft or connective tissue due to infection, in which a thin, watery exudate spreads through the cleavage planes of interstitial and tissue spaces; it may lead to ulceration and abscess. Called also *phlegmon*." (The Sloan-Dorland Annotated Medical-Legal Dict. (1987) p. 128.)

counter the argument that there was no evidence that showed when appellant learned of the nature of his injury. Appellant's final point on appeal is that this should have been part of the initial motion, not of the reply.

DISCUSSION

1. The UCLA Medical Center Is a Health Care Provider Engaged in the Rendition of Professional Services

The Medical Injury Compensation Reform Act (MICRA) was enacted in 1975 in order to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation. (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514.) "MICRA includes statutes relating to arbitration agreements (Code Civ. Proc., § 1295), contingency fees (Bus. & Prof. Code, § 6146), notice before bringing suit (Code Civ. Proc., § 364), the statute of limitations (Code Civ. Proc., § 340.5), the collateral source rule (Civ. Code, § 3333.1), the recoverability of noneconomic damages (Civ. Code, § 3333.2), and periodic payment of any judgment (Code Civ. Proc., § 667.7). Each of these MICRA statutes states its applicability in terms of the 'professional negligence' of a 'health care provider.' Moreover, each of them defines 'professional negligence' as a 'negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death . . . .' (E.g., Code Civ. Proc., § 364, subd. (f)(2).)" (*Ibid.*)

Section 340.5 contains definitions of "health care provider"[4] and "professional negligence,"[5] which are consistent with other MICRA provisions.

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[4] "'Health care provider' means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200 of the Health and Safety Code. 'Health care provider' includes the legal representatives of a health care provider." (§ 340.5, subd. (1).)

[5] "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate

A not insubstantial body of jurisprudence has developed over the years on the topic of what is meant in section 340.5 by the negligence of a health care provider in the rendition of professional services.

In the first place, the act or omission must be negligent. In a case brought by persons who were receiving fertility treatment at a medical clinic, causes of action for fraud, conversion and intentional infliction of emotional distress asserted against the clinic were found to be intentional torts and therefore not within MICRA. (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 355.)

Second. "The relevant test is not the degree of skill required, but whether the negligence occurred in the rendering of services for which a provider is licensed." (*Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 404; accord, *Bellamy v. Appellate Department* (1996) 50 Cal.App.4th 797, 807.)

Third. The act that is performed negligently need not be a medical procedure that can only be performed by a medical doctor. It has been held that the negligent operation of an ambulance (running into a curb) by licensed emergency medical technician constitutes professional negligence for MICRA purposes (*Canister v. Emergency Ambulance Service, Inc., supra*, 160 Cal.App.4th at pp. 392-393, 404-408), as is the failure to secure a rolling X-ray table (*Bellamy v. Appellate Department, supra*, 50 Cal.App.4th at pp. 805-808), or leaving a patient unattended and unrestrained on a hospital gurney. (*Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 57.) We find the following observation to be particularly cogent: "Trying to categorize each individual act or omission, all of which may occur within a space of a few minutes, into 'ordinary' or 'professional' would add confusion in determining what legal procedures apply if the patient seeks damages for injuries suffered at some point during the course of the examination or therapy. We do not see any need for

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cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (§ 340.5, subd. (2).)

such confusion or any indication the Legislature intended MICRA's applicability to depend on such fine distinctions." (*Bellamy v. Appellate Department, supra,* at p. 808, fn. omitted.)

Appellant contends that the term "professional negligence" as "used in section 340.5 was intended in a *restrictive* sense, to limit the statute to only those claims which fall within the category, medical malpractice, that the Legislature intended to address." (Original italics.) Because appellant is not asserting that a medical standard of care was not met, he reasons that this is not a case involving professional negligence.

The assumption of this contention is that pushing a wheelchair from one hospital station to another does not involve a medical standard of care. In turn, the premise upon which this assumption is based is that only the acts or omissions of physicians, i.e., medical doctors, involve medical standards of care. Appellant clearly articulates this premise in his opening brief.[6]

Both the assumption and the premise upon which it rests are wrong. As this case illustrates, there is a right way and a wrong way of moving a patient seated in a wheelchair from one hospital station to another. The standard of doing so is of course not as complex as, for instance, the standard applicable to a surgical procedure but it is a standard nonetheless. "The relevant test is not the degree of skill required . . . ." (*Canister v. Emergency Ambulance Service, Inc., supra*, 160 Cal.App.4th at p. 404.) The fact that no high degree of skill or training is required to manage a wheelchair with a patient does not remove this case from MICRA's ambit. (*Bellamy v. Appellate Department, supra*, 50 Cal.App.4th at p. 808.) Along these lines, appellant also contends that only the *professional* negligence of health care providers is covered by MICRA, suggesting that handling a wheelchair with a patient in it is not a "professional" act. Webster's defines a profession among other ways as a principal calling, vocation or employment. The safe handling of a patient in a wheelchair certainly fits this definition of a "profession."

