

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Pomona Valley Hospital Medical Center v Superior Court 2/7/13

Medical negligence; Leave to amend for punitive damages; CCP section 425.13

On July 13, 2011, plaintiff sued various defendants, including the Hospital, alleging defendant Dr. Mesiwala performed surgery using two products manufactured by defendant Stryker Biotech, using a mixture not approved by the Food and Drug Administration. The Hospital was only named in the 11th cause of action. On August 12, 2012, plaintiff filed a motion to amend her complaint against the Hospital to add three causes of action, including fraud. She also moved for leave to amend to seek punitive damages as required by CCP section 425.13.

Plaintiff presented a declaration from her counsel and three letters from the Hospital's Institutional Review Board (IRB), asserted by counsel to show a secret "research project" which included plaintiff as an unwitting participant. All three letters were directed to Dr. Mesiwala by the IRB discussing various aspects of his work. The proposed amendment sought to add causes of action seeking punitive damages for malicious, fraudulent and oppressive conduct toward plaintiff, alleging she was unaware that she was one of 17 patients enrolled in a five year research project to which she never consented. The Hospital argued the motion was untimely, and filed evidentiary objections. It also argued the plaintiff failed to demonstrate a substantial probability of prevailing on the punitive damages claims as required by 425.13. In reply, plaintiff argued she had substantiated her unwitting participation in the Hospital's research project, thus subjecting it to punitive damages for its conscious disregard of her rights and safety.

The trial court overruled the evidentiary objections, found the motion timely, and granted the motion to amend the complaint with the punitive

damages allegations. Defendant Hospital then petitioned for a writ of mandate, arguing plaintiff failed to meet her burden of showing a substantial probability of prevailing on a claim of punitive damages under section 425.13. Plaintiff asserts the trial court ruled properly.

The Second Appellate District began its opinion by referring to CCP section 425.13(a) which bars inclusion of a punitive damages claim in certain actions against health care providers unless the plaintiff first demonstrates a “substantial probability” that he “will prevail” on the claim. The code section requires that the plaintiff both state and substantiate a legally sufficient claim to amend for punitive damages. The court must deny such a motion where the facts asserted in the proposed amended complaint are legally insufficient to support a punitive damages claim and where the evidence provided in supporting and opposing affidavits either negates or fails to reveal the actual existence of a triable claim. The section 425.13(a) motion may be granted only where the plaintiff demonstrates that both requirements are met. (College Hospital Inc. v Superior Court (1994) 8 Cal.4th 704)

Section 425.13 does not contemplate a mini-trial in which witness testimony is introduced. Instead, like a motion for summary judgment, the motion is decided entirely on an “affidavit showing.” The trial courts are not authorized to weigh the merits of the claim or consider its likely outcome at trial. Rather than requiring the defendant to defeat the plaintiff’s pleading by showing it is legally or factually meritless, the motion requires the plaintiff to demonstrate that he possesses a legally sufficient claim which is “substantiated,” that is, supported by competent and admissible evidence. Substantiation of a proposed punitive damages claim occurs only where the factual recitals are made under penalty of perjury and set forth competent admissible evidence within the personal knowledge of the declarant. The entire package of materials submitted by the plaintiff should be carefully reviewed to ensure that a genuine contestable claim is indeed proposed. (College Hospital, at p. 719-720)

Here, the premise of plaintiff’s punitive damages claim is that the letters from the Institutional Review Board (IRB) demonstrate the Hospital was conducting a secret research project, plaintiff was unwittingly enrolled in the project, and plaintiff would not have consented to participation. The Justices

pointed out that the only sworn evidence presented to the trial court was the declaration of plaintiff's counsel. Counsel set forth no evidence of personal knowledge of the existence of a secret research project conducted by the Hospital or plaintiff's lack of consent to participation. The letters from the IRB do not establish the Hospital was conducting a secret research project or that plaintiff had not consented to participate. The letters simply establish that a project was underway involving the defendant doctor. The letters never use the word "secret" and never reference the plaintiff's involvement in the study. Accordingly, the trial court erred in finding plaintiff met her burden.

On the question of demonstrating malice through competent evidence, Civil Code section 3294(a) requires "clear and convincing" proof of oppression, fraud or malice to warrant punitive damages in an action not based on contract. The punishable acts which fall into these categories are strictly defined. Each involves intentional, willful, or conscious wrongdoing of a despicable or injurious nature. (*College Hospital*, at p. 721) Plaintiff's counsel's declaration is not based on any personal knowledge of conduct by the hospital regarding plaintiff, so it necessarily does not amount to clear and convincing proof of the elements of malice. The letters relied on by plaintiff also fail to show malice. The IRB's conduct, as reflected in the letters, lacks any hint of the necessary element of despicable conduct required for malice on the theory of conscious disregard of the rights and safety of others.

The record presented to the trial court contains no evidence that the IRB failed to monitor whether Dr. Mesiwala, the person primarily responsible for the conduct of a medical experiment, properly obtained informed consent from the patients in the study. (See Health & Safety Code section 24176) Although plaintiff alleges the person primarily responsible for the conduct of a medical experiment must obtain a subject's informed consent (See *Daum v SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285), there is no evidence to support the proposition such an experiment, involving the plaintiff, was even taking place.

As such, the petition for writ of mandate is granted. A peremptory writ shall issue directing the respondent court to vacate its order granting plaintiff's motion to amend the complaint to add punitive damages allegations under section 425.13. Costs are awarded to petitioner Hospital.

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