RUTH BROWN, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.

C034381 & C035554

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

2002 Cal. App. Unpub. LEXIS 9121

September 30, 2002, Filed

NOTICE: [*1] NOT TO BE PUBLISHED CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

PRIOR HISTORY: Super.Ct.No. 97AS01979.

DISPOSITION: The order denying class certification is affirmed in case No. C034381, and the judgment is affirmed in case No. C035554. Defendant is awarded its costs on appeal in both cases.

JUDGES: HULL, Acting P.J. We concur: KOLKEY, J., ROBIE, J.

OPINION BY: HULL

Believing that her surgery was performed by a resident and not the surgeon whom she had authorized, plaintiff Ruth Brown brought suit against The Regents of the University of California. In her second amended complaint, she asserted causes of action for unfair competition (Bus. & Prof. Code, § 17200; further undesignated statutory references are to the Business and Professions Code) and false advertising (§ 17500). She also asserted a claim for breach of contract, and sought to have that cause of action certified as a class action.

The trial court denied certification and ultimately dismissed the breach **[*2]** of contract claim, when plaintiff elected not to pursue the matter on an individual basis. The court granted summary judgment in favor of defendant on the remaining two causes of action.

In case No. C034381, plaintiff appeals from the order denying class certification. In case No. C035554, plaintiff appeals from the judgment entered in favor of defendant after the grant of summary judgment. We consolidated these appeals, and now affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff was referred by her urologist to Dr. Ralph Devere White at the University of California at Davis Medical Center (UC-Davis) to investigate a possible recurrence of

bladder cancer. She met once with Dr. White. When she returned to the hospital for a later preoperative visit, she met with Dr. Stephen Williams, a fourth-year resident. Dr. Williams explained the surgery and informed her that he would be assisting Dr. White in the procedure.

Plaintiff signed a form entitled "Consent to Operation, Procedures and Anesthesia," in which she authorized "R. deVere White, M.D., and those who he or she may designate as associates or assistants to perform the following operation or procedure: trans-urethral resection **[*3]** of bladder tumor, left retrograde pyelogram[,] as well as any related or incidental diagnostic or therapeutic procedures that they believe may be necessary." The form also stated: "I understand that I will be informed of any substitution of the doctor named above and will be given the opportunity to refuse substitution."

Plaintiff asserted she woke from anesthesia for about 15-30 minutes during the middle of her two-hour operation. She heard the voices of two or three people, one of whom she believed to be Dr. Williams. She could not see anyone in the room other than the anesthesiologist. She did not hear Dr. White's voice, and did not know if he was present. She heard Dr. Williams say, "No, I will want another picture at the end," and "I'm almost done. I'm almost done. I want to get it all."

The operating room report, completed under the names of Dr. White and Dr. Williams, described the procedure as follows: After plaintiff was anesthetized, a cytoscope was inserted to view the bladder. A portion looked as if a tumor had regrown. A retrograde pyelogram, which involves radiographic dye and water, was taken for further viewing of the area. The bladder was biopsied and an area **[*4]** of the bladder was resected. A pyelogram was reshot and appeared normal. The cytoscope was used again to inspect the area of resection. Everything appeared normal, a catheter was inserted, and plaintiff was moved to the recovery room.

The report states: "It should be noted that Dr. Devere White was present from the time we shot the first retrograde pyelogram all the way through the end of the case when the Foley catheter was placed."

According to hospital policies, only the surgeon's services, and not those of the resident, are billable. In order to bill for the surgeon's services, the surgeon must be present during the key portions of the surgery, as defined by the surgeon. Dr. White believed that the insertion of the cytoscope, which the operating report indicated was done before he came into the operating room, was a routine procedure and not a key part of plaintiff's operation. The hospital billed plaintiff for Dr. White's services.

In her second amended complaint, plaintiff set forth three causes of action. The first asserted defendant engaged in unfair competition and unlawful business practices in violation of Business and Professions Code section 17200 through "ghost **[*5]** surgery," that is, by having surgeons other than the person named in the consent form perform the procedures but billing as though the authorized surgeon, in fact, operated.