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[6] Appellant writes that professional negligence for the purposes of section 340.5 "consists of the violation of a standard of care requiring evaluation of that degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances."

But it is not merely the handling of a wheelchair that is involved here. Appellant was undergoing medical tests at the UCLA Medical Center. Obviously, part of the process of multiple tests is moving the patient from one test site to another. A hospital has a duty "to use reasonable care and diligence in safeguarding a patient committed to its charge." (*Thomas v. Seaside Memorial Hospital* (1947) 80 Cal.App.2d 841, 847.) Moving the patient safely from test to test is therefore very much a part of the professional services rendered by a hospital, in this case the UCLA Medical Center.[7]

It is also true that if the Legislature had intended to limit "professional negligence" to the acts and omissions of medical doctors, it could have said so. But it did not. Instead, section 340.5 speaks of the "professional negligence" of health care providers who are defined by subdivision (1) of section 340.5 as a far larger and more inclusive class of persons and entities than only medical doctors. (See fn. 4, *ante*.) As the sampling of cases shows that we have cited under our third point, *ante*, acts or omissions of health care providers other than medical doctors have been held to come within MICRA.

Appellant recasts the same basic point in the formulation that as no diagnosis, treatment or the exercise of professional skill was involved, his action cannot be "in the rendering of professional services" in the terms of subdivision (2) of section 340.5. (See fn. 5, *ante*.) But section 340.5 does not speak of diagnosis, treatment or the exercise of professional skill, nor does any other cognate MICRA provision. Section 340.5 is structured by first defining health care providers as healthcare-licensed persons or entities. This ensures that some form of health care is involved. Subdivision (2) then provides that *professional* negligence means an act by such a healthcare-licensed person or entity in the rendering of *professional* services. This means that the Legislature considers all such persons and entities to exercise a *profession*. Not only is this clear from the text of section

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[7] Although in this case it is likely that moving appellant to the X-ray room did not pose a particular problem, moving a patient safely who is on life support, as an illustration, undoubtedly requires some care, training and skill. Appellant does not aid his cause by belittling the process of moving a patient within a hospital. ("A normally attentive six-year-old could have done it without causing harm.")

340.5, it makes perfect sense. Thus, it is quite clear that "professional negligence" under section 340.5 is by no means limited to the acts or omissions of medical doctors.

Appellant cites *Gopaul v. Herrick Memorial Hosp.* (1974) 38 Cal.App.3d 1002, 1005-1006, for the proposition there are some things that can go wrong in a doctor's office or a hospital that are not "professional" malpractice; *Gopaul* gives the rather colorful hypothetical of a chandelier falling on a hospital bed containing a patient. But *Gopaul* predates MICRA and therefore does not address section 340.5.

Appellant waives aside as incorrect the observation in *Bellamy v. Appellate Department, supra*, 50 Cal.App.4th 797, 808, that "the alleged negligent omission was simply the failure to set a brake on the rolling X-ray table or the failure to hold the table in place, neither of which requires any particular skill, training, experience or exercise of professional judgment, does not affect our decision." Appellant states that this violates the rule that statutes of limitation should not be construed expansively, but strictly. As we have shown, the structure of section 340.5, which ensures that all healthcare-licensed workers are treated as professionals, i.e., as covered by MICRA, validates the observation in *Bellamy* that appellant dismisses as wrong. This is not a matter of the "construction" of section 340.5 but rather what is plain on the face of section 340.5.

Appellant claims that the word "professional" in section 340.5 must be read to refer only to medical doctors; if this is not done, the word "professional" "ceases to have any meaning." We do not agree. The Legislature chose to characterize the work of licensed healthcare workers and entities as "professional." It could have limited it to medical doctors but it chose not to do so.

2. Appellant Was Injured by a Healthcare Provider

Appellant contends that respondent's liability is "based solely upon the act of the person who pushed the wheelchair into the wall" and that there is no evidence in the record that this person was a licensed health care provider.

