

Not Reported in Cal.Rptr.3d, 2006 WL 2076944 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
 (Cite as: 2006 WL 2076944 (Cal.App. 4 Dist.))

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Court of Appeal, Fourth District, Division 3, California.

GRETCHEN L., Petitioner,

v.

The SUPERIOR COURT of Orange County, Respondent;

Saddleback Memorial Medical Center, et al., Real Parties in Interest.

No. G037126.

(Super.Ct.No. 05CC07519).

July 27, 2006.

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, [David T. McEachen](#), Judge. Petition granted. **Grobaty & Pitet**, [Michael J. Grobaty](#) and [Christopher L. Pitet](#) for Petitioner.

No appearance for Respondent.

Sinclitico & Burns, [Dannis J. Sinclitico](#), [Hugh R. Burns](#), Dilakash A. Khan and [David J. Ozeran](#) for Real Party in Interest Saddleback Memorial Medical Center.

Ritz, Rubin, Zagzebski & Hall, [Damon Rubin](#) and Joshua T. Ritz for Real Party in Interest St. Joseph Hospital of Orange.

Romeo Le Poblete, in pro. per., for Real Party in Interest.

OPINION

[SILLS](#), P.J.

*1 We issue a peremptory writ for the limited purpose of recognizing the parties' stipulation to withdraw a demurrer, as a matter of right, before it has

been presented to the trial court for decision.

I

Petitioner Gretchen L. (Patient) was a patient at real party in interest Saddleback Memorial Medical Center in December 2004 when she allegedly was sexually molested by a male nurse (Nurse) while she was recovering from an [appendectomy](#).

The operative pleading is Patient's third amended complaint. The first two causes of action seek to hold Saddleback vicariously liable for Nurse's sexual battery "because the act was a foreseeable consequence of the patient-nurse relationship...." The last two causes of action are for Saddleback's direct negligence based on negligent hiring and negligent supervision theories. Patient sought compensatory and punitive damages.

Patient named a second medical facility, St. Joseph Hospital of Orange, as another defendant. She alleged that St. Joseph failed to adequately investigate two prior claims of patient sexual misconduct involving Nurse, one in January 2004 and a second in June 2004. Patient alleged that St. Joseph did not report these prior incidents to the appropriate authorities until after she had been sexually assaulted.

Saddleback demurred to the vicarious liability causes of action based on the California Supreme Court decision in [Lisa M. v. Henry Mayo Newhall Memorial Hospital \(1995\) 12 Cal.4th 291 \(Lisa M.\)](#). *Lisa M.* refused to hold health care providers strictly liable for deliberate sexual assaults by employees "whose duties include examining or touching patients' otherwise private areas...." (*Id.* at p. 302.)

Saddleback also demurred to the negligence claims. As to the negligent hiring cause of action, Saddleback said Patient's allegations against St. Joseph "sufficiently demonstrate that Saddleback did not negligently hire [Nurse] because there was no documented information [that] would have been available through a reasonable investigation about [Nurse's] prior sexual misconduct." And Saddleback derided the negli-

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gent supervision claims for being “inadequately pled.” “Plaintiff, however, has not specified how Saddleback should have properly supervised [Nurse] when he was performing his ‘usual and customary duties’ of caring and treating for her when she was in ‘... a hospital bed recovering from surgery.’ “

After Patient filed her opposition to the demurrer, Saddleback and Patient stipulated to withdraw Saddleback's demurrer to the negligence causes of action, and to limit the demurrer to the vicarious liability causes of action. In turn, Patient dropped her opposition to Saddleback's motion to strike punitive damages. Saddleback filed the signed stipulation with its reply.

In accordance with the stipulation, the hearing on the demurrer focused entirely on the vicarious liability claims. But the trial court's tentative was to sustain the demurrer in its entirety. As the hearing drew to a close, even Saddleback's counsel questioned the court about this, because “we had filed a stipulation with regard to withdrawing our negligence theories, and they would not be alleging punitive damages.” Patient's counsel agreed, pointing out that only the “vicarious liability issue is at issue.” The court responded that it was aware of the stipulation, and would take the matter under submission after it further analyzed the Supreme Court decision in *Lisa M.*

*2 The court issued its minute order the next day. It sustained the demurrer in its entirety, but did not discuss the stipulation.