A second cause of action claimed this same practice constituted untrue and misleading advertising in violation of Business and Professions Code section 17500.

Plaintiff pleaded a third cause of action for breach of contract as a class action "on behalf of all persons who underwent an Operation at the Regents' California medical

facilities in accordance with the terms of [its] Consent forms . . . ." She alleged common issues of law and fact predominated in that each class member signed a consent form like that signed by plaintiff, authorizing a particular doctor to do a particular procedure and requiring that the patient be informed of any substitution of the named doctor and be given an opportunity to refuse substitution. She alleged the university "routinely substituted another person for the named doctor and that person performed the Operation without the class members [*sic*] knowledge and without any communication regarding such substitution," then required the doctor to sign the operation report, **[*6]** as if he or she did the operation, and billed for that doctor's services.

As discussed in greater detail later in this opinion, the trial court that concluded common questions of fact or law did not predominate and denied class certification. Plaintiff declined to file an amended complaint asserting an individual breach of contract claim, and filed a notice of appeal.

Defendant then moved for summary judgment on the remaining causes of action. The trial court concluded that defendant was not a "person" within the meaning of sections 17201 and 17506 and granted the motion. Judgment was entered in favor of defendant and plaintiff appealed.

DISCUSSION

I

Class Certification

Plaintiff contends the court erred in denying class certification of her breach of contract claim. We disagree.

"Section 382 of the Code of Civil Procedure authorizes class suits in California when 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.' To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest **[*7]** among the class members. [Citations.] The community of interest requirement involves three factors: '(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.)

In its tentative ruling, the trial court assumed the existence of an ascertainable class and did not address the adequacy of representation. Instead, it concluded "that the nature of the 'agreements' in issue and the varied nature of the alleged breaches[] are such that there are not predominate common questions of law or fact; rather, there are numerous and substantial individualized questions which predominate."

The court reviewed the two consent forms used by defendant, one dated 1993 and the other 1996, and observed they were substantially identical. Both included language providing: "I understand that I will be informed of any substitution of the doctor named above and will be given the opportunity to refuse substitution."

The court concluded: "Contrary to Plaintiff's contentions, the meaning of the substitution provision **[*8]** in the consent form cannot be ascertained in a 'one size

fits all' vacuum." The court noted that the contractual setting of this case presented the same problem discussed in tort cases such as *Brown v. Regents of the University of California* (1984) 151 Cal. App. 3d 982, 198 Cal. Rptr. 916, namely, that conversations between doctors and patients regarding operations may vary considerably.

The court stated: "The ultimate 'contractual' question in the context of this case is what each patient understood 'substitution' to mean. Once that has been determined on an individual basis, the question would then become: What is the contended activity of substitution in the individual case, and is that activity consistent with the patient's understanding? . . . In sum, the unique circumstances leading to the signing of each consent form are relevant, as is the precise nature of any discussion as to what portion of a given surgery might be performed by an assistant or resident. Once individual consent is determined, was the level of participation of any resident as to an individual's surgery violative of the patient's understanding? These are major issues underlying the parties' **[*9]** dispute; they are individual, not common issues."

The court concluded that common issues did not predominate over individual issues, and it issued its tentative ruling denying class certification.

At oral argument, plaintiff suggested narrowing the class to include only those nonemergency cases treated at UC-Davis, in which the billing surgeon was entirely absent, or absent for key or substantial portions of the procedure.

