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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TRACY STARNES et al., Plaintiffs and Appellants, v. RAMSAY NUCHO et al., Defendants and Respondents.	B270107 (Los Angeles County Super. Ct. No. BC495931)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed.

Law Offices of Steven L. Saldo, Steven L. Saldo and Tyler B. Saldo; and Steven B. Stevens for Plaintiffs and Appellants.

Cole Pedroza, Kenneth R. Pedroza and Maureen M. Home; Law & Brandmeyer and Kent T. Brandmeyer for Defendants and Respondents.

Tracy Starnes and her four children sued Ramsay Nucho, M.D., Darren Hodgins, M.D., and Surgical Multispecialties Medical Group, alleging a cause of action for the wrongful death of Michael Starnes from medical malpractice during surgery. Dr. Nucho, Dr. Hodgins, and their medical group filed a joint motion for summary judgment, with the doctors invoking the "Good Samaritan Law" (see Bus. & Prof., § 2396), and their group arguing that, absent liability on the doctors' part, it could have no vicarious liability as their principal. The trial court granted the defendants' motion. The Starnes family appeals; we affirm.

FACTS

Background

On May 15, 2012, Mr. Starnes underwent scheduled, elective shoulder surgery at White Memorial Medical Center. John Itamura, M.D., (a named defendant, but not a party to the present appeal) performed the surgery.

At the same time as Dr. Itamura was performing Mr. Starnes' shoulder surgery, Drs. Nucho and Hodgins were together performing heart surgery in an adjacent operating room at White Memorial Medical Center.

During the course of Mr. Starnes' surgery, Dr. Itamura encountered "brisk bleeding on top of the subscapularis." Upon noting the bleeding, Dr. Itamura placed pressure on the site of the bleeding, and called the adjacent operating room where Drs. Nucho and Hodgins were performing the heart surgery and asked for emergency assistance. When Dr. Itamura asked for assistance, time was of the essence due to the blood loss that was occurring, and because the continuing pressure being placed on the injury to control the bleeding alone could have caused injury to Mr. Starnes' vasculature in the upper extremity.

Prior to being called to Dr. Itamura's operating room, neither Dr. Nucho nor Dr. Hodgins had ever met or rendered medical care or treatment to Mr. Starnes. Neither had Mr. Starnes had ever been a patient of Dr. Nucho's and Dr. Hodgins' medical group.

Dr. Hodgins responded to Dr. Itamura's operating room first. After scrubbing, Dr. Hodgins determined that Mr. Starnes had suffered an injury to his right axillary artery during the shoulder surgery being performed by Dr. Itamura. Dr. Hodgins began repairing the vascular injury; he worked on Mr. Starnes "for about an hour and a half doing the vascular repair" before Dr. Nucho also responded to Dr. Itamura's operating room.[1]

After Dr. Nucho arrived, he worked with Dr. Hodgins for some time to repair Mr. Starnes' injured axillary artery. Following their initial efforts, Drs. Hodgins and Nucho noted a diminished blood flow below the repair. They reevaluated the axillary artery, which required resection and a bypass graft. They noted there also was decreased blood flow in the right brachial artery, which is below the axillary artery. The right brachial artery was opened, and the doctors removed a clot from a blood vessel to restore blood flow in the right arm and hand. Once blood flow was restored in the right arm, Drs. Hodgins and Nucho "handed the patient back" to Dr. Itamura, who then completed his planned shoulder surgery.[2]

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[1] Dr. Nucho was the lead surgeon for the heart surgery, and needed to complete that surgery before he could leave for Dr. Itamura's operating room.

[2] In support of their opposition to the summary judgment motion, the Starnes family submitted a declaration of a medical

After Mr. Starnes was moved from the operating room, he was noted to be unresponsive, and the hospital's neurological staff ordered an emergency CT of his brain. The CT revealed an obstruction of the blood supply to Mr. Starnes' brain. An MRI revealed that Mr. Starnes suffered a massive stroke. Shortly thereafter, doctors removed Mr. Starnes from life support and he passed away on May 21, 2012.

The Litigation

Tracy Starnes and her children (hereafter Starnes or the Starnes family) filed an action for wrongful death against Dr. Itamura and White Memorial Medical Center Hospital, as well as a number of other medical professionals, including Drs. Nucho and Hodgins and their medical group, Surgical Multispecialties Medical Group. Only Dr. Nucho and Dr. Hodgins and their medical group (hereafter collectively the defendants except as otherwise noted for clarity) are involved in this appeal.

