Filed 5/25/11 Maraj v. Ralphs Grocery CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SHANTIE MARAJ, et al., Plaintiffs and Appellants, v. RALPHS GROCERY COMPANY, Defendant and Respondent.	B223410 (Los Angeles County Super. Ct. No. GC040415)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. De Vanon, Judge. Affirmed.

Strassburg Gilmore & Wei, Justin K. Strassburg and Colleen J. Downes for Plaintiffs and Appellants.

Stone Rosenblatt & Cha, Gregory E. Stone and Venessa F. Martinez for Defendant and Respondent.

As plaintiff Shantie Maraj, an on-duty employee of defendant Ralphs Grocery Company (Ralphs), tried to raise the flag on the flag pole at the market

where she worked, she suffered a severe neck fracture and other injuries when a shopping cart, which had been hoisted up the pole as a prank by third parties, fell on her head. She sued Ralphs for negligence, premises liability, intentional infliction of emotional distress, and fraud and deceit.[1]

To defeat the general rule that Worker's Compensation is plaintiff's sole remedy for injuries suffered in the course of her employment (Lab. Code, § 3601), plaintiff's fraud and deceit claim pled an exception to the rule under Labor Code section 3602, subdivision (b)(2), which provides in relevant part that Worker's Compensation exclusivity does not apply "[w]here the employee's injury is aggravated by the employer' s fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation."

Ralphs moved for summary judgment on the ground that plaintiffs did not have, and could not produce, sufficient evidence to raise a triable issue of material fact whether this exception applied, in that Ralphs did not fraudulently conceal the existence of the injury or its connection with plaintiff's employment, and did nothing to aggravate the injury. The trial court granted the motion, and we affirm the judgment.

BACKGROUND

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[1] Her husband, Maniram Maraj, sued for loss of consortium. Because his claim is derivative of hers, we refer to Shantie Maraj in the singular as "plaintiff" throughout our opinion.

Plaintiff sued Ralphs erroneously as The Kroger Company. She also sued Peggy Lizarraga, the store director of the market where the accident occurred, whose demurrer was sustained without leave to amend. The complaint named as defendants three other persons, who are not parties to this appeal, as the persons who hoisted the shopping cart.

Ralphs Evidence on Summary Judgment

Peggy Lizarraga, the store director of the Ralphs store where plaintiff was injured, pulled into the parking lot to start her shift around 6:00 a.m. and was informed by an employee, Mike Munoz, that something had happened to plaintiff. According to her declaration, Lizarraga saw plaintiff on the ground, bleeding from her head, but saw no shopping cart on or near her, and did not know whether she had been hit by a car or something else, or whether she had simply fallen. Lizarraga told another employee (Susan) to call Med-core, the company Ralphs calls when an employee is injured, and Med-core told Susan to call 911, which she did. Meanwhile, Lizarraga held a towel to the bleeding on plaintiff's head.

Within minutes fire department paramedics arrived (their report showed that they were dispatched at 6:41 a.m. and arrived at 6:45 a.m.). Lizarraga told them she did not know how the accident occurred. She then gathered paperwork to take to the hospital for worker's compensation coverage. When she returned to the store later that day, she was informed that a shopping cart may have fallen from the flag pole and caused plaintiff's injury. She told one employee to call the police and make a report. Another employee called the hospital to report the possible cause.

One of the responding paramedics, Christian Miller, testified at his deposition that had he known when treating plaintiff that the cause of her injury was that a shopping cart had been hoisted on the flag pole and fallen on plaintiff's head, the treatment she received would not have been different: "It [knowing the precise cause of the injury] wouldn't change how we treat the patient, what we do to the patient, where the patient goes [to the hospital] and the treatment the patient receives at the hospital. They are still going to do all of the same things. It just gives them more information."

Dr. G. Scott Brewster, Director of the Department of Emergency Medicine at Providence Tarzana Medical Center, reviewed the records of plaintiff's treatment. In his declaration, he stated that there was "no indication that lack of history or inadequacy of history [regarding the cause of the injuries] caused a deletion or delay of any appropriate care or interventions. . . . In fact . . . it is common to have very little history in the field or in the Emergency Department early in the course of a patient encounter. Therefore, the standard practice in EMS, Trauma and Emergency Medicine is to consider a significant injury until it can be definitively ruled out." He reviewed all the treatment plaintiff received and found it appropriate: "In fact, given the significance of her fractures, it is to the credit of the health care team that [no] significant spinal cord injury occur[red]."

Plaintiff received Worker's Compensation benefits for her injuries in accordance with the Labor Code.

