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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREGORY T. HARRY,

Plaintiff and Appellant,

v.

SOUTH COAST MEDICAL CENTER,

Defendant and Respondent.

G044770

(Super. Ct. No. 30-2009-00332642)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Reversed.

Law Offices of William Stocker and William Stocker for Plaintiff and Appellant.

Beam, Brobeck, West, Borges & Rosa, Louise M. Douville, Matthew A. Yarvis and Glen A. Stebens for Defendant and Respondent.

Plaintiff Gregory Harry appeals from a judgment entered after the trial court granted summary judgment in favor of South Coast Medical Center on his medical malpractice claim. Harry, a quadriplegic, alleged he suffered excruciating pain and trauma as a result of the unintentional removal of a catheter from his penis – which he believes occurred when a custodial worker “tripped up” on the hose to which it was connected – followed by multiple unsuccessful efforts by nurses to reinsert the catheter.

South Coast’s successful motion for summary judgment was based on the assertions that its nurses and nonphysician staff did not violate the standard of care, and that Harry’s injuries were not the result of their alleged negligence. Harry contends the court erred in granting the motion, however, because the expert declarations relied upon by South Coast were insufficient to demonstrate that either of those elements of his cause of action could not be established.

We agree. The declaration of South Coast’s nursing expert demonstrated only one thing clearly – that she had no knowledge about the circumstances of the catheter’s removal. She nonetheless opined that even if the catheter had been “traumatically removed,” as opposed to having simply fallen out, as was reflected in South Coast’s nursing records, such a removal *could have occurred* without negligence. Such an equivocal assertion falls far short of demonstrating that Harry cannot prove what actually happened in this case did involve negligence.

South Coast’s asserted proof Harry’s injuries were not caused by its negligence is similarly equivocal. On that point, its expert urologist first acknowledged it was possible Harry had “developed incontinence secondary to a bladder sphincter injury caused by the traumatic removal of a Foley catheter,” before opining that Harry’s incontinence was *more likely* caused by something else. Again, that evidence falls short of demonstrating Harry could not establish that his incontinence was caused by the removal of the catheter. And perhaps more significant, the urologist’s declaration does

nothing to refute Harry's allegation the "traumatic removal" of the catheter caused him to suffer significant pain and fear, both at the moment of removal and when the nurses subsequently made efforts to reinsert it – efforts which would not have been necessary if the catheter had remained in place. Excruciating pain – not to mention emotional distress – qualifies as cognizable damage even in the absence of permanent incontinence.

Because South Coast failed to sustain its burden of proof in making its motion for summary judgment, the burden never shifted to Harry to demonstrate that a triable issue of fact existed, and it is consequently irrelevant whether Harry successfully did so here. The judgment is reversed.

FACTS

According to a first amended complaint filed in February 2010, Harry was admitted to South Coast on June 18, 2009. Harry is a quadriplegic and his paralysis forces him to use catheters to urinate. Shortly after his admission, "a male non-nurse (believed to be custodial) came through [Harry's] room and became tripped up in the hose of the Foley Catheter." As a result, the inflated catheter was pulled out of Harry's bladder. The unplanned removal of the catheter allegedly caused Harry to pass blood and tissue and feel "great pain and fear."

Harry summoned a nurse, who attempted to insert another catheter, but the attempt caused "great pain." The nurse administered pain medication, waited, and then tried several more times to insert the catheter. At one point, the nurse thought the catheter was fully inserted and inflated it. However, it did not produce urine and after "an hour or more of painful and fearful waiting," the nurse removed the catheter. Harry alleged the removal caused "another eruption of overwhelming pain" and a bloody discharge. Because the nurse was unable to insert a catheter, she summoned a urologist, who successfully inserted a new catheter.

Harry claimed he suffered excruciating pain and trauma, permanent injury, and loss of functionality as a result of South Coast's negligence. He requested general and special damages, costs, and other relief as the court deemed appropriate.

In September of 2010, South Coast filed a motion for summary judgment. Attached to the motion were declarations from Patricia Waldron, a registered nurse with a master's degree in nursing, Dr. David Ginsberg, a board-certified urologist, and Harry's medical records and deposition.

