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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARIA FLORES, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B224903 (Los Angeles County Super. Ct. No. TC020160)

APPEAL from a judgment of the Superior Court of Los Angeles County. William Barry, Judge. Affirmed.

Law Office of Steven W. O'Reilly and Steven W. O'Reilly for Plaintiff and Appellant.

Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill, Lillie Hsu; Monroy, Averbuck & Gysler, Jon F. Monroy and Jennifer E. Gysler for Defendant and Respondent.

* * * * * *

Plaintiff and appellant Maria Flores appeals from the summary judgment in favor of the County of Los Angeles based on her failure to comply with the Government Claims Act (Gov. Code, § 810 et seq.). Appellant filed a government claim for the alleged wrongful death of her 35-year-old daughter, Maria G. Flores (Maria), based on the purported negligence of emergency room physicians on September 19 and 20, 2005. After her claim was denied, appellant sued the County and later amended her complaint to add the allegation that from 1986 onward, other County physicians failed to give Maria a vaccination that would have prevented her death from the infection that ultimately caused it. We agree with the trial court that appellant's new allegations were not fairly reflected in her government claim, and affirm summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Undisputed Facts

In the early afternoon of September 19, 2005, Maria complained to her mother and her brother Carlos of back pain and feeling cold. After calling paramedics to their home, Carlos drove Maria and their mother to the emergency room at Martin Luther King, Jr./Drew Medical Center (the hospital), arriving at approximately 6:30 p.m. The hospital's records showed that Maria was admitted at 7:16 p.m. and her vital signs were taken at 8:00 p.m. The medical history taken upon admission stated that Maria had chills, and back and abdominal pain that was worsening.

Maria was diagnosed with pneumococcal sepsis with disseminated intravascular coagulation (DIC). Despite receiving antibiotics and other medications, Maria's condition deteriorated rapidly. She developed multi-organ failure, and was pronounced dead at 8:07 a.m. on September 20, 2005. The coroner concluded the cause of death was sepsis due to streptococcus pneumonia.

Twenty years earlier, Maria had been involved in a motorcycle accident that required her to undergo a splenectomy, left nephrectomy, and liver resection. She developed Hepatitis C from a blood transfusion given to her at that time, and at some point she was diagnosed with diabetes.

Post-splenectomy patients who develop pneumococcal sepsis with DIC have a high mortality rate, between 50 to 70 percent, despite appropriate antibiotic therapy and intensive medical support. While pneumococcal vaccines are available, they are not administered in hospital emergency rooms. Had Maria been given a pneumococcal vaccine when she arrived at the emergency room, it would not have increased her chances of survival.

Government Claim and Amended Complaint

On or about December 9, 2005, Maria's family filed a government claim with the County. The claim identified the family's injuries as wrongful death and negligent infliction of emotional distress. The claim stated that "[n]egligent treatment of Drs. Moustafa, Gierahn, Gentile, Aguilera, Kachabian, and other presently unknown emergency room physicians, nurses and hospital employees" resulted in Maria's death on September 20, 2005. The claim identified the particular act or omission causing injury as: "No physician attended patient for hours and then negligent treatment and misdiagnosis, including wrong medication and failed [*sic*] to identify injury, resulting in death."

On June 29, 2006, Maria's mother and siblings sued the County.[1] The original complaint alleged two causes of action, wrongful death and negligent infliction of emotional distress. The complaint alleged that after arriving at the hospital's emergency room, Maria received no medical attention for hours, was misdiagnosed, and received the wrong medication.

Three years later, on July 17, 2009, Maria's mother moved to amend the complaint. The County unsuccessfully opposed the motion. On August 11, 2009, Maria's mother, as the sole remaining plaintiff, filed a first amended complaint against the County, alleging a single cause of action for wrongful death. The cause of action was

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[1] The complaint erroneously named the hospital as a defendant. Individually named physicians were later dismissed as defendants.

essentially identical to the one in the original complaint, except the new complaint added the allegations that the hospital's physicians "failed to vaccinate the decedent for Streptococcus pneumonia upon removing her spleen in 1986 and through September 19th, 2005," and "failed to warn and advise the decedent of the high risk of death without vaccination."

