Sanchez v. CareMore Medical Group

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INTRODUCTION

Plaintiff Maria Theresa Sanchez suffered brain damage from a delayed diagnosis of infection of the shunt in her brain. Through her mother and guardian ad litem Rachel Sanchez, Theresa brought the instant negligence action against her neurosurgeon Harley Deere, M.D. and sought to hold her medical service provider, CareMore Medical Group (CareMore), liable as Dr. Deere's principal. The jury returned a special verdict finding that Dr. Deere was negligent in his care of Theresa and that he was CareMore's agent at the time he provided care. CareMore appeals from the $9 million judgment in Theresa's favor. CareMore raises three assignments of instructional error, one claim of error in the special-verdict form, and contends that the evidence is insufficient to support the jury's finding that Dr. Deere was CareMore's agent. We conclude there was no error in the instructions or special verdict form and the evidence is sufficient to support the verdict. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Parties

Theresa, who was 37 years old at the time of the events herein, was diagnosed in childhood with hydrocephalus and had a peritoneal shunt installed in her head to drain the fluid from her brain. Until the events giving rise to this lawsuit, Theresa was considered "highly functional." She was able to care for herself and worked selling soda at a swap meet. Blindness in one eye prevented her from driving and so she used public transportation. Between 2002 and 2006, Theresa was a member patient of, or in CareMore's language, an "enrollee," CareMore.

CareMore claims it is a medical service provider that furnishes health care services and is licensed to practice medicine. Payments on behalf of enrollees are made to Blue Shield, not CareMore. At the time of Theresa's membership, CareMore was a partnership of doctors that formed an independent practice association or IPA.[1] An " 'IPA is an association of physicians that contracts to provide

medical care to [Health Maintenance Organization] HMO members in the physicians' own offices. The IPA in turn contracts with each of its independent practitioner members regarding the terms of participation in the IPA, including payment. The physicians also maintain their own practices outside the HMO. IPA's also contract with nonmember physicians to perform services . . . that member physicians do not provide.' " (Inland Empire Health Plan v. Superior Court (2003) 108 Cal.App.4th 588, 590.)

Under the agreement between CareMore and its physicians, CareMore retains responsibility for its enrollees at all times. Enrollees choose their primary care physician from CareMore's list of providers. To see a specialist, enrollees are referred by the primary care physician to one from CareMore's list of associated specialists. Enrollees do not participate, and have no say, in the selection of the neurosurgeon.

Prior authorization from CareMore is always required for an enrollee to be admitted to a hospital, absent a medical emergency. CareMore uses so-called "hospitalists" to take care of patients in the hospital. To admit a CareMore enrollee to a hospital in an emergency, the emergency room (ER) doctor must obtain approval from the hospitalist on call for that day at the CareMore-affiliated hospital. The hospitalist may not necessarily be the patient's primary care physician.

CareMore pays its primary care physicians what is known as a capitated fee, under which the doctors receive a set amount per enrollee per month, regardless of the amount of medical service the doctor provides that enrollee. CareMore penalizes primary care physicians for referring an enrollee to a physician outside the CareMore collection, or to a CareMore doctor after CareMore denies permission for the visit, by holding the referring physician responsible for the medical bill.

CareMore does not employ specialists, such as neurosurgeons, but contracts with such specialists for their services. Under their contract with CareMore, specialists must obtain written authorization from CareMore's Utilization Management Department, except in an emergency, before seeing an enrollee or referring the enrollee to another physician. Specialists may provide only the services indicated in CareMore's authorization form. If not contained in the initial CareMore approval, a follow-up visit requires another written authorization or CareMore can refuse to pay the specialist for the visit. And, if a specialist's first consultation with the enrollee is more complex, requires more decisionmaking, or exceeds the scope of the preauthorized initial consultation, to be paid, the specialist must obtain CareMore's approval by submitting records justifying the higher-level consultation. Specialists obtain CareMore approval by completing and sending CareMore's "services provided" and "services requested" forms, with the doctor's notes attached, to CareMore's Utilization Management Department for review. Approval is what assures that CareMore will pay the specialist. Finally, specialists are obligated by contract to send CareMore written reports of each visit with a CareMore enrollee.

Dr. Deere is a neurosurgeon who practices out of his own office. He is also affiliated with hospitals

and medical groups other than CareMore. There are no CareMore signs or labels in his office. Dr. Deere agreed to see CareMore enrollees when asked. He understands that he takes over the neurosurgical aspect of care and orders tests as appropriate. CareMore pays him a fee for each patient on an individual basis. Dr. Deere testified he is an independent contractor because he is not a partner of, or affiliated with, CareMore, and is not on salary.