Patient filed a petition for writ of mandate. We informed the parties that we were considering a peremptory writ in the first instance because of the stipulation. (*Palma v. U.S. Industrial Fasteners Inc.* (1984) 36 Cal.3d 171, 180.) Both Saddleback and Patient filed letter briefs in response to our *Palma* notice.

II

No one questions the validity of the parties' stipulation to withdraw the demurrer to the negligence causes of action, thereby limiting the demurrer to Patient's vicarious liability claims. The stipulation is part of the court record and was properly acknowledged as such by the parties and the trial court at the

hearing.

The stipulation, however, somehow got lost in the shuffle when the trial court issued its ruling, and in effect, sustained a demurrer which was no longer before the court. Relying on the stipulation, the parties appeared at the hearing on the demurrer, and limited their oral argument to the vicarious liability causes of action. The parties never briefed nor argued the issue of the trial court's authority to disregard the stipulation and rule on a demurrer that no longer was pending. (Indeed, the minute order leaves us in the dark whether the trial court intentionally ignored the stipulation, or inadvertently overlooked it.)

Elementary principles of due process include the right to notice and to be heard on decisive points of law. (*Moore v. California Minerals Products Corp.* (1953) 115 Cal.App.2d 834, 836 [reversing judgment for plaintiff on the pleadings, made sua sponte by trial court, following the parties' opening statements]; see also *Polibrid Coatings, Inc. v. Superior Court* (2003) 112 Cal.App.4th 920 [peremptory writ to adjust fast-track goals to allow newly served cross-defendant reasonable time for discovery and summary judgment motion].) We specifically have issued peremptory writs to preserve a litigant's right to an oral hearing on dispositive law and motion matters. (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 112 [writ to require oral argument before ruling on a demurrer].) ^{FN1}

FN1. See also *TJX Companies, Inc. v. Superior Court* (2001) 87 Cal.App.4th 747 (peremptory writ to hold oral hearing on class action allegations); *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738 (writ to require oral hearing on corporation's assertion of attorney-client and work product privileges); *Gwartz v. Superior Court* (1999) 71 Cal.App.4th 480 (peremptory writ to require oral hearing on summary judgment motion.)

The trial court never announced its intention to strike the stipulation on its own accord, and nothing in the record suggests that the trial court was determined to take one procedural shortcut too many simply to move the case along. To the contrary, the transcript shows a conscientious judge who was an active and well-informed participant in the give-and-take of the

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hearing (even raising a footnote in *Lisa M.*).

But the net effect of the trial court's written order, whether advertent or not, was to overlook the parties' stipulation to withdraw the demurrer. Saddleback says that the trial court has "inherent authority" to do so. Otherwise, Saddleback says, the trial court would have to permit a "meritless cause of action to go forward" simply because the parties agreed that it could.

***3** Trial courts do have some mechanisms to block meritless lawsuits (see, e.g., [Code Civ. Proc., § 438, subd. \(b\)\(2\)](#).) Disregarding a stipulation to withdraw a demurrer, however, is not among them.

The determinative statute is [Code of Civil Procedure section 472](#). [Section 472](#) is well-known for giving plaintiffs the right to amend their complaint once as a matter of course, without leave of court, before a demurrer is presented to the court for decision. The statute, however, is much broader, and extends such a right to *any* pleading. It provides, "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment." (See 5 Witkin, Cal. Proc. 4th (1997) 1113, p. 569.)

Early on, the California Supreme Court held that a demurrer is a pleading for purposes of [Code of Civil Procedure section 472](#). (*Hedges v. Dam* (1887) 72 Cal. 520, 521 ["the section says *any* pleading, and of course a demurrer to the complaint is a pleading and for the purpose of raising an 'issue of law,' is as important as the complaint"]; see also *Galusha v. Fraser* (1918) 178 Cal. 653, 655; *Pittman v. Carstenbrook* (1909) 11 Cal.App. 224, 229 ["[section 472, Code of Civil Procedure](#) gives the defendant the right to amend the demurrer of course..."].)