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expert, J. Louis Cohen, M.D., who opined that Mr. Starnes should have been moved to the hospital's intensive care unit as soon as the artery repair was completed, and that the failure to do so was below the standard of care. Because their motion was not based on a failure to meet the standard of care, the defendants objected to nearly all of Dr. Cohen's declaration. The trial court sustained the defendants' objections in light of the Good Samaritan Law defense. In their opening brief, the Starnes family's arguments do not challenge the trial court's evidentiary rulings as to Dr. Cohen's declaration.

The defendants filed a motion for summary judgment based on the immunity from liability afforded to doctors under Business and Professions Code section 2396.[3] The defendants' separate statement and supporting evidence set forth the events in the operating room as we summarized above. The main argument presented in the motion was that the defendants, both Drs. Hodgins and Nucho individually, and their medical group, did not have a "pre-existing relationship" with Mr. Starnes, and that the doctors "responded to an emergent situation in good faith, despite the fact that they were under no obligation pursuant to their privileges at White Memorial [Medical Center] to respond to surgical emergencies." The motion included a declaration from Heather Brien, M.D., who summarized the actions that the individual doctor had undertaken in treating Mr. Starnes and who opined that they had met the standards of care.

Starnes filed a timely opposition, arguing that the defendants could not invoke section 2396 as a matter of law because there were triable issues of fact as to whether they had a pre-existing duty to treat Mr. Starnes when they went to Dr. Itamura's operating room. In support of her opposition, Starnes offered an exhibit attached to a declaration from her lawyer, specifically a copy of a contract entitled: "Emergency Department Call Coverage Agreement by and between White Memorial Medical Center . . . and Surgical Multispecialties Medical Group" (hereafter the Call Coverage contract). Further, Starnes' opposition included a declaration of a lawyer, Jeffrey Stulberg, who offered his opinion that the Call Coverage contract had obligated Drs. Nucho and Hodgins to treat Mr. Starnes,

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[3] All further references are to the Business and Professions Code unless otherwise noted.

meaning the doctors legally had a doctor-patient relationship with Mr. Starnes. The opposition also included another exhibit attached to the declaration from Starnes' lawyer, namely a "Claim Payment Report" from an insurance company. This report showed that the insurer had paid the group roughly $4,000 for the care and treatment rendered by Drs. Nucho and Hodgins during their treatment of Mr. Starnes.

The defendants filed a reply to the opposition, including a series of objections to the evidence offered by Starnes in her opposition. The court issued a minute order granting the motion for summary judgment, along with a series of rulings on the movants' evidentiary objections to evidence offered by the Starnes family in their opposition. Thereafter, the trial court entered summary judgment in favor of Drs. Hodgins and Nucho, and their medical group, in accord with the court's minute order and evidentiary objections.

The Starnes family filed a timely notice of appeal.

DISCUSSION

I. The Standard of Review

Summary judgment is warranted 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 the burden of persuasion that one or more elements of the cause of action in question cannot be established or that there is a complete defense to the action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) 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.* (1998) 65

Cal.App.4th 256, 261.) "'[I]n order to avert summary judgment the plaintiff must produce *substantial* responsive evidence sufficient to establish the existence of a triable issue of material fact on the issues raised by the plaintiff's causes of action.' [Citation.]" (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417.)

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.*)

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., supra*, 65 Cal.App.4th at p. 261.) We independently decide whether the undisputed facts warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

II. The Good Samaritan Law for Doctors

A so-called Good Samaritan Law affording immunity against civil damages to doctors who come to the assistance of other doctors in emergency situations has been included in the Business and Professions Code for almost 50 years. (See former § 2144.5; added by Stats. 1969, ch. 989, § 1, p. 1959.) Currently, section 2396 reads as follows:

> "No licensee, who in good faith upon the request of another person so licensed, renders emergency medical care to a person for medical complication arising from prior care by another person so licensed, shall be liable for any civil damages as a result of any acts or omissions by such licensed person in rendering such emergency medical care."

The legislative purpose embodied in section 2396 is to encourage doctors to render emergency medical assistance to persons in need of such care. (*Kearns v. Superior Court* (1988) 204 Cal.App.3d 1325, 1328.) "The legislative purpose is best effectuated by discouraging even the commencement of an action against a health care professional who has rendered emergency medical assistance." (*Ibid*.)