As respondent correctly points out, a party moving for summary judgment only has to address the theories of liability raised in the complaint (citing *IT Corp. v. Superior Court* (1978) 83 Cal.App.3d 443, 452). In this case, the complaint alleges that appellant "sought

medical evaluation and treatment . . . including at UCLA Medical Center" and that appellant was in a wheelchair in the UCLA Medical Center when his foot was injured. Appellant's theory, at least as set forth in the complaint, is that the UCLA Medical Center owed him a duty of duty care and failed in that duty.

Appellant's theory set forth in the complaint cannot be faulted. We have noted that a hospital has a duty "to use reasonable care and diligence in safeguarding a patient committed to its charge" (*Thomas v. Seaside Memorial Hospital, supra*, 80 Cal.App.2d at p. 847) and that moving a patient safely from test to test within the hospital is without a doubt the hospital's responsibility. If appellant was injured while in the wheelchair as he describes it, the UCLA Medical Center failed in its duty.

Thus, appellant is not correct when he claims in his appellate brief that everything rides on whether the attendant who was handling the wheelchair was a licensed health care provider. This is not how he framed his case. He did not sue the attendant but respondent as the owner and operator of the UCLA Medical Center. While he could have chosen to sue the attendant, he elected to pursue the theory that the UCLA Medical Center breached its duty of due care. In this, as we have noted, he was completely within his rights as the medical center directly owed him a duty of due care.

During oral argument, counsel stressed that all that is involved here is the negligent act of an unlicensed person that occurred while appellant, seated in a wheelchair, was being pushed along a hallway. It is perfectly possible to see the case this way but, when viewed in this manner, the UCLA Medical Center has nothing to do with the case. It is because appellant contends that the UCLA Medical Center owed him a duty of due care in transporting him through the hospital that the UCLA Medical Center is involved.

Appellant contends that there is no evidence that the UCLA Medical Center is a licensed health facility, a point that he also advanced in his reply to respondent's opposition to the summary judgment motion. The trial court found that there is no question that the UCLA Medical Center is a health care provider. We see no reason to question this factual finding. Whether the UCLA Medical Center is a licensed health care provider is an appropriate matter for judicial notice. While we would not think so if we were dealing with

a lesser institution, it is, simply put, an absurd proposition that the UCLA Medical Center is not a licensed health care facility.

We think that it is pointless to engage in a debate about whether it is in actual fact respondent as the owner who is licensed or whether the UCLA Medical Center itself is licensed. Respondent takes the former view. Be that as it may, there is without a doubt a license.

In sum, the UCLA Medical Center owed appellant the duty to move him safely from the CT test to the X-ray room. If appellant was injured as he describes it, that duty was breached.

3. Appellant Knew That He Was Injured When His Foot Was Rammed into the Wall

In his opposition to the motion for summary judgment, appellant propounded under a separate caption the argument that there was no evidence as to when he knew that he had sustained an injury.

In answer to that argument, respondent produced in its reply excerpts from appellant's deposition. Among other things, appellant testified that right after his foot was rammed into the wall, he told the attendant that he, appellant, thought his foot was broken; appellant also testified that he was immediately in a lot of pain. The day after the accident, appellant was examined by a physician who told him that there was a possible fracture and an infection. His leg looked red, bruised and was very painful. Upon discharge, appellant was told that he was being put on antibiotics for cellulitis.

It is evident that appellant knew not only that he was injured, he even knew of the consequences of the injury.

Appellant's contends that the foregoing information from his deposition should have been produced as part of the motion itself and that it was too late to do so as part of the reply. This is specious. Once appellant raised this issue in his opposition, the only course of action respondent could take was to produce evidence that replied to this contention. Respondent was not required to anticipate the claim that there was no evidence about when appellant knew that he was injured. The plain import of the allegations of the complaint was that he immediately knew that he was injured, which turned out to be the case.

4. Section 340.5 Is Constitutional

Appellant contends that he has been deprived of the equal protection of the laws because he is not treated like others who are injured as he was but where the injury occurred in some location other than a hospital.

We are not convinced. Classifying persons in wheelchairs in a hospital differently from persons in wheelchairs outside the hospital is eminently reasonable; in fact, it is a very sensible classification. Persons in wheelchairs in the hospital require active medical care and supervision while this is not likely, or at least not necessarily true, of persons in wheelchairs in locations other than a hospital.

In any event, MICRA has been sustained against an equal protection challenge. (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372.)

DISPOSITION

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

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.