Waldron, a nurse with a master's degree and over 30 years of experience in the industry, stated she had reviewed the pertinent medical records. In particular, she noted that at 5:00 p.m. on the date of Harry's admission, a nurse had reported that "a CNA told her [Harry's] Foley catheter 'fell out[.]'" Waldron concluded there was no negligence: "Based on my review of the materials described above, and based upon my training and my professional experience, it is my opinion, that the care and treatment provided to Mr. Harry by the nurses and non-physician staff of SOUTH COAST MEDICAL CENTER at all times complied with the applicable standard of care. Initially, with respect to the dislodgement of the catheter, I note that there is an inconsistency between Mr. Harry's allegations and the nursing notes. However, in my opinion, even had the catheter been traumatically removed (catheters can become dislodged secondary to any number of more benign factors) by a member of the staff, the same would not prove to be a violation of the applicable standard of care. While an attempt to avoid such a dislodgement should always be made, there are numerous circumstances where a Foley catheter (or any other type of inserted devices) might become dislodged inadvertently and in a situation where due care is being exercised. Even in the best of circumstances, a member of the staff might get ensnared by a line leading to its dislodgement. Such an event, not purposefully done, does not fall below the standard of care. [¶] [] Moreover, it is my opinion that once the Foley became dislodged that the nurse acted appropriately.

She attempted to reinsert the catheter herself. Once, she proved unable to do so, she promptly and appropriately contacted the physician to intervene. The inability to insert a Foley catheter is something that can happen even in the best of circumstances. In this matter, the nurse both appropriately attempted reinsertion, and then called for physician assistance once she proved unable to do so.”

David Ginsberg, a board-certified urologist and Chief of Urology at the Rancho Los Amigos National Rehabilitation Center with over 20 years experience in the medical profession, stated he had treated many paralyzed individuals with neurogenic bladders like Harry. Ginsberg assessed Harry’s claim that he “developed incontinence secondary to a bladder sphincter injury caused by the traumatic removal of a Foley catheter.” He rejected this theory, stating, “there is no way to say with certainty what has brought on Mr. Harry’s incontinence. The same is related to either a change in the status of his neurogenic bladder or perhaps to a sphincter injury.” Ginsberg observed, “While there is always a possibility that Mr. Harry’s urinary sphincter was injured when his Foley catheter became dislodged, based on the totality of Mr. Harry’s complaints, it is my opinion that to a degree of reasonable medical probability that his incontinence is related to a change in the status of his neurogenic bladder as opposed to a sphincter injury . . . namely the loss of urine when coughing or sneezing, when transferring from his wheelchair or with other forms of activity.” Moreover, Ginsberg stated he was “unaware of any circumstance where a few unsuccessful attempts by a medical professional to place a Foley catheter [] led to a change in the status of a patient’s neurogenic bladder or led to abnormal function of their urinary sphincter.”

Harry filed his opposition in December 2010, which included his declaration and the declaration of Dr. Danny Lee Keiller,¹ a board-certified urologist. According to Harry's declaration, he was admitted to South Coast Medical Center through its emergency department with primary complaints of testicular pain and swelling, fever, and painful urination. He was diagnosed with acute epididymo-orchitis, systemic inflammatory response, atrial fibrillation, gastroesophageal reflux, quadriplegia, urinary retention requiring self-catheterization, and an abscess on his right elbow. Once admitted, Harry received a urology consult from Dr. Taylor, who placed him on broad-spectrum intravenous antibiotics, and ordered pain medicine, ice and elevation of Harry's scrotum, and insertion of a Foley catheter.

A few hours later, Harry's Foley catheter became dislodged. According to Harry's declaration, an unknown hospital employee, perhaps a custodian, somehow became entangled in the hose of the catheter and the fully-inflated catheter was forcibly removed. Harry reported blood and tissue came out of his penis and he experienced "great pain and fear." He summoned a nurse and she administered pain medication and attempted to insert a catheter. Harry claimed the nurse attempted to insert a catheter "an agonizing number" of times, but only bright red blood came out of Harry's penis. She removed the Foley catheter and tried again. This time, although there was minimal bleeding, no urine was produced. At this point, the nurse decided to page Dr. Taylor.

Dr. Taylor first directed the nurse to irrigate the Foley catheter and then ask the patient to attempt to self-catheterize if there was no urine flow. When these measures proved unsuccessful, the nurse summoned Dr. Taylor and he inserted a catheter. Harry

¹ Although Keiller's declaration is numbered in order from pages 18 through 20 (clerk's transcript pages 268-270), one page of this declaration, the page with paragraphs 9 through 14, is not included in the record. Defendant objected to Harry's declaration to the extent he offered expert opinion on the issue of causation, and to Dr. Keiller's declaration to the extent his opinions about causation were based on an insufficient foundation. Although the record reveals no express ruling on the objection, we presume from the court's decision that the objection was sustained. However, we can consider Harry's declaration as a percipient witness and Keiller's opinions concerning the nature of the accident were based on an adequate foundation.

was discharged the following day. He claimed he did not have “significant incontinence” before his admission to South Coast, but afterward his “urinary incontinence has been constant and dramatic.”