Section 2396's plain statutory language prescribes three elements for the application of the immunity it affords: (1) the defendant doctor must be licensed; (2) the defendant doctor must have rendered emergency care at the request of a another licensed doctor for medical complications arising from the requesting doctor's prior medical care; and (3) the defendant doctor must have acted in good faith.

Although the three elements noted above are the only elements for immunity that are expressly stated in the language of section 2396, "case law has developed a fourth: the absence of a preexisting duty of professional care to the patient. [Citations.]" (*Perkins v. Howard* (1991) 232 Cal.App.3d 708, 714 (*Perkins*).) As explained in *Colby v. Schwartz* (1978) 78 Cal.App.3d 885 (*Colby*): "Physicians . . . who treat patients requiring immediate medical care as part of their normal course of practice do not need the added inducement that immunity from civil liability would provide. . . . [T]o extend immunity to such physicians would deny an overly broad spectrum of malpractice victims of their legal remedies. [¶] [Thus, we interpret section 2396 to be] directed towards physicians who, by chance and on an irregular basis, come upon or are called to render emergency medical care." (*Colby, supra*, 78 Cal.App.3d at p. 892.)

In the Starnes family's present case, only the fourth element discussed above is implicated.

III. The Claim of Evidentiary Error

Starnes contends the trial court erroneously interposed and sustained its own lack of foundation objection to an exhibit included in their opposition, namely, a copy of the Call Coverage contract between White Memorial Medical Center and the defendant doctors' medical group. We address this issue first, as it affects other issues concerning our review of the trial court's ruling. We find no error.

The record shows that Starnes filed the Call Coverage contract into evidence as an exhibit attached to a declaration from their lawyer, Tyler Saldo. Further, Starnes submitted a declaration from an attorney, Jeffrey Stulberg, who offered an expert legal opinion that the Call Coverage contract "created pre-

existing duties/obligations between Surgical Multispecialties Medical Group, its physicians, and the patients at [White Memorial Medical Center]." Specifically, that it "created obligations on . . . Dr. Nucho and Dr. Hodgins to provide emergency vascular services to patients at [White Memorial Medical Center] on an on-call basis . . . " and that the doctors "were on-call doctors at the time . . . they cared [for] and treated Mr. Starnes."

The defendants filed a properly formatted series of separate evidentiary objections (see Cal. Rules of Court, rule 3.1354(b)) to attorney Stulberg's declaration. Amongst a number of other objections,[4] the defendant doctors interposed two objections based on Evidence Code section 403, for a lack of foundation, one of which stated, "[p]laintiff have produced no admissible evidence to establish any such obligations." This can only be considered an objection to the Call Coverage contract, as it is the sole document upon which Starnes relied to demonstrate the defendant doctors had a duty to assist Mr. Starnes as on call physicians. Another properly formatted series of separate objections was filed to the declaration of Dr. J. Louis Cohen. Amongst those objections was also one for lack of foundation in reference to the Call Coverage contract. Again, the defendants' indicated, ". . . plaintiffs have produced no admissible evidence to establish any obligations."

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[4] The defendants also asserted that any interpretation of the Call Coverage contract was a legal matter for the trial court at most, and that attorney Stulberg was offering an improper legal conclusion. The trial court sustained the defendants' objections, and the Starnes' do not set forth any argument against the court's evidentiary rulings as to the interpretation of the Call Coverage contract.

In addition, the defendants' objections were sufficient to bring the issue of authenticity to the attention of the trial court. Evidence Code section 403 indicates that "[t]he proponent of proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] . . . [¶] (3) The preliminary fact is the authenticity of a writing . . . ." Given this record, we find Starnes' contention that the court interposed an objection sua sponte is incorrect.

Having cleared up that a proper objection was interposed by the defendants, we turn to the propriety of the trial court's ruling finding the contract inadmissible. In doing so, we adhere to the rule followed by the majority of California appellate courts, that a trial court's evidentiary rulings on the papers in summary judgment proceedings are reviewed for abuse of discretion. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.) As there is no evidence in the record on the summary judgment motion to authenticate the Call Coverage contract, we find no abuse of discretion.