Plaintiffs' Evidence

Plaintiff produced evidence that she suffered scalp lacerations, cervical spine fractures and displacement, traumatic brain injury, and deficits in mobility, self care, and cognition. As relevant to this appeal, plaintiff disputed only one material fact: whether Lizarraga knew at the scene that plaintiff had been struck by a shopping cart. Employee Mike Munoz testified at his deposition that he spoke to Lizarraga while plaintiff was injured on the ground and said that a shopping cart fell on her.

Plaintiffs also produced two expert declarations from Dr. Charles O. Otieno, an emergency room physician at, among other hospitals, UCLA EMPH Program and Center for International Medicine. In his first declaration, Dr. Otieno found it significant that Lizarraga held a towel to plaintiff's head, because "any movement

of the head or neck of a patient with a broken neck can increase instability and aggravates the underlying injury." He stated as well that there was a 41 minute delay in summoning treatment (Lizarraga arrived around 6:00 a.m. and saw plaintiff was injured; paramedics were not dispatched until 6:41 a.m.). He believed that "[t]he treatment delay, as exhibited in this case, particularly due to [plaintiff's] neurological damage and neck fracture, can also lead to poorer long-term prognosis." Finally, he noted that the paramedics were unable to ascertain the mechanism of the injury (the falling shopping cart) and unable to relay that information to the hospital. He believed that the inability of the emergency room physician to know the mechanism of the injury "can potentially" mislead the treatment provider in terms of appropriate studies, tests, and care.

He concluded: "With the extensive injuries to the patient in this case, it is difficult to ferret out the exact amount of aggravation of the underlying injury, however, based upon my review of the records, the failure of [plaintiff's] co-worker to relay the mechanism of injury to the paramedics, the significant delay in time between the incident and the paramedic arrival, and [Lizarraga's] attempt . . . to towel off [plaintiff's] head prior to being immobilized, I am of the opinion that there was some aggravation of the underlying injury. [¶] In conclusion, . . . I am of the expert opinion that, to a reasonable degree of medical probability, the concealment of [plaintiff's] mechanism of injury . . . aggravated her injuries."

In his supplemental declaration, he stated that he "remain[ed] of the expert opinion that the concealment of [plaintiff's] injuries aggravated those injuries." First, he could "not rule out the possibility that some displacement [of the cervical spine] occurred during" Lizarraga's toweling of plaintiff's head and the delay in calling 911. Second, the delay in calling 911 "caused [plaintiff] to suffer additional pain unnecessarily, by delaying the administration of pain medication.

. . . Pain makes the patient uncomfortable, and increases the probability of the patient further aggravating her injuries by her moving her already fractured neck. . . . The untreated pain for 41 minutes provides an additional mode of aggravation to the patient's injuries."

The trial court sustained Ralphs' objections to the entirety of Dr. Otieno's declarations. The court concluded that plaintiff had failed to raise a triable issue whether her injuries had been aggravated. The court did not reach the other two issues raised by Ralphs: whether Ralphs fraudulently concealed the existence of plaintiff's injuries or their connection with plaintiff's employment.

DISCUSSION

We review the trial court's summary judgment ruling de novo, viewing the evidence in a light favorable to plaintiff as the losing party, liberally construing the plaintiff's evidentiary submission while strictly scrutinizing Ralphs showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. (*Weber v. John Crane, Inc*. (2006) 143 Cal.App.4th 1433, 1438 (*Weber*).) A motion for summary judgment must be granted "if all the papers submitted show that there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant has met its burden of showing that a cause of action has no merit if it has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. Once the defendant has met that burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action. (*Id.*, subd. (p)(2); see *Weber, supra*, 143 Cal.App.4th at p. 1437.) "In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence

set forth in the papers . . . and all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).) In some instances, however, "evidence may be so lacking in probative value that it fails to raise any triable issue." (*Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co.* (1988) 199 Cal.App.3d 791, 795.)

In the instant case, the evidence shows, as a matter of law, that plaintiff cannot prove the applicability of the exception of Labor Code section 3602, subdivision (b)(2), to Worker's Compensation exclusivity.

"An employee injured during the course of employment is generally limited to remedies available under the Workers' Compensation Act. [Citations.] Section 3602, subdivision (b)(2) provides a narrow exception to this exclusivity rule and allows a civil suit '[w]here the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. . . .' This provision was enacted in 1982 and codifies the common law fraudulent concealment exception that was enunciated by our Supreme Court in *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465. [¶] Three conditions are necessary for the fraudulent concealment exception to apply: (1) the employer must have concealed 'the existence of the injury'; (2) the employer must have concealed the connection between the injury and the employment; and (3) the injury must have been aggravated following the concealment. [Citation.] If any one of these conditions is lacking, the exception does not apply and the employer is entitled to judgment in its favor." (*Jensen v. Amgen Inc.* (2003) 105 Cal.App.4th 1322, 1325.) In the present case, plaintiff fails to raise a triable issue as to all three conditions.