2. The Events Leading to this Lawsuit

Experiencing painful headaches and vomiting, on December 2, 2003, Rachel brought Theresa to see Dr. Keipp, an employee and medical director of CareMore, who was Theresa's primary care physician. The headaches had persisted for days, and so Dr. Keipp considered that "something [was] going on in her head." Dr. Keipp did not perform a physical examination or ask about any other physical symptom. Dr. Keipp prescribed Tylenol for Theresa.

Four days later, Theresa's headaches and vomiting were worsening and so Rachel brought Theresa to Downey Regional Medical Center ER, a non-CareMore facility, because Dr. Keipp "didn't do nothing." The ER doctor, who is not a CareMore-contracted physician, identified numerous symptoms leading him to conclude the most life-threatening condition -- infection of Theresa's shunt -- needed to be ruled out. The ER doctor wanted to admit Theresa to the hospital for evaluation, but as Theresa was a CareMore enrollee, she could only be admitted to a CareMore hospital. She was transferred to Lakewood Regional Hospital (Lakewood). The records accompanying Theresa's transfer indicated that the reason for hospitalization was to rule out an infected shunt.

Upon her arrival at Lakewood, Theresa was examined by Dr. Jason Austin, a doctor of osteopathy and the admitting CareMore hospitalist at the time. Dr. Austin reviewed the transfer records, but his intake assessment of Theresa did not note her symptoms or that she was coming to Lakewood to rule out an infected shunt. Dr. Austin determined Theresa had a " 'ventriculoperitoneal shunt malfunction' " and decided to obtain a neurosurgical consult with Dr. Deere, one of two CareMore-affiliated neurosurgeons in the Lakewood area. Thus, CareMore selected Theresa's neurosurgeon.

Dr. Deere relied on Dr. Austin's notes. Dr. Deere never reviewed the transfer records from the Downey Hospital ER doctor referring to an infected shunt, did not consider an infected shunt, and sought no authorization for tests to rule out an infected shunt. Soon after Theresa was admitted, Dr. Deere left town for a weeks' vacation. No one at Lakewood contacted Dr. Deere during that time about Theresa's care.

On January 5, 2004, a nurse at Lakewood announced that Theresa would be discharged. Rachel tried to prevent the discharge because Theresa's condition was unchanged, nothing had been done for her, and she had not seen Dr. Deere in days. Theresa was told simply to follow up with Drs. Keipp and Deere.

Theresa was only able to be treated by Drs. Deere and Keipp between the time Theresa was discharged in January 2004 and when she was rushed back in May 2004. Moreover, in order to see Dr. Deere, Rachel had to obtain CareMore's pre-approval in the mail for each visit. Theresa saw Dr. Deere three times in that intervening five-month period. During those visits, Dr. Deere did not examine her; he looked at her and talked to her.

Meanwhile, Theresa's condition continued to deteriorate. Rachel repeatedly expressed dissatisfaction with Dr. Deere and requested a change of neurosurgeon. Dr. Keipp refused to refer Theresa to another specialist.

Theresa fell in the middle of the night of May 24, 2004, and hit her face. Rachel took her to see Dr. Keipp and, again expressing dissatisfaction with Dr. Deere's care, asked for another neurosurgical opinion. Dr. Keipp resisted but finally acquiesced to a consult with another specialist. But, instead of giving Rachel the name of a neurosurgeon or an emergency authorization, he gave her an "elective routine referral" form. Under CareMore's rules, Rachel had to await approval of that referral in the mail.

Three days later, however, Theresa became "totally withdrawn," had headaches, noise and light were bothering her more, and her right leg was dragging. Rachel sought help from Dr. Deere, as she had not yet received approval for a different neurosurgeon. The nurse who answered the telephone at Dr. Deere's office refused to schedule a visit for Theresa without CareMore's prior approval. It did not matter to Dr. Deere's office that Rachel was calling for help because he could not see Theresa without CareMore's authorization. Rachel was told to take Theresa to the ER for evaluation.

Rachel took Theresa to Lakewood's ER where she was seen by a non-CareMore physician, Dr. Jeremy Kroes. Suspecting Theresa was suffering from an infection of the brain, Dr. Kroes called Dr. Deere for guidance. Dr. Deere's response was brusque. He told Dr. Kroes to send Theresa home. Uncomfortable with that decision, Dr. Kroes called Dr. Keipp who also directed that Theresa be discharged, explaining that nothing could be done to help her, and there was no point in admitting her to a hospital.

Theresa's condition deteriorated further. Two days later, on May 29, 2004, she would not get out of bed and could no longer walk, and so her brothers carried her out to the car to return to the ER. CareMore again declined to admit her. But, when she collapsed to the right, "slid out of the wheelchair," and "fell to the floor," the CareMore hospitalist decided she would have to be admitted.