A writing must be authenticated before it may be admitted into evidence. (Evid. Code, § 1401, subd. (a).) Authentication of a writing is "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

To support the argument that the Call Coverage contract was authenticated, Starnes grasps at straws. She claims that the contract is authenticated because it bears an exhibit tag marked

"Nucho;" because the face of the agreement states Call Coverage agreement between Surgical Multispecialties and White Memorial; and because it purports to bear the signatures of doctors, including what the Starnes say is Dr. Nucho's signature. We will not find the trial court abused its discretion in finding none of these markers sufficient to warrant admissibility of the document. The fact that the contract has an exhibit tag does not necessarily show it was admitted in Dr. Nucho's deposition, though had the deposition transcripts been made part of the record on appeal we might have been able to so find. That the document bears the name of what the Starnes purport it to be and is signed by persons whose signatures have not been identified does not assist them either. There would be no more rule requiring authentication if a document's name and unidentified signatures alone made it what it purports to be.

As a result, we find no error in the trial court's ruling. This being said, *we find that even had the agreement been admitted*, *the motion for summary judgment was properly granted*, which we next address.

IV. The Motion for Summary Judgment

Starnes contends summary judgment must be reversed because Drs. Nucho and Hodgins failed to establish their section 2396 affirmative defense as a matter of law. Starnes argues there are triable issues of fact whether the doctors had "a pre-existing duty to render care to Mr. Starnes" given the evidence of the Call Coverage contract discussed in Section III of this opinion above. Given that we have found the Call Coverage agreement was properly excluded from evidence, we could stop here and say the motion for summary judgment was properly granted. However, we also find that even if the Call Coverage contract was

admissible, the trial court properly granted summary judgment in favor of Drs. Nucho and Hodgins under section 2396.

The Starnes family's argument is as follows: Drs. Nucho and Hodgins were members of Surgical Multispecialties Medical Group (hereafter SMMG), and SMMG entered the Call Coverage contract with White Memorial Medical Center under which SMMG agreed to provide group doctors to the hospital to ensure surgical coverage for its emergency room 24 hours per day, seven days per week. The Starnes family argues that, given the Call Coverage contract, it follows, or is at least a disputed fact that when Drs. Nucho and Hodgins rendered emergency surgical care to Mr. Starnes at Dr. Itamura's request, they were acting "as part of their normal course of practice," and not "by chance and on an irregular basis," within the meaning of *Colby, supra*, 78 Cal.App.3d at page 892.

Starnes' argument does not persuade us that the trial court erred in granting summary judgment. The evidence in support of the defendants' motion showed that Drs. Hodgins and Nucho rendered emergency aid at the request of Dr. Itamura when he encountered a bleeding emergency during Mr. Starnes's scheduled shoulder surgery. Further, the evidence showed that Dr. Hodgins and Dr. Nucho, and their medical group, had no prior relationship with Mr. Starnes and had no obligation pursuant to their privileges at White Memorial Medical Center to respond to surgical emergencies at the time the doctors responded to Dr. Itamura's request for emergency help. Accordingly, the defendants' motion showed sufficient facts to establish a complete defense to the Starnes family's claim for wrongful death under section 2396, and the burden shifted to the

family to show the existence of facts that would make summary judgment improper.

The argument by the Starnes family that the doctors "failed to produce the on-call schedules for the day of Mr. Starnes's surgery," and that they "did not identify the surgeons who were on call for surgical emergencies," misplaces the burden for a motion for summary judgment. To defeat the doctors' showing that they had no prior relationship with Mr. Starnes, the opposition should have presented evidence regarding any on-call schedule requiring the doctors to assume a medical relationship with Mr. Starnes. The Starnes family argues that the burden never shifted to them because Dr. Hodgins's and Dr. Nucho's showing in their moving papers was not sufficient in the first instance. In other words, the Starnes family argues that, because the doctors failed to present evidence showing that they were not scheduled to provide surgical services to White Memorial Hospital under the Call Coverage contract at the moment they responded to Dr. Itamura's request for emergency assistance, the trial court could not grant the doctors' motion. We are not persuaded.

