Filed 5/29/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

JEAN DENNIS, Plaintiff and Appellant, v. SCOTT W. SOUTHARD et al., Defendants and Respondents.	C058948 (Super. Ct. No. SC20060003)

APPEAL from a judgment of the Superior Court of El Dorado County, Jerald M. Lasarow, Judge. Affirmed.

Hardy Law Group, Ian E. Silverberg and Del Hardy for Plaintiff and Appellant.

Schuering Zimmerman Scully Tweedy & Doyle, Robert H. Zimmerman and J. Hawken Flanagan for Defendants and Respondents.

In the published portion of this opinion involving a jury trial on medical battery, we hold that the two form instructions

---

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, V, VI, and VII of the Discussion.

on medical battery found in CACI Nos. 530A and 530B correctly state the intent requirement for medical battery.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jean Dennis sued defendant Scott W. Southard (and his corporation of the same name) for medical malpractice and medical battery after she suffered complications following knee replacement surgery Dr. Southard performed on her right knee. Following the trial court's granting of Dr. Southard's motion for summary adjudication of the medical malpractice cause of action, the case went to trial on medical battery.

At trial, Dennis testified that in June 2004, Dr. Southard performed a successful left knee replacement surgery that she had conditioned on using a prosthesis other than one manufactured by Johnson & Johnson. Dr. Southard used a Biomed prosthesis, and the surgery was successful.

In October 2004, the hospital where Dr. Southard operated switched from using Biomed prostheses to Johnson & Johnson prostheses. That same month, Dr. Southard performed a right knee replacement surgery on Dennis using a Johnson & Johnson prosthesis. During the surgery, Dr. Southard inadvertently transected Dennis's medial collateral ligament.

The jury found for Dr. Southard.

Dennis appeals, contending the trial court erred in: (1) granting summary adjudication of her medical malpractice cause of action; (2) failing to remove a juror for cause; (3) misinstructing the jury on the elements of medical battery; (4) excluding expert witness testimony on medical ethics;

(5) excluding testimony and argument that transecting the ligament was "an item of damages related to the medical battery"; (6) denying her motion to amend the complaint; and (7) denying her motion for a directed verdict. Disagreeing with these contentions, we affirm the judgment.

DISCUSSION

I

The Court Did Not Err In Granting Summary Adjudication Of The Medical Malpractice Cause Of Action

Dennis contends the court erred in granting summary adjudication of the medical malpractice cause of action. She argues that the declaration of Dr. Southard's expert, which stated that transecting the ligament was not below the standard of care, was conclusory; she presented testimony "indicating" Dr. Southard's treatment fell below the standard of care; and, in any event, she did not need to present expert witness testimony because the medical condition "is readily ascertainable by a lay person without the need for expert testimony" -- the so called "common knowledge" exception. She is mistaken on all counts.

A necessary element of medical malpractice is the failure to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.) Because the standard of care is a matter "peculiarly within the knowledge of experts" (*Sinz v. Owens* (1949) 33 Cal.2d 749, 753), expert testimony is required to "prove or disprove that the defendant performed in

accordance with the prevailing standard of care," unless the negligence is obvious to a layperson (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523).

Here, in support of his motion for summary adjudication, Dr. Southard submitted the declaration of Dr. Edward Younger, a physician "board certified" in orthopedic surgery. Based on his review of the medical records in this case and related depositions, it was his opinion that "dissecting the medial collateral ligament during knee replacement surgery" was "not a breach of the standard of care." The injury was a "recognized complication" of the surgery, "Dr. Southard immediately recognized the complication and appropriately repaired the medial collateral ligament and medial capsule during the procedure. Dr. Southward also informed [Dennis] of the complication that had occurred during surgery while she was recovering in the hospital. Dr. Southard appropriately monitored [Dennis]'s post operative condition and correctly utilized conservative treatment including pain medication, time and a customized knee brace." Given these statements, we reject Dennis's claim that Dr. Younger's declaration was inadequate to explain his conclusion that the injury Dr. Southard caused was not below the standard of care.

Because Dr. Southard supported his motion for summary adjudication with expert testimony that his conduct fell within the appropriate professional standard of care, he was entitled to summary adjudication unless Dennis came forth with conflicting expert testimony. (*Munro v. Regents of University*

of California (1989) 215 Cal.App.3d 977, 984.) For two reasons, she did not. One, although Dennis provided the testimony of Dr. Martin Anderson who performed the "revision" on Dennis's right knee, Dr. Anderson specifically stated he was not testifying as an expert. Two, in any event, Dr. Anderson never testified that transecting the ligament was below the standard of care. He testified it was "error," and he "d[id]n't know" whether that "would . . . rise to a level . . . of concern about the care that [Dr. Southard] rendered."