The hospitalist contacted Dr. Deere's colleague, Dr. Lemay, who performed emergency surgery to remove Theresa's infected shunt and drain a large abscess. Dr. Lemay found more puss in Theresa's brain than he had seen in his entire life. Theresa is now partially paralyzed and wears diapers. She has trouble sitting down and cannot walk. Her speech is slurred, she has difficulty swallowing, and so must be fed. Theresa is in frequent pain.

3. Procedural History

Through Rachel, as guardian ad litem, Theresa brought the instant negligence action against CareMore and Drs. Keipp and Austin, among others, and against Dr. Deere. On the eve of trial, Dr. Deere settled with Theresa for the maximum limits of his insurance policy. After trial, the jury returned the special verdict finding that (1) Dr. Deere was the only negligent doctor, (2) his negligence was a cause of Theresa's injury; (3) at the time of his negligence, Dr. Deere was an agent of CareMore; and (4) Theresa will sustain $9 million in future damages. After judgment was entered, CareMore moved for new trial and judgment notwithstanding the verdict. The trial court denied the motions and CareMore filed its timely appeal.

CONTENTIONS

CareMore raises three instructional errors, one error in the special verdict form, and contends that the evidence is insufficient to support the agency verdict.

DISCUSSION

I. Instructional Error

a. Standard of Review on Appeal Raising Instructional Error

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 572.) A court may refuse a proposed instruction that is misleading or erroneous. (Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal.App.3d 684, 698.) " 'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]' [Citation.] Finally, '[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given. [Citations.]' [Citations.]" (Major v. Western Home Ins. Co. (2009) 169 Cal.App.4th 1197, 1217.)

" ' " 'A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]' [Citation.]" [Citation.]' [Citation.]" (Ayala v. Arroyo Vista Family Health Center (2008) 160 Cal.App.4th 1350, 1358, italics omitted.) We review a claim of instructional error by examining the instructions as a whole rather than considering a single instruction in isolation. (People v. Harrison (2005) 35 Cal.4th 208, 252.) We presume the jury followed the instructions given unless the record clearly shows otherwise. (People v.

Sanchez (2001) 26 Cal.4th 834, 852.)

Finally, instructional error in a civil case is not grounds for reversal unless it is probable the error " 'prejudicially affected the verdict.' " (Soule v. General Motors Corp., supra, 8 Cal.4th at p. 580.)

b. The Definition Instructions were not Erroneous

1. The Instruction the Trial Court Gave the Jury on the Definition of Actual Agency did not Mischaracterize the Law of Agency

Relying on Civil Code sections 2299[2] and 2300,[3] CareMore first contends that the trial court erroneously modified the agency instruction by substituting "engages" for "employed," and where CareMore did not actually employ Dr. Deere, he could not be an agent of CareMore.

The trial court gave CareMore's proposed Special Instruction No. 2 (with the court's modifications italicized and deletions stricken through): "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency. Agency is either actual or ostensible. [¶] Actual agency arises when the principal actually employs engages the services of another, but not when the other is an independent contractor. [¶] Ostensible agency arises when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed engaged by him."

CareMore argues that where Civil Code sections 2299 and 2300 use the word employ to define actual and ostensible agency, the trial court's modifications improperly expanded the definition and hence mischaracterized the law. We disagree because agency is a broad concept that encompasses more than merely an employment relationship.

Employment and agency are not synonymous. "Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. . . . [¶] . . . [¶] The common law of agency encompasses employment as well as non-employment relations." (Rest.3d Agency, § 1.01, coms. c, p. 19 & g, p. 30.) Thus, "[i]t is said that a servant or employee works for the employer, while an agent also acts for and in the place of the principal for the purpose of bringing the principal into legal relations with third persons. [Citations.]" (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 4, p. 42; see Doe v. Capital Cities (1996) 50 Cal.App.4th 1038, 1046-1047 [casting director acted as agent of broadcasting company and so company is vicariously liable for agent's alleged conduct].)

Although Civil Code sections 2299 and 2300 define actual and ostensible agency using the word "employ," section 2295 defining agency, does not utilize that word. It defines an agent as "one who represents another, called the principal, in dealings with third persons. Such representation is called

agency."[4] Indeed, it has long been the law that "[a]ctual authority arises as a consequence of conduct of the principal which causes an agent reasonably to believe that the principal consents to the agent's execution of an act on behalf of the principal. [Citations.]" (Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal.2d 638, 643, italics omitted.) To create an agency relationship " ' "[a]ll that is required is conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction. [Citations.]" ' [Citation.]" (Frank Pisano & Associates v. Taggart (1972) 29 Cal.App.3d 1, 15, italics added.) Neither the Supreme Court in Tomerlin nor the appellate court in Frank Pisano & Associates mentions employment as a requirement of actual authority. Accordingly, the CACI jury instructions recognize and allow for the numerous bases for agency, of which employment is only one. CACI Nos. 3701 and 3703, which are endorsed by the Judicial Council in its effort to ensure they reflect an accurate statement of existing law (Cal. Rules of Court, rule 2.1050(b)), list many sorts of agents: "agent/employee [insert other relationship, e.g., 'partner']."

