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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HERMINIA RAMIREZ et al.,

Plaintiffs and Appellants,

v.

ON ASSIGNMENT, INC., et al.,

Defendants and Respondents.

B238388

(Los Angeles County
Super. Ct. No. NC051507)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Roy L. Paul, Judge. Affirmed.

Law Offices of Philip P. DeLuca and Philip P. DeLuca for Plaintiffs and Appellants.

Ericksen Arbuthnot, Mark L. Kiefer, Kathleen E. Wilcox and Gregory Mase for Defendants and Respondents.

This appeal arises from a wrongful death action based on medical malpractice which is alleged to have occurred in the course of treating a gunshot victim in a hospital emergency room. This appeal concerns an emergency room nurse. The trial court granted the nurse's motion for summary judgment, and entered summary judgment accordingly. We affirm.

FACTS

On July 28, 2007, an assailant shot Julio Ramirez in the left thigh and lower leg. After the shooting, paramedics transported Ramirez to Long Beach Memorial Medical Center (LBMMC). Ramirez arrived at LBMMC's emergency room at about 11:45 p.m. Defendant and respondent Lynn Witte, R.N., attended Ramirez in the emergency room.¹ Atul Gupta, M.D., was the primary emergency room doctor.² Based on a lack of pulse in Ramirez's lower leg and severe bleeding from his gunshot wounds, Dr. Gupta ordered an on-call vascular surgeon to be summoned. However, there were significant delays in his arrival at the hospital. Ramirez was not taken from the emergency room to an operating room until about 2:45 a.m. on July 29, 2007. He died during surgery at about 7:00 a.m. on July 29, 2007. Further facts will be noted below in addressing the summary judgment in favor of Nurse Witte that is challenged on this appeal.

Ramirez's mother and minor children (collectively Plaintiffs) filed a wrongful death action. Plaintiffs' operative pleading eventually became their Second Amended Complaint (SAC), which they filed in December 2008. Plaintiffs' SAC alleges Ramirez "unnecessarily bled to death" as a result of a negligent delay in getting him into surgery.

¹ Our references to Nurse Witte include defendant and respondent On Assignment, Inc., a "travel nurse registry." On Assignment placed Nurse Witte at LBMMC on the day Ramirez was treated at the hospital.

² Dr. Gupta was also sued for wrongful death based on alleged medical malpractice. By motion separate from the nurse, the trial court entered summary judgment in favor of Dr. Gupta. On January 12, 2012, we dismissed an appeal from summary judgment in favor of Dr. Gupta. Frederick Stafford, M.D., was a trauma surgeon at LBMMC; he was operating on a more seriously injured gunshot wound victim while Ramirez was in the emergency room. Dr. Stafford was also sued for wrongful death based on alleged medical malpractice; we are unsure of the outcome of the claims against Dr. Stafford.

The SAC contains no specific allegations as to Nurse Witte or any other nurse. Plaintiffs added Nurse Witte as a defendant in August 2010 by filing a DOE amendment.³

In June 2011, Nurse Witte filed a motion for summary judgment (MSJ). Witte's MSJ was supported by a declaration from Tammi McConnell, R.N., as an expert on the standard of care. Nurse McConnell's declaration included her opinion that the nursing medical treatment which Nurse Witte provided to Ramirez in the LBMMC emergency room did not fall below the required standard of care. Nurse McConnell explained and opined: "The primary responsibility [of a nurse] with a critical patient is to directly care for that patient's needs and [to] monitor that patient's condition, which Nurse Witte did." Further, ". . . Nurse Witte did not breach any standard of care by failing to go up the chain of command to have a supervisor see to it that the vascular surgeon was being contacted more frequently — Dr. Gupta had already assumed that function, and repeatedly informed Nurse Witte that he was on top of this issue."

Plaintiffs filed an opposition to Nurse Witte's MSJ in August 2011. Plaintiffs' opposition was supported by a declaration from Patricia Reigers, R.N., as an expert on the standard of care. In her declaration, Nurse Reigers explained that Nurse Witte had expressly stated concern to Dr. Gupta at 1:00 a.m. that Ramirez "was going to die if he did not get help or surgery," but "never personally called a surgeon or inquired to the unit secretary the status of a surgeon's arrival." And further: "It was negligent and below the community standard of care of California Licensed Registered Nurses [for] . . . Witte . . . to fail to act as a [*sic*] patient who was obviously dying while under her care and going up the hospital chain of command to seek a surgeon for this patient immediately to attempt to control his bleeding."