Finally, contrary to Dennis's argument on appeal, this was not a case where the "common knowledge" exception to the expert testimony requirement applied. That exception applies where a layperson "'"is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."'" (*Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1302.) This narrow exception applies only in cases of obvious negligence, such as when a foreign object is left in the body of a patient after surgery (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001) or when injury occurs to a part of the body not scheduled for treatment (*Ybarra v. Spangard* (1944) 25 Cal.2d 486, 488). This was not such a case.

For these reasons, the court did not err in granting summary adjudication in favor of Dr. Southard on the medical malpractice cause of action.

II

The Court Did Not Abuse Its Discretion In Failing To Remove Juror J. W. For Cause

During voir dire, Juror J. W. volunteered that Dr. Southard performed knee surgery on his wife three months before. When questioned by the court, Juror J. W. explained that his wife was "doing great." He answered "no" or "no, sir" when asked whether anything about that surgery would cause him concern about sitting in this case or being fair and impartial; whether he would not show up at Dr. Southard's office "next week" if he rendered a verdict in favor of Dennis and awarded her "some money"; and whether he was concerned about "repercussions or anything from anybody."

When questioned by Dennis's counsel, Juror J. W. and counsel had the following exchange:

"[DENNIS'S COUNSEL]: [I]f you were to render a verdict in favor of Jean Dennis and award money damages to make up for the harm that she suffered, how would that meeting be going back to your wife saying, 'Hey, I just entered a verdict against your doctor'? Have a nice meeting next week?

"[JUROR J. W.]: Well, that's a tough question. I look at it this way: If you have a license or a degree or something doesn't necessarily mean you're good at what you do, and there is human error in there. For example, I have a brother-in-law who just had knee surgery done in the Bay Area. He's still laying on the couch. My wife is cutting hair already in three

months so, you know, who's to say his pain is worse than her pain?

"[DENNIS'S COUNSEL]: Well, if it's really close, and it has to be more than likely than not in this case, really close, and you're trying to decide do you think it tips slightly in favor of Jean Dennis, which is all we have to show, is it going to enter your mind at all that you have to go talk to your wife about the fact that you just entered a verdict against her surgeon?

"[Juror J. W.]: Not at all. Not at all.

"[DENNIS'S COUNSEL]: All right. If it is at all just even subconsciously, please let us know.

"[JUROR J. W.]: I don't know why it would be.

"[DENNIS'S COUNSEL]: "Because your wife's got to go back to this doctor [who] you just entered a verdict against.

"[JUROR J. W.]: My wife believes in the doctor, and that's her ideas, and that's her beliefs. It has nothing to do with me and what he does.

"[DENNIS'S COUNSEL]: You're not worried about any tension?

"[JUROR J. W.]: No."

Dennis's counsel challenged J. W. "for cause." The court denied the challenge, and on appeal, Dennis contends error. We disagree.

"'In general, the qualification[s] of jurors challenged for cause are "matters within the wide discretion of the trial court, seldom disturbed on appeal."'" (*People v. Holt* (1997) 15 Cal.4th 619, 655-656.) If a juror's responses to voir dire are

conflicting or equivocal, the trial court's ruling regarding the juror's qualifications is binding on the reviewing court. (*People v. Lucas* (1995) 12 Cal.4th 415, 481.) The reviewing court defers to the trial court's determination because the trial judge has heard the tone and inflection of the juror's response and observed his demeanor. (See *People v. Holt*, *supra*, 15 Cal.4th at p. 659 [trial court observed juror's tone and demeanor]; *People v. Cain* (1995) 10 Cal.4th 1, 60 [deference to trial court which sees and hears prospective juror].)

Here, we find no abuse of discretion in the court's failure to remove Juror J. W. for cause. Juror J. W. consistently stated that Dr. Southard's role as his wife's doctor would not have any impact on his decision-making in this case. His only response that could be considered equivocal was Juror J. W.'s statement that it was a "tough question" what a meeting with his wife would be like if he rendered a verdict against her doctor. However, he followed that statement with an explanation that even people with licenses are prone to human error; it would "[n]ot at all" enter his mind when making a decision that he would have to tell his wife he entered a verdict against her surgeon; he was not worried about "any tension"; and his beliefs and his wife's beliefs were separate. The trial judge, who was in a position to observe the tone and inflection of the juror's voice and observe his demeanor, credited these responses. On this record, there was no abuse of discretion in the court's failure to remove Juror J. W. for cause.