CareMore cites Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal.App.4th 298 in support of its contention that actual agency is an employment relationship only. The Pagarigan court held there was no evidence that the adult children of a comatose patient had the power to bind their parent to an arbitration agreement merely because the children had represented themselves as having the power. (Id. at p. 301.) "A person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed . . . ." (Ibid., italics added.) This sentence does not support CareMore's position that actual agency is necessarily employment only. By "actually be so employed" the Pagarigan court necessarily meant so employed as an agent. This is made obvious by the Pagarigan court's further conclusion: "Defendants produced no evidence Ms. Pagarigan had ever employed either of her daughters as her agent in any capacity." (Pagarigan, supra, at p. 302, italics added.) In the context of Pagarigan, the use of "employ" is merely another way of denoting retain, use, or utilize, as an agent.

Consequently, as "agency" can have far broader meanings than simply an employment relationship, CareMore's preferred instruction, characterizing actual agency as employment, is much too narrow a definition based on the evidence adduced in this case. CareMore's theory of the case was that Dr. Deere was an independent contractor and not an employee. But, Theresa's case, tried to the jury, was not that Dr. Deere was narrowly an employee, but more broadly that he was an agent acting on behalf of CareMore as his principal. (See, e.g., Tomerlin v. Canadian Indemnity Co., supra, 61 Cal.2d at p. 643.) To instruct the jury as CareMore would have it that actual agency is strictly an employment relationship, would have unfairly skewed the jury's perceptions toward the choice between employment or not, when there was also evidence that, while not an employee, Dr. Deere was an agent. (Civ. Code, § 2295.) Therefore, the failure to alter the instruction would have mischaracterized the law, misled the jury, and been erroneous.

2. The Lack of Instruction About a Presumption Against Agency was not Erroneous

CareMore's proposed Special Instruction No. 3 read: "The law indulges in no presumption that an agency exists, but instead presumes that a person is acting for himself and not as an agent for another. Plaintiff Maria Theresa Sanchez bears the burden of proof to establish Dr. Deere was acting as either the actual agent or ostensible agent of CareMore Medical Group." The trial court rejected this instruction.

CareMore contends that to have found an agency relationship between Dr. Deere and CareMore, the jury must have erroneously believed the law indulges in a presumption in favor of agency. CareMore speculates that the jury would never have found agency had this instruction been given, because "[n]o other instruction addressed any presumptions or inferences of agency." The contention is meritless.

Viewing the instructions as a whole, the jury was thrice instructed that Theresa bore the burden to prove the existence of agency. The trial court instructed that "Maria Theresa Sanchez claims that [Dr. Deere] [w]as the agent of the CareMore Medical Group and that CareMore Medical Group is therefore responsible for Dr. Deere's conduct. . . . Maria Theresa Sanchez bears the burden of proof to establish Dr. Deere was acting as either the actual agent or ostensible agent of CareMore Medical Group." (Italics added.) Next, the court instructed, "If you find that Dr. Deere's negligence harmed Theresa Sanchez, then you must decide whether CareMore Medical Group is responsible for the harm. CareMore Medical Group is responsible if Theresa Sanchez proves the following: [¶] One. That [Dr. Deere] was CareMore's agent and; [¶] Two. That [Dr. Deere] was acting within the scope of his agency when he harmed Theresa Sanchez." (Italics added.) Finally, the court instructed the jury that "To establish this claim of ostensible agency, Maria Theresa Sanchez must prove the following: [¶] One, that CareMore intentionally or negligently created the impression that Dr. Deere was a CareMore employee. [¶] Two, that Maria Theresa Sanchez reasonably believed that Dr. Deere was a CareMore employee and; [¶] Three, that Maria Theresa Sanchez reasonably relied on that belief." (Italics added.)

Given that the trial court instructed the jury three times that Theresa bore the burden to prove all of the elements of agency, and also instructed the jury that it was to consider all of the instructions together, the inclusion of CareMore's proposed Special Instruction No. 3 would have been improperly redundant. As we explained, " '[E]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given. [Citations.]' [Citations.]" (Major v. Western Home Ins. Co., supra, 169 Cal.App.4th at p. 1217, italics added.)

3. The Instruction the Trial Court Gave the Jury on the Elements of Ostensible Agency was not Error

The trial court instructed from CareMore's Special Instruction No. 6, which read (with the modification italicized and deletions stricken through): "To establish this claim of ostensible agency, Maria Theresa Sanchez must prove all of the following: [¶] 1. That CareMore Medical Group intentionally or negligently created the impression that Dr. Deere was CareMore Medical Group's

employee; [¶] 2. That Maria Theresa Sanchez reasonably believed that Dr. Deere was CareMore Medical Group's employee; and [¶] 3. That Maria Theresa Sanchez detrimentally reasonably relied on that belief."