Motion for Summary Judgment

The County moved for summary judgment on four grounds: (1) the amended complaint was at variance with the government claim; (2) the County did not cause Maria's death because at the time she arrived at the hospital she did not have a greater than 50 percent chance of survival; (3) the vaccination theory was based on unsupported speculation; and (4) the claim of malpractice dating back to 1986 was time-barred. In support of its motion, the County submitted numerous documents, including the expert witness declaration of Robert Joseph, M.D., who stated that due to Maria's splenectomy, "she was at risk for overwhelming infection," and that there is "an extremely short time" between symptoms of post-splenectomy patients with pneumococcal sepsis with DIC and death, "i.e., 68% of patients [die] within 24 hours and 80% of patients within 48 hours." Dr. Joseph opined that at the time Maria presented at the hospital she "did not have a greater than 50% chance of survival," and that "a pneumococcal vaccine administered to this patient, at the time of her splenectomy, or anytime subsequent thereto, would not have increased her chances of survival." The County also relied on the declaration of one of the emergency room treating physicians, Patrick A. Aguilera, M.D., who noted that Maria had received Interferon treatments for Hepatitis C, and that "the pneumococcal vaccine may not establish immunity and can potentially harm a patient such as Maria Flores, who had been receiving Interferon treatments for Hepatitis C."

Appellant opposed the motion, arguing that by granting her motion for leave to amend the complaint, the trial court had already ruled her government claim adequately raised her vaccination theory, and that the County had to move for reconsideration under Code of Civil Procedure section 1008. Appellant also presented the expert witness

declaration of Bernard T. McNamara, M.D., who agreed with the County's expert that patients without a spleen who develop streptococcous pneumonia have an 80 to 90 percent fatality rate. He opined that the emergency room physicians nevertheless accelerated her death by failing to take a blood culture until seven hours after she was admitted and by delaying administration of antibiotics and IV liquids to fight the fast-moving infection. Dr. McNamara also opined that the standard of care required that patients who are missing a spleen, or who have Hepatitis C or diabetes, be vaccinated against streptococcous pneumonia infection or be advised of the high mortality rate without vaccination. Specifically, he opined that Maria should have been vaccinated after her splenectomy in 1986 and revaccinated every five years, and that she would have had "a near 100% chance of survival" if she he been vaccinated. He believed the most recent breach of the standard of care occurred on August 23, 2005, about a month before her death, when she had a nonemergency consultation with internal medicine physician Anil K. Dev, M.D., who did not vaccinate her or warn her to get vaccinated.[2]

The Trial Court's Ruling

The trial court granted the County's motion for summary judgment, finding no triable issue of material fact. The court found that the County had no liability for the acts or omissions of the hospital's emergency room staff, reasoning that Dr. McNamara's declaration established that Maria had only a 10 to 20 percent chance of survival when she arrived at the emergency room, and the County's uncontradicted authority demonstrated that a medical practitioner cannot be held responsible for a patient's death unless there was at least a 50 percent chance of survival.

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[2] The County objected to Dr. McNamara's expert declaration on the grounds that it was conclusory and lacked foundation for the statements that (1) Maria had never been vaccinated against streptococcous pneumonia infection, and (2) the hospital was her sole provider of medical care from 1986 until her death. The County based its objections on the lack of any supporting evidence and the fact that the hospital had no medical records for Maria prior to 2001. The trial court sustained the objections.

The trial court also found that appellant's vaccination theory was not presented in her government claim, and therefore did not provide an independent basis of liability. The court's written ruling stated: "[T]he fact that [appellant's] Claim did not mention this vaccination issue as a basis for liability, and that she did not seek leave to amend her Claim to include a later discovered basis for a claim, is fatal to her case. . . . [T]he circumstances surrounding the alleged vaccination issue are significantly different than the alleged negligence in the emergency room, such that this new issue is not an expansion of the underlying claim. [¶] . . . . [Appellant] was indeed given leave to add this specific issue [to her complaint], but when the court allowed that amendment, it was doing so in connection with a motion to file an amended pleading, which is decided under a liberal standard, one that disfavors barring an amendment because it might lack merit at the end of the day. Therefore, the court did not rule on the merits of whether or not the issue might be barred. For that reason, C.C.P. § 1008 is not applicable here." The court entered judgment on March 30, 2010. This appeal followed.

DISCUSSION

I. Standard of Review

We review a grant of summary judgment de novo, considering "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) If there is no triable issue of material fact, "we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by

the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

The general rule is that summary judgment is appropriate where "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 defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co., supra,* at p. 850.) "'[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . [;] the defendant need not himself conclusively negate any such element . . . .' [Citation.]" (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894.) Once the moving party's burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Silva v. Lucky Stores, Inc., supra,* 65 Cal.App.4th at p. 261.) The plaintiff must produce "substantial" responsive evidence sufficient to establish a triable issue of fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Ibid.*) """When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork."' [Citation.]" (*Mills v. U.S. Bank, supra,* at p. 894.)