III

The Court Did Not Err In Its Instruction On Medical Battery

There are two form instructions for medical battery: (1) CACI No. 530A, which is to be used when it is alleged the defendant performed a medical procedure without the plaintiff's consent;[1] and (2) CACI No. 530B, which is to be used when a plaintiff gave conditional consent to a medical procedure and when it is alleged that the defendant proceeded without the condition having been satisfied.[2]

---

[1] CACI No. 530A reads as follows:

"[Name of plaintiff] claims that [name of defendant] committed a medical battery. To establish this claim, [name of plaintiff] must prove all of the following:

"1. [That [name of defendant] performed a medical procedure without [name of plaintiff]'s consent; [or]]

"[That [name of plaintiff] consented to one medical procedure, but [name of defendant] performed a substantially different medical procedure;]

"2. That [name of plaintiff] was harmed; and

"3. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

"A patient can consent to a medical procedure by words or conduct."

[2] CACI No. 530B reads as follows:

"[Name of plaintiff] claims that [name of defendant] committed a medical battery. To establish this claim, [name of plaintiff] must prove all of the following:

Here, the court instructed pursuant to CACI No. 530B instead of CACI No. 530A, over Dennis's objection.[3] On appeal, Dennis contends this was error, alleging the intent element

---

"1. That [name of plaintiff] consented to a medical procedure, but only on the condition that [describe what had to occur before consent would be given];

"2. That [name of defendant] proceeded without this condition having occurred;

"3. That [name of defendant] intended to perform the procedure with knowledge that the condition had not occurred;

"4. That [name of plaintiff] was harmed; and

"5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

"A patient can consent to a medical procedure by words or conduct."

[3] The version of CACI No. 530B given by the court reads as follows:

"Jean Dennis claims that Scott W. Southard, M.D., committed a medical battery. To establish this claim, Jean Dennis must prove the following:

"[One,] [t]hat Jean Dennis gave informed consent to a medical procedure, but only on the condition that he not use a Johnson & Johnson knee replacement, and Scott W. Southard, M.D., proceeded without this condition having occurred.

"Two, that Scott W. Southard, M.D., intended to perform the procedure with knowledge that the condition had not occurred.

"Three, that Jean Dennis was harmed.

"And, four, that Scott W. Southard, M.D.'s, conduct was a substantial factor in causing Jean Dennis' harm.

"A patient can consent to a medical procedure by words or conduct."

"add[ed]" in CACI No. 530B is "misleading at best and incorrect at worst." She is mistaken.

The intent requirement in CACI No. 530B is correct. It requires "inten[t] to perform the procedure with knowledge that the condition had not occurred." (CACI No. 530B.) Inclusion of intent and knowledge as elements of medical battery is consistent with well-established principles of civil battery. (See, e.g., *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1496 [nonsuit for medical battery cause of action proper where the defendant "could not have *intentionally* deviated from the scope of the consent because he was unaware of any condition on that consent"].) Thus, while Dennis is correct that the intent does not need to be malicious, or need to be an intent to inflict actual damage, she is wrong in arguing that the only intent required is intent to perform the procedure.

Moreover, the reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that "[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present." (*Piedra v. Dugan*, *supra*, 123 Cal.App.4th at p. 1496.) That situation is covered by CACI No. 530A. On the other hand, in a case involving conditional consent, the requisite element of deliberate intent to deviate from the consent given cannot be presumed simply from the act itself. This is because if the intent element is not explicitly stated in the instruction, it would be possible for a

jury (incorrectly) to find a doctor liable for medical battery even if it believed the doctor negligently forgot about the condition precedent.

As such, the court did not err in instructing the jury pursuant to CACI No. 530B regarding conditional consent with its explicit intent and knowledge requirement.

IV

The Court Did Not Err In Excluding The Expert Witness Testimony

Dennis contends the court erred in excluding expert witness testimony about "the field of medical ethics." Dennis "believe[d] th[e] witness would be instructive to the jury and would assist the jury in showing from an ethical standpoint what a doctor is supposed to do when it relates to honoring the wishes of his patient."

The court explained that it was excluding the expert from testifying for the following reason: "[w]hat's in this case is not what the ethics are, but if he did put in -- put the Johnson & Johnson in and he shouldn't have, then the next issue would be damages, so I don't see that your expert's going to help in that."