CareMore contends detrimental reliance is an "indispensable" element of ostensible agency, with the result that the instruction the trial court gave the jury was inadequate. As the instruction given only required reasonable or justifiable reliance, CareMore argues, it expanded the circumstances under which reliance could be found.

However, the trial court instructed the jury verbatim from CACI No. 3709, which does not employ the word "detrimental." Element number three of CACI No. 3709 reads, "That [name of plaintiff] was harmed because [he/she] reasonably relied on [his/her] belief."

Among the sources and authorities for CACI No. 3709 is Associated Creditors' Agency v. Davis (1975) 13 Cal.3d 374, in which the Supreme Court stated, " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence. [Citation.]' [Citations.]" (Id. at pp. 399-400, italics added.) Logically, reasonable reliance, is another way of stating for the jury that the third person is not "guilty of negligence" in relying.[5]

The sources and authority for CACI No. 3709 also quote from Preis v. American Indemnity Co. (1990) 220 Cal.App.3d 752, that ostensible authority rests on the doctrine of estoppel. However, Preis uses the word "justifiable," not "detrimental," to describe the nature of the reliance required: "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury. [Citation.]" (Id. at p. 761, italics added.) In this context, "justifiable" reliance is another way of conveying "reasonable" reliance.

None of the cases CareMore cites supports CareMore's argument that detrimental reliance is "indispensable" in the context of ostensible agency. (Saks v. Charity Mission Baptist Church (2001) 90 Cal.App.4th 1116, 1138 [justifiable reliance an element of ostensible authority]; Yanchor v. Kagan (1971) 22 Cal.App.3d 544, 549-550 [same]; Van Den Eikhof v. Hocker (1978) 87 Cal.App.3d 900, 906 [no discussion of the quality of reliance]; see also Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp. (1960) 54 Cal.2d 773 [no discussion of ostensible agency]; Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal.App.4th 1364, 1383 [no discussion of ostensible agency].)[6]

From the foregoing, it is clear that the trial court did not err in instructing directly from CACI No. 3709. While ostensible agency is based on the principles of estoppel, the elements of this form of

agency are based on negligence, as the Supreme Court's stated in Associated Creditors, along with the numerous cases cited therein standing for the rule that the reliance must be reasonable. (Associated Creditors' Agency v. Davis, supra, 13 Cal.3d at pp. 399-400.)

4. No Prejudice

Given our conclusion that none of CareMore's assignments of instructional error has merit, we need not address its further argument that the errors are prejudicial. We note, however, CareMore argues repeatedly that the instructional errors were prejudicial because the jury was unable to reach a verdict about agency. However, reviewing the entire record, it shows that the jury's confusion was about whether to consider Dr. Deere negligent at all, not whether Dr. Deere was an agent. Early on, the jury learned that Dr. Deere had settled. The special verdict asked whether any of the five defendant doctors was negligent. It then asked, if you find Dr. Deere was negligent and a cause of Theresa's injuries, to then consider whether Dr. Deere was an agent of CareMore.

After some deliberation, the jury indicated it was deadlocked about the defendant doctors' negligence. When polled about Dr. Deere, the foreman stated: "He's not on there. . . . We came to an agreement that Dr. Deere was not part of CareMore. [¶] We were told that Dr. Deere was no longer part of this proceeding." The foreperson then stated: "It would really clarify things if Dr. Deere was still part of this." The following day, the foreperson stated: "Yesterday there was a question on whether or not Dr. Deere was still a part of this, and we were under the impression that we shouldn't consider Dr. Deere was part of this lawsuit, case. And right now we were just looking at and deliberating on whether or not he was an agent of CareMore, and I think we still need to go and revisit that." (Italics added.) The court clarified, Dr. Deere "is not a party to the case, but in your deliberations, there is a question there on the verdict form was he the agent of CareMore. That is the question." After the jury recommenced deliberations, it found that Dr. Deere was negligent and that he was an agent of CareMore.

The instructions were clear that Dr. Deere's conduct was the only conduct for which CareMore could be liable as the principal. At the time it deadlocked, the jury indicated it had not reached the question of agency. The jury had not even considered Dr. Deere's negligence, which was a predicate to determining whether he was an agent, because it assumed Dr. Deere "was no longer part of this proceeding." Once the jury learned that Dr. Deere was "part of this lawsuit," it returned and considered the agency question. Stated differently, the jury was hung on the question of negligence, not agency.