The trial court concluded that this proposal did not cure the problem. Evidence had disclosed that doctors discussed the role of residents with their patients during the informed-consent process. The court then stated: "If the class were limited to only those plaintiffs whose surgeons were entirely absent, a stronger case for "common questions of law and fact' might be present . . . because it could be inferred that no reasonable person would consent to the total absence from the surgical procedure of the surgeon who was designated the responsible surgeon. However, there is no evidence of the number of cases that fall into this category. There is insufficient evidence before the Court regarding this narrow class to meet [plaintiff's] burden that class certification **[*10]** is appropriate. As to the conjunctive 'absent for key or substantial portions,' the Court finds that individual questions would still outweigh any common questions of law or fact. Each surgery is different, and therefore the definition of 'key' or 'substantial' portions of each surgery would differ in every case. Each patient's unique surgical needs, each patient's understanding of the role of the resident in the surgery, and each patient's understanding of what 'key' or 'substantial' means with respect to his/her unique surgery cannot be determined on a class wide basis. [P] Therefore, the [plaintiff's] proposed narrowing of the class has not persuaded the court that class certification is appropriate."

The court confirmed its tentative decision and denied certification.

Defendant contends this appeal should be dismissed, because plaintiff lacks standing. Specifically, defendant argues that plaintiff's refusal to amend her complaint and the subsequent dismissal of the breach of contract action precludes plaintiff from proceeding in a class action. We disagree.

Cases cited by defendant relate to an entirely different situation, namely, whether a party is an appropriate class **[*11]** representative. For example, in *Baltimore*

Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 359-362, 215 Cal. Rptr. 323, this court reiterated that a party must have a personal claim against each defendant in order to serve as a class representative. The same principles were enunciated in *Phillips v. Crocker-Citizens Nat. Bank* (1974) 38 Cal. App. 3d 901, 906-908, 113 Cal. Rptr. 688, also cited by defendant. Nothing in these cases, or any other cited by defendant, requires a party to go to the expense and effort of refiling an individual claim after the denial of class certification in order to preserve that person's right to appeal that order.

The denial of class certification is an appealable order (*Linder v. Thrifty Oil Co., supra,* 23 Cal.4th at p. 435), and plaintiff's appeal is properly before us.

We digress briefly to clarify the scope of our review. In their briefs, the parties allude to several intriguing but irrelevant matters. We need not resolve whether plaintiff's case, in fact, involved ghost surgery, whether plaintiff had a viable individual claim for breach of contract, or whether plaintiff was a suitable **[*12]** class representative. Instead, we are limited to one, narrow question: Did the trial court properly conclude individual questions of fact predominated over common questions?

Trial courts have great discretion in granting or denying class certification. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 435.) "In the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [Citation]. Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal '"even though there may be substantial evidence to support the court's order."' [Citations.] Accordingly, we must examine the trial court's reasons for denying class certification. 'Any valid pertinent reason stated will be sufficient to uphold the order.'" (*Id*. at pp. 435-436; accord, *Caro v. Procter & Gamble Co*. (1993) 18 Cal.App.4th 644, 655-656.)

The plaintiff bears the burden of demonstrating that substantial benefits to litigants and the court will result from class certification. **[*13]** (*Collins v. Safeway Stores, Inc*. (1986) 187 Cal. App. 3d 62, 68, 231 Cal. Rptr. 638) Consequently, the plaintiff must establish the existence of an ascertainable class and a well-defined community of interest, including the predominance of common questions of law or fact. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23.) "Satisfaction of that burden requires that the plaintiff establish more than 'a reasonable possibility' that class action treatment is appropriate. The 'reasonable possibility' standard applies when the class action complaint is tested on demurrer [citation], but not when the court determines the issue of class propriety at hearing on an appropriate motion at which evidence is presented. [Citations.] Then the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact." (*Hamwi v. Citinational-Buckeye Inv. Co*. (1977) 72 Cal. App. 3d 462, 471-472, 140 Cal. Rptr. 215.)

"The requisite community of interest exists only where 'the issues which may be jointly tried, when compared with those requiring separate **[*14]** adjudication, [are] sufficiently numerous and substantial to make the class action advantageous . . . .' It is not present where each class member is 'required to individually litigate numerous and substantial questions to determine his right to recover . . . .' [Citation.] [P] Thus, if a class action 'will splinter into individual trials,' common questions do not predominate and litigation of the action in the class format is inappropriate." (*Hamwi v. Citinational-Buckeye Inv. Co, supra*, 72 Cal. App. 3d at p.