Saddleback's stipulation to withdraw its demurrer to the third and fourth causes of action acted, in essence, as an amendment to the demurrer and fell within the ambit of [section 472](#). No leave of court was required, and the amendment to the demurrer took effect when filed. The trial court lacked the power to revive a

demurrer that was no longer pending. "Whatever the inherent powers of the trial court, and of this court, they do not extend to the resurrection of the dead." ([People v. McKinney](#) (1979) 95 Cal.App.3d 712, 744.)

III

Saddleback argues that we should sustain the trial court's rulings based on its alternative motion for judgment on the pleadings. Saddleback points out that its demurrer was captioned "Notice of Demurrer and Demurrer ... or *in the Alternative Motion for Judgment on the Pleadings and Proposed Order.*" (Italics added.) Saddleback says that the stipulation only mentions the former, not the latter.

The short answer, of course, is that the trial court never purported to rule on the "alternative" motion for judgment on the pleadings, or to give notice of its intent to make such a motion sua sponte. The topic never crossed anybody's lips at the hearing.

Saddleback reminds us of our discretion to "treat a ruling on one type of motion to be a ruling on another type of motion." It asks that we look to the substance of the trial court's order, not its label. "The basis for the motion for judgment on the pleadings was *identical* to the basis for the demurrer.... This court should not elevate form over substance." (Emphasis in original.)

***4** It is true that we have discretion to treat the ruling on the demurrer as a ruling on a statutory or common law motion for judgment on the pleadings. (See, e.g., [Hejmadi v. Amfac, Inc.](#) (1988) 202 Cal.App.3d 525, 535-536 [treating defective summary judgment motion as motion for judgment on the pleadings].)

However, we decline to exercise such discretion here because to do so would violate the " 'justice of procedure.' " ([People v. Rodriguez](#) (1943) 58 Cal.App.2d 415, 424.) " 'Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure.' " (*Id.* at pp. 424-425.)

It is objectively clear that the parties intended the stipulation to cover Saddleback's attack on Patient's third and fourth causes of action. To their credit, the attorneys for both sides expressly informed the trial

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court of their mutual understanding that the stipulation limited the court's scrutiny to the vicarious liability issues, not negligence.

The stipulation itself bears this out. It states, "Defendant Saddleback Memorial Medical Center will limit its demurrer and motion to strike and *corresponding papers* to Plaintiff's Third Amended Complaint as to only the issues of vicarious liability presented to Plaintiff's Third Amended Complaint, specifically as to Plaintiff's Sexual Battery and Intentional Infliction of Emotional Distress causes of action against Defendant Saddleback Memorial Medical Center." (Emphasis added.) ^{FN2}

FN2. The stipulation provided:

"1. Plaintiff is not opposed to the issuance of an order striking the allegation of punitive damages contained within her Third Amended Complaint without prejudice against Saddleback Memorial Center....

"2. Defendant Saddleback Memorial Medical Center hereby withdraws its demurrer and motion to strike portions of Plaintiff's Third Amended Complaint with regard to Plaintiff's third and fourth causes of action against Saddleback Memorial Medical Center....

"3. Defendant Saddleback Memorial Medical Center will limit its demurrer and motion to strike and corresponding papers to Plaintiff's Third Amended Complaint as to only the issues of vicarious liability presented in Plaintiff's Third Amended Complaint, specifically as to Plaintiff's Sexual Battery and Intentional Infliction of Emotional Distress causes of action against Defendant Saddleback Memorial Medical Center."

The only objectively reasonable reading of this reference to "corresponding papers" is that it covers the entirety of the legal issues (and legal remedies) presented in Saddleback's moving papers. If Saddleback harbored a hidden intent to carve out an exemption for its pending motion for judgment on the pleadings (a doubtful proposition since it would negate the

stipulation), it had an obligation to make this intent clear. As Patient aptly points out, "[I]t is incredible to believe [Patient's] counsel was agreeing to give up her right to claim punitive damages in exchange for taking the demurrer off calendar, but not the identical 'alternative' motion for judgment on the pleadings."