II. The Special Verdict Form

a. The Standard of Review on Appeal Raising Error in the Special Verdict Form

"[A] special verdict is one where the jury finds the facts, and leaves the judgment to the court. (Code

Civ. Proc., § 624.)" (Shaw v. Hughes Aircraft Co. (2000) 83 Cal.App.4th 1336, 1347, fn. 7.) "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' [Citation.]" (Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280, 285.) The special verdict must allow the jury to resolve all of the ultimate facts presented to it on "every controverted issue necessary to dispose of liability." (Contreras v. Goldrich (1992) 10 Cal.App.4th 1431, 1434.) A special verdict is "fatally defective" if it fails to allow "the jury to resolve the controverted issue." (Fuller-Austin Insulation Co. v. Highlands Ins. Co. (2006) 135 Cal.App.4th 958, 1006.)

"With a special verdict, we do not [infer] findings on all issues in favor of the prevailing party, as with a general verdict. [Citation.]" (Trujillo v. North County Transit Dist., supra, 63 Cal.App.4th at p. 285.) "[A] special verdict's correctness is analyzed as a matter of law and therefore subject to de novo review. [Citation.]" (Zagami, Inc. v. James A. Crone, Inc. (2008) 160 Cal.App.4th 1083, 1092.)

b. The Failure of the Special Verdict Form to Separate Actual and Ostensible Agency was Not Error

CareMore contends that the trial court erred in refusing to put forth separate interrogatories for actual and ostensible agency in the special verdict form. CareMore's argument works thusly: special verdict forms must ask the jury to answer each "ultimate fact" in the case. (Trujillo v. North County Transit Dist., supra, 63 Cal.App.4th at p. 284.) The "elements of a cause of action constitute the essential or ultimate facts in a civil case" (Stoner v. Williams (1996) 46 Cal.App.4th 986, 1002, fn. omitted), and citing a New York case, CareMore argues in "an action involving different theories of liability, e.g.[,] actual and ostensible agency, the verdict form should reflect the theory of liability upon which the jury's finding is predicated."

However, in California a cause of action is based on the primary right invaded. (Swartzendruber v. City of San Diego (1992) 3 Cal.App.4th 896, 904, disapproved on other grounds in Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 72.) "Agency" was not a cause of action in this context; negligence was. Agency was the basis for holding CareMore responsible for Dr. Deere's negligence, as opposed to partnership, for example. At trial, Theresa's cause of action was for damages stemming from negligence, and she sought to hold CareMore liable as a principal for the negligence of its agent, Dr. Deere. But the flavor of that agency, e.g., actual or ostensible, is not the cause of action. The presence or absence of agency was thus the ultimate fact. (Skopp v. Weaver (1976) 16 Cal.3d 432, 437 [when determining whether allegation is of ultimate fact, courts "consider pleadings in the same manner as findings" and "numerous cases have held a pleading of agency an averment of ultimate fact"].)

In an analogous situation, Babcock v. Omansky (1973) 31 Cal.App.3d 625, one defendant argued that the judgment as to him was void because the jury determinations as to fraud were conclusions of law in violation of Code of Civil Procedure section 624. (Babcock, supra, at p. 630, superseded by statute on another point by Civ. Code, § 3439.02.) The jury was asked whether the plaintiff was induced to enter into a loan commitment agreement "by reason of any fraud on the part" of the defendant.

(Babcock, supra, at p. 630.) The appellate court rejected the argument that the verdict form should have asked the jury to decide whether each of the elements of fraud was present rather than using the words "any fraud." The Babcock court reasoned, inter alia, that a finding as to fraud is the ultimate fact. (Ibid.) Likewise here, the special verdict form did not leave anything for the trial court to infer. The finding as to agency was the ultimate fact, and so the special verdict form was not improper.

We are not persuaded otherwise by Saxena v. Goffney (2008) 159 Cal.App.4th 316. There, the plaintiff alleged three causes of action: wrongful death, negligence, and battery. (Id. at p. 324.) The negligence cause of action was premised on lack of informed consent, whereas a " 'battery theory [is premised on] an operation to which the patient has not consented.' [Citation.]" (Ibid., italics added.) The appellate court held the special verdict to be fatally defective because it asked the jury whether the defendant performed a procedure without the plaintiff's informed consent (id. at p. 326), an element of the negligence claim (id. at p. 324), but did not require the jury to answer the distinct question whether the defendant performed the procedure with no consent, which was an element of the separate tort of battery. (Id. at pp. 324, 326.) The special verdict form did not ask the jury to answer all of the elements of the battery cause of action. By contrast, here, Theresa's cause of action was against Dr. Deere for his own negligence. The special verdict form asked the jury to determine all the elements of negligence. She sought to hold CareMore liable for that negligence based on agency. The jury was then asked to determine the ultimate fact: agent/no agent.