Dr. Keiller stated he reviewed the medical records, Harry’s deposition and declaration, and conducted a physical examination of Harry. Based on Harry’s report of few urological problems over the years of his quadriplegia and rare instances of incontinence, his report of traumatic removal of the Foley catheter while in the care of South Coast Medical Center, and Keiller’s observation of “scarring [] worse than that usually seen even after years of intermittent catheterization,” he opined that Harry’s catheter had not simply fallen out by itself. In fact, he stated, “I am in general agreement with Mr. Harry, that a catheter with a fully-inflated balloon does not ‘fall out’ by itself.” He opined, “It is greatly more likely that an external tug on [the] tube was needed. A tug on the tube by an inadvertent foot is the stronger probability. The forceful removal of an inflated catheter was a traumatic and injurious event.”

Keiller found it “difficult to allocate” Harry’s injuries between the traumatic removal and the nurses unsuccessful attempts to insert a catheter, but opined the inflation of the Foley catheter balloon against the bladder sphincter was “the more likely cause of the serious scarring” and Harry’s significant and permanent urinary incontinence.

After the January 4, 2011 hearing, the trial court granted South Coast Medical Center’s motion for summary judgment. The court wrote, “the moving defendant, by way of declarations had established the lack of a triable issue of fact as to the issue of the standard of care, and that in doing so the burden shifted to plaintiff,” and “further found that plaintiff by way of his Opposition failed to rebut the declarations submitted by defendant on the issue of the standard of care, as Mr. Harry’s declaration failed to establish sufficient expertise to opine regarding the standard of care and the

declaration from Dr. Keiller submitted by plaintiff failed to opine that the defendant breached the standard of care.” The order granting summary judgment was filed on January 6, 2011. Harry filed a timely appeal.

DISCUSSION

I

We review de novo the trial court’s decision to grant summary judgment. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1067.) “In reviewing the grant of summary judgment, we employ the same three-step analysis as the trial court. ““First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party’s showing has established facts which negate the opponent’s claims and justify a judgment in movant’s favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.” [Citation.] [Citation.]” (*Salas v. Department of Transportation, supra*, 198 Cal.App.4th at p. 1067.)

To satisfy its burden in seeking summary judgment, a moving defendant must “show[] that one or more elements of the cause of action . . . cannot be established” by the plaintiff. (Code Civ. Proc., § 437c, subd. (p)(2).) As explained in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, what this means is that a defendant “must present evidence that would *require* a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, [defendant] would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.” (*Id.* at p. 851, some original italics.)

It is only after the moving defendant has met this burden that the “burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists.” (Code Civ. Proc., § 437c, subd. (p)(2).) On de novo review, we view the evidence in the

light most favorable to the losing plaintiff, liberally construing the plaintiff's submissions and strictly scrutinizing the defendant's showing, to resolve any evidentiary doubts or ambiguities in plaintiff's favor. (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1260.)

II

In any medical malpractice action the plaintiff is required to establish the following elements: ““(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.’ [Citation.]” (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 877.) In this case, South Coast’s summary judgment motion primarily challenged the second element of Harry’s cause of action – the breach of duty or “negligent conduct” element – and to a lesser extent, challenged the third element – causation.

With respect to the negligence element, South Coast relied on the declaration of its nursing expert, Waldron, to establish that negligence played no part in either the removal of Harry’s catheter, or in the nurse’s unsuccessful efforts to reinsert it. However, Waldron’s declaration did nothing more than establish that: (a) she didn’t know what caused Harry’s catheter to become dislodged; (b) even if the catheter had been “traumatically removed,” as Harry alleges, it would not *necessarily* have been the result of negligence; (c) she didn’t know what the nurse actually did or didn’t do in her effort to reinsert it the catheter; and (d) that *sometimes* catheters cannot be easily inserted even when a nurse does everything appropriately. None of that actually establishes that whatever actually happened to Harry was not the product of negligence.

Specifically, with respect to the dislodgement of the catheter, Waldron opined that “there are numerous circumstances where a Foley catheter (or any other type

of inserted devices) might become dislodged inadvertently and in a situation where due care is being exercised. Even in the best of circumstances, a member of the staff might get ensnared by a line leading to its dislodgement.” That testimony, which is, in any event, wholly conclusory, suggests only that dislodgment *could happen* without negligence, but falls far short of demonstrating that such dislodgement would never be caused by negligence.