II. The County was Entitled to Summary Judgment

On appeal, appellant does not challenge the trial court's finding that the County cannot be held liable based on the alleged negligent acts or omissions of the hospital's emergency room staff, because Maria had less than a 50 percent chance of surviving her

infection upon her admission to the hospital. She has therefore forfeited this issue. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.) Instead, appellant limits her appeal to challenging the trial court's finding that her failure to comply with the government claim requirements precluded her vaccination theory. As discussed below, we find no error.

Under the Government Claims Act (Gov. Code, § 810 et seq.), a lawsuit for money or damages against a public entity may not be maintained unless a written claim has first been timely presented to and rejected by the public entity. (Gov. Code, § 945.5; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776; *Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, 434 (*Fall River*).) The claim must include "[t]he date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted," a general description of the injuries or damage, and the names of the public employees who caused them. (Gov. Code, § 910, subd (c).) Failure to comply with the statutory requirements bars the claimant's action at law. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.)

The parties acknowledge the purpose of the claim requirement is '"to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims.' [Citation.]" (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 888 (*Turner*); *City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 455; *Phillips v. Desert Hospital Dist*. (1989) 49 Cal.3d 699, 705.) The claim requirement must be satisfied even if the public entity had actual knowledge of the circumstances surrounding the claim. (*City of San Jose, supra*, at p. 455; *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 82.)

"It is therefore necessary for the claim served on the governmental entity to describe fairly what that entity is alleged to have done. 'If a plaintiff relies on more than one theory of recovery against the State, each cause of action must have been reflected in a timely claim. In addition, the factual circumstances set forth in the written claim must

correspond with the facts alleged in the complaint; even if the claim were timely, the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.'" (*Turner, supra*, 232 Cal.App.3d at p. 888, quoting *Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79; *Fall River, supra*, 206 Cal.App.3d at p. 434; *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1808.) "[A] claim filed in anticipation of litigation must set forth all the legal and factual bases that will be asserted in any subsequent lawsuit . . . ." (*Doe 1 v.City of Murrieta* (2002) 102 Cal.App.4th 899, 920.)

While courts have formulated a "substantial compliance" exception to the strict claims requirement, the exception "is unavailing where the plaintiff seeks to impose upon the defendant public entity the obligation to defend a lawsuit based upon a set of facts entirely different from those first noticed." (*Fall River, supra*, 206 Cal.App.3d at p. 435.) To hold otherwise, would be "an obvious subversion of the purposes of the claims act, which is intended to give the governmental agency an opportunity to investigate and evaluate its potential liability." (*Id*. at pp. 435–436; *Turner, supra*, 232 Cal.App.3d at p. 891.)

Here, the factual circumstances described in the government claim allege that the emergency room staff failed to treat Maria for hours and then provided negligent treatment, including misdiagnosing her and giving her the wrong medication, which led to her death on September 20, 2005. Appellant's amended complaint contained these same allegations, but also added a different factual and legal theory. The amended complaint alleged that County physicians failed to vaccinate Maria for streptococcus pneumonia or to warn her of the high risk of death without vaccination when they removed her spleen in 1986 and continuing until her hospital admission on September 19, 2005. The amended complaint alleges: "Specifically, the negligent acts include, with knowledge that the decedents [*sic*] spleen had been removed, the physicians employed by the defendant failed to vaccinate the decedent for Streptococcus pneumonia upon removing her spleen in 1986 and through September 19th, 2005, and the defendant's

physicians failed to warn and advise the decedent of the high risk of death without vaccination, upon removing her spleen in 1986, and through September 19th, 2005."

On appeal, appellant limits the time frame of these allegations, asserting that County physicians were negligent in failing to vaccinate Maria (or to warn her of the dangers of not being vaccinated) during one consultation on August 23, 2005, about a month before she presented at the emergency room. In opposing the motion for summary judgment, appellant asserted that the August 23, 2005 consultation was with Anil K. Dev, M.D., an internal medicine physician who was not one of the physicians named in the government claim.

We conclude that appellant's failure-to-vaccinate theory was not fairly reflected in her government claim. We agree with the County that this new theory asserts liability based on different acts, by different actors, that occurred at different times and in different places from those asserted in the government claim. The asserted theory of liability in the government claim is based on the acts and omissions of particular emergency room physicians in failing to treat Maria immediately, and then giving her the wrong medication and misdiagnosing her in the emergency room on September 19 and 20, 2005. The vaccination theory, on the other hand, bases liability on other physicians' failure to vaccinate Maria or to warn her of the dangers of not being vaccinated, during a nonemergency consultation one month before her emergency room visit, or, as alleged in the amended complaint, during multiple visits over a 20-year period. Thus, the amended complaint "attempts to premise liability on an entirely different factual basis than what was set forth in the tort claim. Such a variance has been held fatal to a plaintiff's pleading in several analogous cases." (*Fall River, supra,* 206 Cal.App.3d at p. 435.)