CareMore argues because the special verdict form did not distinguish between actual and ostensible agency, five of the jurors voting for agency could have done so premised on the theory of actual agency, and five might have supported ostensible agency, with the result there would be insufficient votes for a finding of agency. Not so. "It is not necessary for the same nine jurors to agree on all elements of the verdict. Thus, where a special verdict is submitted to the jury . . . all jurors participate in answering each question. The identical nine need not agree on each answer. [Citations.]" (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2009) ¶ 17:32, p. 17-9, citing Keener v. Jeld-Wen, Inc. (2009) 46 Cal.4th 247, 255.)

III. Sufficiency of the Evidence

a. The Standard of Review

CareMore contends that the jury's agency finding is not supported by substantial evidence. Although we review the evidence favorably to the appellant when assessing prejudice, when the challenge is to the sufficiency of the evidence to support the judgment, our analysis is quite different: " '[w]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' " (Estate of Bristol (1943) 23 Cal.2d 221, 223, quoting from Crawford v. Southern

Pacific Co. (1935) 3 Cal.2d 427, 429.) "[O]ur review requires us to focus on evidence that is favorable to [the respondent], rather than to weigh favorable evidence against unfavorable. [Citation.]" (Stevens v. Parke, Davis & Co. (1973) 9 Cal.3d 51, 64.) " 'If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]" (Donovan v. Poway Unified School Dist. (2008) 167 Cal.App.4th 567, 612.)

"Substantial evidence has been defined as relevant evidence that a reasonable mind might accept as adequate support for a conclusion [citation]" (Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal.App.3d 1331, 1340-1341), or " ' "ponderable legal significance . . . reasonable in nature, credible, and of solid value." ' [Citation.]" (Ofsevit v. Trustees of Cal. State University & Colleges (1978) 21 Cal.3d 763, 773, fn. 9.)

1. There was Substantial Evidence of Actual Agency

The parties agree that whether a person performing work for another is an agent or an independent contractor "depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. [Citations.]" (Malloy v. Fong (1951) 37 Cal.2d 356, 370; Kim v. Sumitomo Bank (1993) 17 Cal.App.4th 974, 983.) "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship. [Citation.]" (Malloy v. Fong, supra, at p. 370.) By contrast, "[w]hen the principal only controls the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. [Citation.]" (Kim v. Sumitomo Bank, supra, at p. 983.)

There was ample evidence from which the jury could conclude that CareMore had the right to control and supervise all aspects of Dr. Deere's treatment of Theresa and not simply the results, and so the physician was CareMore's actual agent. The jury heard about Dr. Deere's contract with CareMore that spelled out in detail the requirement of, and method for, obtaining CareMore's approval for every aspect of treatment of CareMore's enrollees. The contract limited what Dr. Deere could do in an initial consultation; circumscribed his treatment through CareMore's Utilization Management Department's approval process; and required documentation and prior written approval for additional procedures or treatment. In fact, all of Dr. Deere's laboratory and diagnostic services had to be sent to a CareMore contracted provider or the cost would be deducted from his pay. As the consequence of not following the strict approval protocol contained in the CareMore contract with its contracting doctors, CareMore could refuse to pay for the services. Further, Dr. Deere was the specialist CareMore doctors chose for Theresa; neither she nor he had any say. Indeed, she had to apply to CareMore to obtain a second neurosurgical consult. When Rachel called Dr. Deere's office in late May seeking help for Theresa's deteriorating condition, Dr. Deere would not see her without prior written authorization. His own refusal to see Theresa in May evinces Dr. Deere's acceptance of CareMore's contractual control of him. From this evidence the jury could easily conclude that

CareMore controlled whom Dr. Deere saw, when he saw them, how often he saw them, which tests and procedures Dr. Deere could prescribe, what laboratories and services he could use. CareMore could refuse to pay Dr. Deere for any divergence from its requirements.

CareMore did adduce evidence that would suggest Dr. Deere could have been an independent contractor, such as Dr. Deere's testimony that he was an independent contractor. However, its countervailing evidence of independence does not undermine the sufficiency of the evidence described above, from which the jury could find actual agency. CareMore points to evidence Dr. Deere was not an employee. Yet, that does not resolve the issue based on the evidence.

CareMore repeatedly argues that it never denied authorization to Dr. Deere nor ever declined to pay him for treatment rendered. The existence of the ability to control is the issue, not whether it was actually exercised. (Malloy v. Fong, supra, 37 Cal.2d at p. 370.) It is CareMore's ability to deny authorization requests or payment for unauthorized work that is the important feature. That ability, coupled with CareMore's involvement in every minute aspect of Dr. Deere's treatment of CareMore's patients, is what evinces agency. Moreover, although CareMore argues "that the work of specialists, such as neurosurgeons, is not subject to supervision by persons not versed in the particular field of specialization," its own contract establishes that CareMore had the right to decline reimbursement for services that CareMore deemed "not medically necessary." Nor is it significant that Dr. Deere has contracts with other medical groups and hospitals. Agents may work for more than one principal. (See Jacoves v. United Merchandising Corp. (1992) 9 Cal.App.4th 88, 104 [doctor's staff privileges at other hospitals "not dispositive of agency"].) Finally, that Dr. Deere's contract declared him an "independent person" is only one piece of evidence the jury heard.