We decline to instigate what would amount to a legal ambush. Patient's counsel attended the in-person hearing on the demurrer believing that the hearing would address only Saddleback's attack on vicarious liability. Indeed, the hearing was devoted to a vigorous and robust discussion of the meaning and application of the Supreme Court decision in [Lisa M., supra, 12 Cal.4th 291.](#)

Patient's counsel had no reason to believe otherwise. He never waived his right to object to a ruling that the trial court never made. Saddleback did nothing to justify the inference that the trial court had the authority at the hearing to dismiss the complaint in its entirety. (In fact, Saddleback confirmed Patient's viewpoint at the hearing.) By justifiably relying on the stipulation, Patient was deprived of her procedural due process rights to an oral hearing on the direct negligence causes of action. ([Medix Ambulance Service, supra, 97 Cal.App.4th 109;](#) see also [Moore, supra, 115 Cal.App.2d 834.](#))

*5 Because Patient's entitlement to relief is so obvious under well-settled principles of law and undisputed facts, no purpose could reasonably be served by plenary consideration of the issue. We have so advised the parties by written notice, and no further response has been received. Accordingly, the issuance of a peremptory writ in the first instance is appropriate. ([Lewis v. Superior Court \(1999\) 19 Cal.4th 1232, 1259-1260.](#))

IV

As a last-ditch effort to fend off our intervention, Saddleback tells us that we would be wasting our time since the trial court invariably will make the same ruling on a renewed motion for judgment on the pleadings, and Patient "will be back in the Court of Appeal on another writ petition addressing the identical issues, only one or two more months will have elapsed." Indeed, Saddleback asks us to instruct the trial court (should we be inclined to issue a peremp-

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tory writ) to rule on its motion for judgment on the pleadings.

We decline the invitation. It is obvious that the parties (and the trial court) were primarily focused below on the vicarious liability claims. Most notably, the legal arguments regarding the sufficiency of the fourth cause of action for negligent supervision were not addressed in the reply or at the hearing. Absent in Saddleback's demurrer to this cause of action is any legal authority on the subject of a hospital's supervisory duty of care, and what degree of specificity is required for pleadings.

We will not venture into this void. In *Lisa M.*, the Supreme Court spoke of a hospital's "duty of due care to its patient ... to take all measures dictated by ordinary prudence to protect against even such unusual sources of injury," but did not further define it. (*Lisa M.*, [supra](#), 12 Cal.4th at p. 306.) "The Court of Appeal declined to decide whether plaintiff's cause of action for negligence could survive summary judgment. The court therefore did not decide whether Hospital fulfilled its duty of care under the circumstances nor did it resolve any issue as to the adequacy of, or necessity for, plaintiff's expert declaration. Consequently, we consider it appropriate to remand the matter to the Court of Appeal for decision in the first instance on plaintiff's negligence cause of action." (*Ibid.*)

We are not so prescient to presume what will transpire in the trial court following our issuance of a peremptory writ. Perhaps Saddleback will reexamine the legal landscape and determine that a successful pretrial attack on the sufficiency of the negligent hiring and negligent supervision claims is better mounted by summary judgment, directed verdict, or jury trial. Perhaps the trial court, presented with new legal papers and oral arguments, will reach a different result.

Perhaps not. We do not intend this opinion to be taken as a roadmap as to where either the parties or the trial court should go. But we cannot gainsay that they necessarily will follow the same path. If the parties below take a fresh look at the facts and the law, then so will we, should we again be presented with the matter in an appropriate appellate setting. A peremptory writ proceeding is not the place for us to be

seer or guide.

V

*6 Patient renews her request to issue an alternative writ as to the first and second causes of action at the same time that we issue a peremptory writ for the third and fourth causes of action. We do not think that fragmenting this case into separate proceedings in two courts will serve the orderly administration of justice. " 'If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to nisi prius tribunals.' [Citation .][¶] Particularly today, 'in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation.' " ([Omaha Indemnity Co. v. Superior Court](#) (1989) 209 Cal.App.3d 1266, 1272.)

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its order sustaining Saddleback's demurrer to the third and fourth causes of action of petitioner's third amended complaint and denying Saddleback's motion to strike as moot. Respondent court should enter a new and different order in conformance to the parties' stipulation, filed with respondent court on May 10, 2006. The writ of mandate is denied as to Patient's prayer for extraordinary relief regarding her first and second causes of action.

No costs are awarded for this interim proceeding, but may be allowed to the party ultimately prevailing in the discretion of the superior court.

WE CONCUR: [RYLAARSDAM](#) and [IKOLA](#), JJ.
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