We reject appellant's argument that she "substantially complied" with the claim statutes by alleging in her government claim "wrongful death" as the injury and "negligent treatment" as the cause. From this information, appellant claims the County could have identified the failure to vaccinate as a possible basis for the claim. Specifically, appellant argues that a "reasonable investigation" by the County would have

included a review of Maria's medical records, which showed that she had three risk factors for death if she became infected as she did. Appellant's reliance on *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441 (*Stockett*) to support her position is unavailing.

In *Stockett*, the plaintiff presented his public employer with a claim alleging that he had been wrongfully terminated for supporting a coworker's sexual harassment complaints against the employer's insurance broker, because he knew the employer's executive committee and broker had purchased insurance without competitive bidding, and he had considered soliciting other bids. (*Stockett, supra*, 34 Cal.4th at p. 444.) The plaintiff later asserted in an amended complaint and at trial that he had also been fired for the additional reasons of opposing the insurance broker's conflict of interest and telling an insurance industry newsletter that the employer's workers' compensation insurer was selling insurance below cost. (*Id*. at pp. 444–445.) Our Supreme Court found that the plaintiff's government claim was not at variance with his amended complaint because "the additional theories pled in Stockett's amended complaint did not shift liability to other parties or premise liability on acts committed at different times or places," but "simply elaborated and added detail to his wrongful termination claim by alleging additional motivations and reasons for [the] single action of wrongful termination." (*Id*. at p. 448.)

The *Stockett* Court further reasoned that by notifying the employer of the precise wrongful act, i.e., termination, that caused the plaintiff's injury, and naming the individuals he believed responsible, the plaintiff's claim "provided sufficient information for [the employer] to investigate and evaluate its merits." (*Stockett, supra*, 34 Cal.4th at p. 449.) Because the plaintiff had requested, and been denied, the reasons for his termination, a reasonable investigation of his wrongful termination claim "would have included questioning members of the committee to discover their reasons for terminating Stockett and an evaluation of whether any of the reasons proffered by the committee, including but not limited to the theories in Stockett's claim, constituted wrongful termination." (*Ibid*.)

By contrast, appellant's vaccination theory based liability on different wrongful acts, committed at different times and by people different than those alleged in her government claim. Thus, unlike *Stockett*, appellant's claim and new theory were not "predicated on the same fundamental actions or failures to act by the defendants." (*Stockett*, *supra*, 34 Cal.4th at p. 447.) Moreover, while Stockett's claim ensured that the employer would investigate all of the reasons for his termination, appellant's claim notified the County only that the actions of the emergency room physicians on two specific dates caused Maria's death. A reasonable investigation of those actions would not necessarily involve evaluating the actions of Maria's prior physicians during all previous consultations—over a 20-year period—to determine whether they had committed additional wrongful acts.

We also reject appellant's argument that by granting her motion for leave to amend her complaint, the trial court ruled that her government claim adequately raised her vaccination theory, and therefore the County could not raise the issue on its summary judgment motion, but was instead required to proceed by a motion for reconsideration pursuant to Code of Civil Procedure section 1008.

First, appellant points to no place in the record supporting her argument. At the hearing on appellant's motion for leave to amend the complaint, the trial court stated that it understood "the plaintiff's case is that the doctors should have done things differently when she presented in the emergency room, one of the things they should have done was given her different medications for the situation she was confronting, and that kind of wraps in that they knew or should have known that she didn't have the shot. So it is adding something new . . . [but] I think under the circumstances I have to allow the plaintiff to do this." Thus, it appears the trial court expected appellant to allege that the emergency room physicians would have treated Maria differently when she arrived at the emergency room, by giving her different medications or vaccinating her, had they known she had never been vaccinated. But the amended complaint instead alleged negligence in failing to vaccinate her dating back more than 20 years before she presented at the emergency room. Moreover, on summary judgment, the County presented evidence that

emergency room physicians do not give vaccinations, and the evidence was undisputed that even if Maria had been vaccinated in the emergency room, she had less than a 50 percent chance of survival.

Second, in granting summary judgment, the trial court expressly explained that when it allowed appellant to amend the complaint, it "was doing so in connection with a motion to file an amended pleading, which is decided under a liberal standard, one that disfavors barring an amendment because it might lack merit at the end of the day. Therefore, the court did not rule on the merits of whether or not the issue might be barred." The trial court was correct in ruling that it was "not reconsidering a decision."

DISPOSITION

The summary judgment is affirmed. The County is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