The court was correct. Dennis needed to prove that her consent to the knee surgery was conditioned on Dr. Southard not using a Johnson & Johnson prosthesis; Dr. Southard intentionally violated the condition while replacing Dennis's right knee; and Dennis was harmed as a result of Dr. Southard's violating the condition. (*Piedra v. Dugan*, *supra*, 123 Cal.App.4th at pp. 1497-1498.) Expert opinion testimony on medical ethics

would not add anything to proving these elements. As such, it was irrelevant and properly excluded. (Evid. Code, §§ 210, 350.)

V

The Court Properly Excluded Evidence And Argument That Transection Of The Ligament Was An Item Of Damages Recoverable For Medical Battery

Over Dennis's objection, the court excluded testimony and argument that transection of Dennis's ligament was an item of damages recoverable under Dennis's cause of action for medical battery. On appeal, Dennis contends this was error. She is wrong.

There was no evidence the ligament injury was caused by Dr. Southard's use of the Johnson & Johnson prosthesis as opposed to any other brand of prosthesis. (Cf. *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 608-609, 612 [cause of action for medical battery proper where condition precedent for surgery was that only family-donated blood would be used during the surgery; doctor instead used other blood, causing plaintiff to contract HIV].) Without causation tied to the Johnson & Johnson prosthesis, Dennis could not recover damages under a battery theory for the transection of her ligament.

VI

The Court Did Not Abuse Its Discretion

In Denying Dennis's Motion To Amend Her Complaint

On the last day of trial, Dennis filed a motion to amend her complaint to "include a claim for breach of contract against the defendant and for punitive damages."

The court denied the motion because "the prejudice [was] too great at this time to amend" and "at this point it's a little late . . . ." The court explained as follows: "[A]s an attorney representing a client, I think it's most important for me to prepare on the case that I'm going to have to defend, not one that all of a sudden I may have to defend in the middle of a trial, call in other witnesses. There could be other witnesses, for instance, that either side would want to call on a breach of contract regarding what was said, who was present when it was said. Was it clearly just a statement of [intent], or was it, you know, kind of a condition precedent to the contract?"

On appeal, Dennis contends the court's ruling was error. Dennis, however, does not make an attempt to show why the court's ruling was an abuse of discretion, the standard by which we review the trial court's ruling. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) Rather, she has copied verbatim from her argument in her points and authorities accompanying the motion to amend the pleadings filed in the trial court. This recycled argument does not convince us the court *abused its discretion* in denying the motion.

In any event, our review shows no abuse. Inexplicable delay and prejudice to the opposing party are valid reasons for the denial. (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175.) There was nothing alleged in the motion to amend that explains why Dennis waited until the last day of trial to seek to amend her pleadings. As counsel for Dr. Southard explained in opposing the motion to amend, "[A]llowing an amendment . . . not only is dilatory" it is also "inexcusable" because "they understood the facts that would be the basis for [the amendment] from the get-go." As to prejudice, Dr. Southard's counsel explained he would have to go back and research breach of contract and affirmative defenses, and "a defendant is entitled to go into trial understanding the risk and understanding the exposure, and to do this type of thing at this point in time . . . creates significant prejudice." These arguments, which the court credited in denying the motion to amend, were sufficient to defeat the motion and sufficient to withstand our review for abuse of discretion.

VII

The Court Did Not Err In Denying

Dennis's Motion For A Directed Verdict

Dennis moved for a directed verdict, which the court denied. On appeal, Dennis contends the court erred. We disagree because the verdict in favor of Dr. Southard was supported by substantial evidence. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631 [standard of review].)

The gravamen of Dennis's cause of action for medical battery was that her consent to the right knee replacement surgery was conditioned on Dr. Southard not using a Johnson & Johnson prosthesis, and he knowingly ignored that condition. Dr. Southard produced the testimony of two witnesses who refuted that claim. One, Dennis herself testified that she did not tell Dr. Southard about the prohibition on using a Johnson & Johnson prosthesis on her right knee. And two, Dr. Southard testified that when they were discussing her right knee surgery, Dennis did not tell him that she did not want a Johnson & Johnson prosthesis. This evidence, which Dennis fails to cite, was sufficient to support the verdict in Dr. Southard's favor. The court therefore did not err in denying Dennis's motion for a directed verdict.

DISPOSITION

The judgment is affirmed. Dr. Southard is awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

ROBIE, J.

We concur:

SIMS, Acting P. J.

BUTZ, J.