2. There was Substantial Evidence of Ostensible Agency

The record also contains substantial evidence to support the jury's finding that Dr. Deere was an ostensible agent of CareMore. As noted, the elements of ostensible agency are: " 'The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence. [Citation.]' [Citations.]" (Associated Creditors' Agency v. Davis, supra, 13 Cal.3d at pp. 399-400, italics added.)

The evidence shows that as a CareMore enrollee, Theresa was not allowed any choice with respect to the hospital that could admit her or the specialist she could see. She was transferred to CareMore's Lakewood hospital and CareMore assigned her to Dr. Deere. Although Rachel tried to prevent Theresa's first hospital discharge, CareMore sent Theresa home without allowing her to see another neurosurgeon. In the ensuing five months, the only neurosurgeon Theresa was able to see was Dr. Deere. The neurosurgeon's office told Rachel in no uncertain terms that she could not schedule an appointment with Dr. Deere without written preauthorization from CareMore, even in May 2004

when Rachel believed Theresa's condition required immediate attention. Despite her dissatisfaction with Dr. Deere and repeated demands to see another neurosurgeon, Rachel understood that she had to wait for prior written authorization in the mail to see another specialist. Thus, when Theresa's condition became urgent on May 27, 2004, Rachel attempted to see Dr. Deere because she did not yet have an approved referral. In fact, Theresa could only see a CareMore specialist, or her visits would not be covered by her health plan. This is ample evidence from which Theresa could have reasonably concluded that Dr. Deere was the ostensible agent of CareMore.

CareMore's evidence does not undermine the ample evidence of ostensible agency. Dr. Deere testified he was a unaffiliated with CareMore. Yet, the only reason Theresa went to Dr. Deere at all was because CareMore chose him for her from its list of affiliated neurosurgeons, and she understood he was the only neurosurgeon she could see, even though she begged for a second opinion.

Finally, CareMore contends the jury could never have found ostensible agency because, as Theresa did not testify, she presented no evidence about whether she believed Dr. Deere was an agent of CareMore or whether she relied on that belief. However, reliance and reasonableness can be inferred. For example, in Leno v. Young Men's Christian Assn. (1971) 17 Cal.App.3d 651, the plaintiffs brought an action for damages for the wrongful death of their 20-year-old son who had drowned during a scuba-diving class given under the auspices of the Y. Obviously, because the son was deceased, he did not testify. However, the appellate court held there was "no question that plaintiffs made a sufficient prima facie showing that [the instructor] was the Y's agent." (Id. at p. 658.) In so concluding, the Leno court listed evidence from which "any student would reasonably assume that [the instructor] was the Y's agent." (Ibid., italics added.)

Here, the jury heard that Theresa was highly functional until these events, and that afterwards she was severely limited in all functions. It also heard from Rachel about her difficulty in scheduling visits, consulting another neurosurgeon, and opposing Theresa's discharges from the hospital, all because of CareMore's control over not just the doctors Theresa could see, but also the tests and procedures those doctors could perform. Under these circumstances, any patient could reasonably assume that Dr. Deere was CareMore's agent.

As none of the assignments of error has merit, the judgment must be affirmed.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

We concur: KLEIN, P. J., CROSKEY, J.

1. CareMore claims it is not subject to the Knox-Keene Health Care Service Plan Act of 1975 (Health & Saf. Code, § 1340

et seq.) and so it is not entitled to the protections of section 1371.25, which provides in part, "A plan, any entity contracting with a plan, and providers are each responsible for their own acts or omissions, and are not liable for the acts or omissions of, or the costs of defending, others." (See Watanabe v. California Physicians' Service (2008) 169 Cal.App.4th 56.)

2. Civil Code section 2299 reads: "An agency is actual when the agent is really employed by the principal."

3. Civil Code section 2300 reads: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

4. Also, Labor Code section 2750, defining employment contracts, uses the word "engages." It states, "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee . . . ." (Italics added.)

5. CareMore does not contend that CACI No. 3709 is wrong as a matter of law.

6. Because CareMore is not a hospital, the trial court correctly refused to rely on hospital cases such as Seneris v. Haas (1955) 45 Cal.2d 811, Quintal v. Laurel Grove Hospital (1964) 62 Cal.2d 154, Mejia v. Community Hospital of San Bernardino (2002) 99 Cal.App.4th 1448, Ermoian v. Desert Hospital (2007) 152 Cal.App.4th 475, and Stanhope v. L. A. Coll. of Chiropractic (1942) 54 Cal.App.2d 141.