Nurse Witte filed objections to Nurse Reigers's declaration submitted in support of Plaintiffs' opposition to the MSJ, both in its entirety and as to specific parts. As to the objection to the declaration in its entirety, Nurse Witte argued that while Nurse Reigers was a *qualified nurse*, she was not a *qualified emergency room nurse*. Thus, she was not

³ In December 2010, the trial court denied Plaintiffs' motion for leave to file a Third Amended Complaint. That ruling is not challenged on this appeal.

competent to offer an expert opinion on the standard of care in the setting presented in Plaintiffs' case.

At a hearing on September 1, 2011, the trial court directed the parties to submit further briefing and supporting evidence as appropriate addressing the issue of Nurse Witte's duty of care. The parties complied. At a further hearing on October 20, 2011, the trial court sustained Nurse Witte's objection to the entirety of Nurse Reigers's declaration in support of Plaintiffs' opposition to the MSJ, and then granted the MSJ. On November 2, 2011, the trial court signed and entered a formal order granting Nurse Witte's MSJ and summary judgment in favor of Nurse Witte.

Plaintiffs filed a timely notice of appeal.

DISCUSSION

Plaintiffs contend the summary judgment in favor of Nurse Witte must be reversed because there is evidence in the record showing she violated her duty to act as a patient advocate for the decedent, Ramirez. Plaintiffs acknowledge that Nurse Witte submitted an expert's declaration from Nurse McConnell, but claim that, because they submitted an expert's declaration from Nurse Reigers, there is conflicting evidence, making this an improper case for granting a MSJ. Plaintiffs' argument does not persuade us to reverse summary judgment in favor of Nurse Witte.

In their opening brief on appeal, Plaintiffs acknowledge that the "direct nursing care" provided by Nurse Witte was "within the acceptable standard of care," but argue her "indirect care was not acceptable" because she acted "below the standard of care of Registered Nurses practicing in the community." Plaintiffs argue Nurse Witte should have acted as a "patient advocate" – by "initiating action to improve the health care or change decisions which were not in the best interest of Mr. Ramirez." Plaintiffs argue Nurse Witte acted substandardly in that she "did not go up the hospital chain of command by calling in the house R.N. supervisor to take command of calling physicians on a more frequent basis than was [being] done by the unit secretaries or contacting other qualified physicians in a more timely manner."

The problem with Plaintiffs' arguments on appeal is that they ignore, and do not challenge, the trial court's evidentiary ruling to sustain Nurse Witte's objection to Nurse Reigers's entire expert declaration in support of the opposition to the MSJ. "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers *except that to which objections have been made and sustained.*" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334, italics added; and see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1035 [accord].) In short, unless a prevailing argument is made on appeal that a trial court's evidentiary ruling was incorrect, we must disregard evidence as to which an objection was made and sustained.

Plaintiffs have not challenged – and therefore cannot prevail on – the trial court's evidentiary rulings concerning Plaintiffs' evidence below. In light of the principles guiding our review, we are reviewing an order granting a MSJ that was not opposed with conflicting evidence. Because Nurse Witte's MSJ showed that she did not act below the required standard of care, and because there is no evidence showing there is a dispute of material fact about Nurse Witte's standard of care, we affirm the summary judgment in favor of Nurse Witte.

We agree with Plaintiffs that a trial court may not weigh the evidence like a factfinder when ruling on a MSJ. Further, that summary judgment is a drastic remedy, and that a trial court is required to liberally construe opposition papers. The problem with these standardized rules set forth by Plaintiffs is that they do not defeat Nurse Witte's MSJ because there was no evidence admitted in opposition to her MSJ. We also agree with Plaintiffs that a trial court may not grant a MSJ where there is "valid, conflicting expert testimony" regarding the issues of duty, breach and causation. However, as we have noted, there is no conflicting expert testimony here because the trial court sustained Nurse Witte's objection to Nurse Reigers's expert declaration in its entirety.

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.