471.)

Here, plaintiff initially proposed a class consisting of those "who underwent an Operation at the Regents' California medical facilities in accordance with the terms of [its] Consent forms . . . ." At oral argument in response to the court's proposed reasons for denying class certification as set forth in its tentative ruling, plaintiff narrowed her application to a class consisting of persons who underwent nonemergency surgery at the UC-Davis Medical Center, in which the billing surgeon was entirely absent or was absent for key or substantial portions of the procedure. The trial court properly concluded that neither proposed class should be certified, **[*15]** because individual issues predominated in each of them.

Evidence demonstrated that doctors discussed upcoming surgeries individually with each patient. The content of that conversation would be critical in any claim for breach of contract. Each patient's understanding of the particular procedure and the roles of surgeons and residents in that surgery would depend on what was discussed with his or her doctor. Patients may also have had differing assumptions about how teaching hospitals function. While plaintiff thought a resident's participation would be limited to handing instruments to the responsible surgeon, other patients might have expected residents to have far more participation in the procedure.

Moreover, as to the narrowed class that plaintiff proposed at oral argument, the "key" portion of each surgery was determined by the responsible surgeon for the procedure, which varied depending on the procedure involved, the general health of the patient, and the experience level of the resident. And, whether the billing surgeon was absent for "substantial" portions of the procedure would depend on the nature of the surgery and the timing of the absence in each case as well. "Substantial" **[*16]** must be deemed to have more than a temporal meaning. A surgeon's absence for 30 minutes could be substantial in one case, due to the length and timing of the absence, the nature of the surgical procedure, and the health of the patient and not be substantial in the next. Even if the class had been narrowed to those patients whose surgeons were entirely absent during the procedure, there was no showing, as the trial court pointed out, how many such patients there were.

Plaintiff cites a number of out-of-state cases involving lawsuits for "ghost surgery." None of those cases, however, involved a class action; each was a lawsuit brought by an individual plaintiff. (E.g., *Guebard v. Jabaay* (Ill.App.2d 1983) 117 Ill. App. 3d 1, 452 N.E.2d 751, 72 Ill. Dec. 498; *Perna v. Pirozzi* (N.J. 1983) 92 N.J. 446, 457 A.2d 431; *Buie v. Reynolds* (Okla.Ct.App. 1977) 571 P.2d 1230.) As we have already stated, the question in this case is not whether plaintiff can assert a claim but whether class certification is appropriate.

Accordingly, proposed class members will have had different understandings of the roles of surgeons and residents in their procedures, **[*17]** and surgeons will have defined the "key" portions of each procedure on an individual basis. Under these circumstances, individual questions predominated over common questions. (See *Caro v. Procter & Gamble, Co. supra,* 18 Cal.App.4th at pp. 668-669; see *Brown v. Regents of University of California, supra,* 151 Cal. App. 3d at p. 989.) The trial court properly denied plaintiff's motion for class certification.

II

Summary Judgment

The two remaining causes of action in plaintiff's complaint alleged unfair competition and false advertising under sections 17201 and 17506. The trial court found that defendant was not subject to these statutory schemes, because it did not meet the statutes' definitions of "person," and it therefore granted summary judgment in favor of defendant. Plaintiff contends this ruling was erroneous. It was not.

"'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But "it is a settled principle of statutory interpretation **[*18]** that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." [Citations.] Thus, "the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." [Citation.]' [Citation.] To properly apply these principles, we must at the same time remain cognizant of 'the objective to be achieved and the evil to be prevented by the legislation. [Citations.]'" (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064-1065, 959 P.2d 360.)

Section 17201 provides, for purposes of unfair competition actions, that "the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

Section 17506 provides a narrower definition for false advertising claims, stating: "'Person' includes any individual, partnership, **[*19]** firm, association, or corporation."

Plaintiff contends that, because defendant is a corporation, it comes within the ambit of both provisions. Case law has consistently held otherwise.