There is nothing in the published cases to support the Starnes family's proposition that section 2396 requires a doctor to disprove each and every possible disqualifying factor that might make his or her invocation of Good Samaritan immunity unavailable to the doctor. As discussed above, the language of section 2396 and the published cases provide that a doctor may invoke Good Samaritan immunity by showing four elements. Here, the motion filed by Drs. Hodgins and Nucho showed the presence of the four required elements. We see no support in the language of section 2396 or in the published cases for a rule

requiring a further showing because such a rule would undermine the purpose of the Good Samaritan law, which we have pointed out is to induce doctors to render emergency care to patients in need of such care.

As we noted above, this case is about whether there are any disputed facts concerning the fourth element required for immunity under section 2396, namely, the absence of a preexisting duty of professional care on the part of Drs. Hodgins and or Nucho to Mr. Starnes. (*Perkins, supra*, 232 Cal.App.3d at p. 714.) On this issue, we see no evidence in the record tending to show that Drs. Hodgins and Nucho were acting under the Call Coverage contract when they responded to Dr. Itamura's operating room at his request. The Call Coverage contract shows only an agreement by the group to provide surgical doctors to the hospital for its emergency room and for in-hospital patients who become in need of emergency surgical treatment. It does not show that Drs. Hodgins and Nucho were acting as such assigned surgical doctors at the time they responded to Dr. Itamuras' operating room.

We do not agree with the Starnes family that this case falls under the reach of *Colby, supra*, 78 Cal.App.3d 885, or *Street v. Superior Court* (1990) 224 Cal.App.3d 1397 (*Street*). In *Colby*, two physicians provided emergency care to a patient, by the doctors' own declarations, in their capacity as members of a hospital's emergency surgical call panel. The doctors filed an motion for summary judgment based on the predecessor Good Samaritan statute to section 2369. The trial court granted the motion; the Court of Appeal reversed. As noted above, *Colby* is one of the cases that developed the so-called fourth element for immunity under the Good Samaritan statute — that absence of a

pre-existing relationship with a patient. The Court of Appeal in *Colby* ruled that only doctors who, by chance and on an irregular basis, render emergency medical care are afforded immunity under the Good Samaritan statute. *Colby* is not helpful to the Starnes family because there is no evidence here showing that Drs. Hodgins and Nucho provided medical care to Mr. Starnes in their role as members of White Memorial Hospital's emergency surgical call panel. The evidence of their membership in a group with a contract with the hospital, standing on its own, does not show their role at the time they responded to Mr. Starnes.

In *Street*, a patient at a medical clinic experienced an emergency during "what should have been a routine intravenous pyelogram" and died. (*Street, supra*, 224 Cal.App.3d at p. 1399.) The patient's surviving spouse and child brought an action for wrongful death against the clinic owner. The clinic's owner, a doctor, filed a motion for summary adjudication of issues that he was immune from civil liability under section 2396 even if the emergency care he provided had been negligent. The trial court granted the motion. The Court of Appeal granted a petition for writ of mandate and vacated the order. In so doing, the Court of Appeal explained that a doctor who is owner of medical facility and who renders emergency aid to a scheduled patient at the facility is not a "volunteer" as required by the cases interpreting section 2396 (e.g., *Colby*), even though another physician was providing the treatment in the clinic at the time the emergency arose. *Street* does not fit Dr. Hodgins and or Dr. Nucho because, as noted above, the undisputed evidence showed that neither of those doctors (or their medical group) had any pre-existing relationship with Mr. Starnes before Dr. Itamura called them for help during Mr. Starnes' surgery.

In our view, the Starnes family's present case falls under the reach of *Perkins, supra,* 232 Cal.App.3d 708. There, two doctors started a hip surgery. During the surgery, one of the doctors became ill and could not continue. The remaining original doctor then called a third doctor who had an office across the street from the hospital for help. After the hip surgery was over, the patient sued all three doctors for medical malpractice. The third defendant doctor moved for summary judgment based on section 2369. The trial court granted the motion, and the Court of Appeal affirmed.

As explained by the *Perkins* court: "Faring no better is appellant's attempt to create a preexisting duty of care on the basis of the professional relationship between Dr. Lang[, the requesting doctor,] and [the defendant,] Dr. Howard. Again the evidence is undisputed. The two physicians had shared office space – rent, office equipment and materials – from June of 1983 until October 1987. They were not business or corporate partners. They did not have a common practice nor did they share revenues. At the time of the June 1988 surgery they had no ongoing business relationship. Although Dr. Howard had referred as many as 10 patients to Dr. Lang in the past, it was not his practice to make such referrals. The two were members of an 'on-call' group with Dr. O'Neill and a fourth physician.' Scheduled at the beginning of the month, each would provide coverage for weekends and vacations. . . . The agreement did not involve or require assistance during surgery on a stat basis. According to Dr. Howard the on-call relationship was not the reason he responded to the emergency call: 'I think that I would have responded, because of the situation, to any of the orthopods in town if they were in trouble.'