With respect to the nurse’s effort to reinsert the catheter, Waldron opined only that the nurse “acted appropriately” in attempting “to reinsert the catheter herself,” and that “[t]he inability to insert a Foley catheter is something that can happen even in the best of circumstances.” Absent from this opinion is any suggestion Waldron actually knows what the nurse did or didn’t do in her efforts to insert the catheter, or has any idea whether the nurse was attempting to do so appropriately. The fact that a catheter may prove difficult to insert in the best of circumstances in no way demonstrates that the negligence of the person performing the insertion could not be the cause of the difficulty in some cases.²

Stated simply, the mere fact that something *could occur* in the absence of negligence does not demonstrate it could never occur as result of negligence in a particular case. We take no issue with Waldron’s assertions, but they only serve to highlight the fact that South Coast failed to actually demonstrate that nothing negligent happened to Harry in this case. South Coast failed to present any evidence, such as a declaration from the custodial employee involved, the CNA who reported the incident to the nurse, or the nurse who made the attempts to reinsert the catheter, to show who actually did what in relation to Harry’s catheter. Absent such evidence, Waldron’s

² Waldron’s implication is tantamount to a suggestion that as long as it is appropriate to perform surgery in a case, a patient’s death in the course of that surgery could not be attributable to negligence, because “even in the best of circumstances,” people sometimes die in surgery. Of course, the fact that some patients die in surgery without any negligence does not demonstrate that no one dies during surgery because of negligence.

opinion that the dislodgement of the catheter and the nurse's subsequent effort to reinsert it were not necessarily negligent falls far short of satisfying South Coast's initial obligation to show that Harry "cannot . . . establish[]" negligence in this case. (Code Civ. Proc., § 437c subd. (p)(2).)

South Coast's attempt to prove its alleged negligence was not the cause of Harry's injury is similarly flawed. Ginsberg's declaration, while offering his own medical opinion as to the cause of Harry's incontinence, candidly acknowledges its "possible" the incontinence was caused by an injury to his bladder sphincter, and that "there is no way to say with certainty what has brought [it] on." Thus, by its terms, Ginsberg's declaration demonstrates there is room for a difference of opinion on the issue of what caused Harry's incontinence, and establishes only that Harry would not be able to prove "with certainty" what caused it. But Harry is not required to prove anything "with certainty" in order to prevail at trial – instead his burden is only to prove his incontinence is more likely caused by that trauma than something else. Because nothing in Ginsberg's declaration "require[s] a reasonable trier of fact not to find" that Harry's incontinence was caused by traumatic injury. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 851), it does not satisfy South Coast's defense burden on summary judgment.

In any event, there is an additional flaw in South Coast's reliance on Ginsberg's declaration to establish that its alleged negligence did not cause injury to Harry. Stated simply, Ginsberg's declaration addresses only one aspect of Harry's damage claim – the assertion that he suffered permanent incontinence. But incontinence was only one of the injuries Harry alleged in his complaint. Harry also alleged he suffered great pain, fear, and emotional trauma as a result of the forced dislodgment of his catheter and of the nurse's repeated unsuccessful efforts to reinsert it. South Coast did not make any effort to establish that Harry could not prove those damages at trial, and

thus it would not be entitled to summary judgment even if Ginsberg's declaration had been sufficient to establish that South Coast's negligence did not cause Harry's incontinence.

Because South Coast failed to satisfy its initial burden of establishing Harry could not prove one of the elements of his cause of action, the burden never shifted to Harry to prove anything, and the court was obligated to deny the motion for summary judgment without considering the content of Harry's opposition.³ Consequently, we reverse the judgment entered in favor of South Coast.

DISPOSITION

The judgment is reversed. Harry is to recover his costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

³ In light of our analysis, we need not decide whether, as Harry contends, this case falls within that restricted class of cases where the doctrine of *res ipsa loquitur* applies. The doctrine is an evidentiary presumption impacting the burden of proof. (Evid. Code, § 646, subd. (b).) Because the doctrine permits an inference of negligence from the incident alone, a jury is permitted to rely on common knowledge to decide it was more likely than not the result of the defendant's negligence. (*Zentz v. Coca Cola Bottling Co.* (1952) 39 Cal.2d 436, 442; *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1546-1547.) With no definitive information about what actually happened here, we are in no position to express any opinion about whether the doctrine could properly be applied.