Article IX, section 9, subdivision (a) of the California Constitution provides in relevant part: "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services."

In addition to its status as a constitutionally created public corporation, defendant is also a "public entity." (Gov. Code, § 811.2). Defendant's status is therefore not that of a typical corporation.

In *California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542, review denied **[*20]** June 21, 2000 (S084269), the court specifically held: "Although 'persons' who engage in unfair competition may be sued for damages and injunctive relief [citations], the University of California is a 'public entity [citation] and, therefore, not a 'person' within the meaning of the Unfair Practices Act." (*Id*. at p. 551.)

Similarly, in *Janis v. California State Lottery Com*. (1998) 68 Cal.App.4th 824, the court held that governmental entities, such as the Lottery Commission, are not included in the statutes' definitions of "persons." Consequently, the court held that plaintiff's claims for unfair business practices and misleading advertising under sections 17200 and 17500 failed as a matter of law. (*Id*. at p. 831.) This court adopted the same analysis in *Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1203.

Under this line of authority, the trial court properly concluded that defendant cannot be deemed a "person" for purposes of sections 17200 and 17500.

In arguing to the contrary, plaintiff places great reliance on *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, in **[*21]** which the court found the state's compensation fund, a public entity, to be liable under section 17200. However, as *Notrica* makes clear, the history of this fund virtually compelled such a conclusion, as the fund had consistently cast itself as a private enterprise and sought to be treated as such. Insurance Code section 11873 acknowledged this effort and specifically delineated the few instances in which the fund was to be treated as a public entity. (*Id*. at pp. 940-941; see also *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1511-1515.) Defendant does not share a similar history and, consequently, *Notrica* is inapplicable.

Plaintiff also cites a 1989 Attorney General's opinion that found that a pharmacy operated by the University of California to be subject to the provisions of the state's pharmacy law. (72 Ops.Cal.Atty.Gen. 119.) However, at that time, former section 4039 of the pharmacy law defined "person" to include "firm, association, partnership, corporation, state governmental agency, or political subdivision." (Stats. 1980, ch. 948, § 1, p. 2993.) Sections 17201 and 17506 do not include similar **[*22]** references to governmental agencies or political entities.

As defendant notes, section 17021 of the Unfair Practices Act specifically defines "person" to include "any person, firm, association, organization, partnership, business trust, company, corporation or *municipal or other public corporation*." (Italics added.) If the term "corporation" were deemed to automatically encompass public corporations, there would be no reason to include these additional terms. Section 17021 reflects a belief that these different types of corporations are, in fact, distinct. Had the Legislature wished to include public corporations in sections 17201 and 17506, it could have done so by using language similar to that in section 17021.

Given these statutory definitions, it is of little relevance that the university was held to be a person for purposes of the usury laws in *Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 536-537, 131 Cal. Rptr. 228, 551 P.2d 844. Under both case law and principles of statutory interpretation, defendant cannot be considered a person under sections 17200 and 17500.

Plaintiff argues at great length that the Legislature was **[*23]** empowered to bring defendant within the ambit of sections 17200 and 17500, because consent procedures are the same at UC-Davis and private hospitals, and do not affect defendant's mandate as a teaching hospital. We question the validity of plaintiff's claim. Since the precise roles of a resident and responsible surgeon in a given procedure cannot always be delineated ahead of time, the hospital's teaching functions might indeed be impacted if specific predictions as to what was going to be

done by whom had to be given to a patient. This situation does not arise in private, nonteaching hospitals. But even if we assume plaintiff to be correct, its theorizing is irrelevant. The question is not whether the Legislature could have included defendant in her definitions of "person" -- which we need not reach -- but whether it did so. It did not.

DISPOSITION

The order denying class certification is affirmed in case No. C034381, and the judgment is affirmed in case No. C035554. Defendant is awarded its costs on appeal in both cases.

HULL, Acting P.J.

We concur:

KOLKEY, J.

ROBIE, J.