"Because of their relationship it might have been reasonable for Dr. Lang to expect that Dr. Howard would respond to the hospital's request for assistance during surgery. But that expectation did not create a duty to respond: Dr. Howard could have declined. Appellant was not Dr. Howard's patient, Dr. Howard did not have a financial interest in Dr. Lang's treatment of appellant, and he did not have an employment obligation to respond. In the true sense of the word, Dr. Howard acted as a 'volunteer' when he came into the operating room. (Cf. *McKenna v. Cedars of Lebanon Hospital* [(1979)] 93 Cal.App.3d [282,] 288 [hospital resident who responded to stat call on another doctor's patient and whose employment contract did not require him to respond was a volunteer]; *Burciaga v. St. John's Hospital* [(1986)] 187 Cal.App.3d [710,] 716 [pediatrician visiting patients in a hospital who responded to stat call by a obstetrician in the delivery room was a volunteer where the pediatrician had no obligation to respond to the call and the obstetrician did not customarily refer patients to him]; *Kearns v. Superior Court, supra,* 204 Cal.App.3d at pp. 1327-1329 [physician visiting patients in hospital who responded to a stat call in the operating room and who had not treated, diagnosed, consulted or participated in the care of the patient was a volunteer].)" (*Perkins, supra*, 232 Cal.App.3d at pp. 718-719, fns. omitted.)

We come to a similar conclusion in the Starnes family's case. There is no evidence in the record to show that Drs. Hodgins and or Nucho had a duty to respond to Dr. Itamura's request for help during Mr. Starnes' surgery. There is no evidence of a relationship between Dr. Itamura and Drs. Hodgins or Nucho. The Call Coverage contract does not specify that any particular member of the doctors' group was required to provide

emergency surgical services. The contract required *the group* to provide a doctor to the hospital for emergency surgical services; it was not a contract between the hospital and any individual doctor who happened to be a member of the group. Once Drs. Hodgins and Nucho presented evidence that they had no prior relationship with Mr. Starnes, the opposition needed to present evidence to create a triable issue of fact as to whether such a relationship did exist.[5]

Finally, evidence showing that the medical group billed for medical services after the rendition of those services is not evidence tending to show that a prior relationship existed between Drs. Hodgins and Nucho. We do not agree with the Starnes family's argument that "[c]harging and accepting payment supports the inference that the defendants [doctors] were not mere volunteers, that they bill patients such as Mr. Starnes as any other on-call physician would do if summoned to provide services." Charging after treatment does not show that, in responding to a call for help, the doctor had — in the words of Starnes — a pre-existing "financial interest in the treatment of the patient." It was undisputed that Mr. Starnes was not a patient of the group. We do not agree with the Starnes family that charging after the fact of treatment is "inconsistent with a claim of volunteer status" in the act of responding to an emergency. Under such an argument, no doctor could invoke immunity under section 2396 if, after the fact of giving treatment, he or she billed for that treatment. Such a rule would

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[5] Given our findings, we need not address the argument in the respondent's brief from Drs. Nucho and Hodgins concerning the issue of "intraoperative emergencies."

mean that doctors might be induced not to render volunteer emergency treatment lest he or she could not be paid for treatment. Such a rule would dramatically undermine, rather than advance, the purposes of section 2369.

The briefs filed by both sides of this appeal have noted *Clayton v. Kelly* (1987) 183 Ga.App. 45, 357 S.E.2d 865 (*Clayton*), but we find the case unhelpful to our examination of the issues presented. First, Georgia law is not binding on our court. Second, the issue in *Clayton* was whether a doctor who did not bill for medical services was, on that fact alone, "per se" afforded immunity under a Georgia Good Samaritan law for doctors. The Georgia court of appeals said no. The Georgia court did not address the issue of whether issuing a bill would "per se" disallow a doctor from attempting to invoke the Good Samaritan law. We see nothing helpful in *Clayton* for purposes of the present appeal.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J. SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.