There is no evidence whatsoever that Ralphs concealed the existence of plaintiff's injuries or their connection with plaintiff's employment. When Lizarraga saw plaintiff on the ground, bleeding from her head, she told another employee to call Med-core, the company Ralphs calls when an employee is injured, and Med-core told the employee to call 911, which she did. Meanwhile, Lizarraga held a towel to the bleeding on plaintiff's head. After fire department paramedics arrived, Lizarraga told them she did not know how the accident occurred, and then gathered paperwork to take to the hospital for worker's compensation coverage. When she returned to the store later that day, she was informed that a shopping cart may have fallen from the flag pole and caused plaintiff's injury. She told one employee to call the police and make a report. Another employee called the hospital to report the possible cause.

Nothing in this series of events suggests that Lizarraga or anyone else employed by Ralphs concealed the existence of plaintiff's injury or its connection to her employment. Plaintiff contends that a triable issue of fact exists because, viewed in the light most favorable to plaintiff, paramedics were not summoned for approximately 40 minutes after the injury, Lizarraga attempted to clean the blood from plaintiff's head, and no one associated with Ralphs disclosed the cause of the injury (a shopping cart falling from the flag pole) until hours after plaintiff was at the hospital, even though Mike Munoz testified that he told Lizarraga at the scene that a shopping cart fell on plaintiff. However, we fail to see how these purported facts create the rational inference that Ralphs concealed that plaintiff had been injured. Lizarraga immediately took action to have the injury reported to Med-core, which resulted in a call to 911 and the paramedics' response. To conclude that her applying a towel to staunch the blood from plaintiff's head was an attempt to hide the head injury is nonsensical. Moreover, there is no evidence that any

delay in treatment was the product of an attempt to conceal the existence of the injury or its connection with plaintiff's employment, fraudulent or otherwise. (Lab. Code, § 3602, subd. (b)(2) [stating requirement that injury be aggravated by "employer's *fraudulent* concealment" (italics added)].)

Moreover, there is no evidence that Lizarraga's injury was aggravated by the conduct of Ralphs employees. In his declaration, Dr. G. Scott Brewster, found "no indication that lack of history or inadequacy of history [regarding the cause of the injuries] caused a deletion or delay of any appropriate care or interventions." Similarly, one of the responding paramedics, Christian Miller, testified at his deposition that had he known when treating plaintiff that the cause of her injury was that a shopping cart had been hoisted on the flag pole and fallen on plaintiff's head, the treatment she received would not have been different.

To raise a triable issue that her injury was aggravated, plaintiff relied on the declarations of Dr. Charles O. Otieno.[2] However, his opinions were speculative. That he could "not rule out the possibility that some displacement [of the cervical spine] occurred during" Lizarraga's toweling of plaintiff's head and the delay in calling 911, does not create a rational inference that, in fact, any additional spinal displacement was caused by those factors. Similarly, his opinion that the delay in calling 911 caused plaintiff to suffer unnecessary additional pain and "increase[d] the probability" that she aggravated her injuries by moving her neck in response, is insufficient to create a rational inference that she did, in fact, move her neck and cause additional injury.

Plaintiff argues that the purported fact that she suffered unnecessary pain is itself sufficient to create a triable issue that her injury was aggravated. She is

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[2] We consider Dr. Otieno's declarations on their merits and find them insufficient to create a triable issue. We therefore do not address plaintiff's contention that the trial court erred in sustaining Ralphs' objections to the declarations.

mistaken. An injury within the meaning of the Worker's Compensation statutes is "'one which causes disability or need for medical treatments.'" (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753.) Here, the injuries that caused disability and the need for medical treatment were the lacerations to her head, the fractures and displacement of her cervical spine, and the resultant brain damage. Any pain she suffered from these injuries did not constitute an aggravation of the injuries themselves, but rather was merely "collateral to or derivative of a compensable workplace injury," and therefore subject to the general rule of Worker's Compensation exclusivity. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 814 [injuries that are collateral to a compensable injury are covered by Worker's Compensation, and cannot be the subject of a lawsuit].)

DISPOSITION

The judgment is affirmed. Ralphs shall recover its costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.